



# LeClair Thibeault

## Electronic Monday Morning Meeting

Vol. 2004, Number 2, June 16, 2004

*“we have an overlying obligation to ensure that the person signing it (the Power of Attorney) has the mental capacity to understand”*

### This Edition's Main Headlines and Information:

- News and Views.
- Validity of Powers of Attorney.
- Land Titles Watch.
- Final Messages

## News and Views

We would like to welcome you to our new format for EM3. Some of you have mentioned that you like to give our newsletter to clients where something of interest is included. In response, what we have tried to do is make EM3 more user friendly so that information is easier to retrieve.

As you will notice we have added some level of colour and detail as has been requested by a number of you. We are hoping that the new format will be more informative and easier to read. Please let us know your thoughts.

### FAQ Real Estate Pamphlets

We are still making our Real Estate Pamphlets available. If you have run short on your supply or would like to review them simply email us at [tinad@calgarylaw.com](mailto:tinad@calgarylaw.com) and ask Tina to deliver some to you.

We have 4 different pamphlets available including: Selling Your Home, Purchasing a Home, Purchasing a Condominium and Understanding Your New Mortgage.

### Buddy Emails

If you know of any person or colleague who might benefit from reading EM3 let us know by emailing Ron @ [thibeault@calgarylaw.com](mailto:thibeault@calgarylaw.com).

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## Realtor/Broker Quick Helpers

In our ongoing attempt to keep real estate professionals and clients informed of vital issues, we provide our free quick helpers to help you reduce liability and ensure smoother transactions.

This week's hint deals with the issue of the issue of Powers of Attorney and some of the pitfalls of "off-the-shelf" products.

### Confirming the Validity of Powers of Attorney

A recent file in our office indicates the need for you to ensure that a client's Power of Attorney is valid. The two main issues of POAs are, first, that the form of the POA is correct and, second, that the POA is valid in substance.

Typically, the main issues are in relation to the form of the POA (i.e. Is it signed correctly? Is it in the right form of document?). These problems normally can be solved by a simple court order called a Fiat which involves a lawyer appearing before a justice and asking for the order.

A totally different situation arises where the substantive elements of the POA

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are in question. In this circumstance, the very legality of the POA is in question. The typical scenario here is where there is some question as to whether the person giving the POA had the capacity to give power of attorney to another person. One of the main reasons why lawyers are so cautious with POAs is that we have an overlying obligation to ensure that the person signing it has the mental capacity to understand the nature of the document and the powers given to the attorney.

In the case we have recently become involved in, the client was selling a property and granted POA to a third party approximately 1 month prior to the sale. The POA executed was an “off-the-shelf” document purchased at a stationary store. The document was not executed before a lawyer. It has now been determined via doctor’s certificates that the seller has a mental deficiency.

The first issue with the POA was that the form of it was incorrect. However, the problem could easily be resolved by obtaining a fiat. However, the more pressing problem is the issue of the sanity of the client. In this case, there was a clear indication that the client had an existing mental incapacity and, by extrapolation, likely had the same condition in the month prior when the POA was executed.

In this case, we could not go to court to obtain a fiat as we cannot be certain that the seller had the capacity to execute the POA because where capacity is in question a fiat will not be granted. As such, in this case, the clients were obligated to make an application to the Public Trustee so that the necessary documents could be signed by a properly appointed attorney.

The lessons here are two-fold. First, when you have a client that claims to have a POA, review it to see if whether a lawyer in Alberta has been involved. If not, you should have it reviewed by your clients’ lawyer just in case. “Off-the-shelf” POAs are often flawed and fail to transfer the necessary power to be effective. This is not to say that lawyer drafted POAs are always correct but at least if there is a problem it typically can be resolved with little to no cost to the client.

Secondly, where you have any indication that there are issues of capacity (i.e. client is being cared for, etc.) you should ensure that your clients’ lawyer is aware of this issue. These two simple steps could help save your commission after all your hard work.

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## **Website Update**



As a new feature, we are going to start updating you as to changes to our own website as well as directing you to new sites that you might be interested in.

If you are looking to increase your web traffic, concentrate your efforts with Google. Recently, Google altered the algorithm they use to rank sites so that the more relevant sites that link to yours the higher your rank will be. Make the effort to build up links to your site and it should help you generate more traffic (More traffic = More sales).

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## Land Titles Watch

As we approach the summer months we fully expect that Land Titles will start to drag down in terms of registration times.

As of this moment, LTO is registering documents submitted on June 9, 2004, which means that registration is taking 5 full business days.

Please make sure that your clients are aware of the potential delays and that all required information is delivered well in advance of closing.

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## Final Messages



We have to run but we certainly hope that our new format for EM3 is viewed as a positive step by our readers.

We are always trying to improve our service and, though it is a small step, the improved look of our newsletter will hopefully not encourage only you to read it more but also share it with fellow professionals and clients.

Have a great week buying and selling and make sure to contact us with feedback, questions, concerns and just plain "Hello... how are you"s

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