`NOVA SCOTIA COURT OF APPEAL

Citation: *The Powers of Attorney Act (Re)*, 2021 NSCA 48

Date: 20210615
Docket: CA 502479
Registry: Halifax

In the Matter of the *Powers of Attorney Act*

In the Matter of the Appointment of a Substitute Attorney

Ex Parte Appeal by Timothy Kirkpatrick — Appellant

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	May 18, 2021 (by written submission only)
Legislation:	*Powers of Attorney Act*, R.S.N.S. 1989, c. 352, s. 5(1)
Cases Considered:	*Laframboise v. Millington*, 2019 NSCA 43; *Wilson Estate (Re)*, 2008 NSSC 418; *Houston v. Houston*, 2012 BCCA 300; *Potasky v. Potasky*, 2002 MBQB 146; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *E.M.Y. v. Nova Scotia (Community Services)*, 2020 NSCA 46; *R. v. Anand*, 2020 NSCA 12; *Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51
Texts Considered:	Adlington, *Atlantic Canada Estate Administration Manual* (Thomson Reuters: Online), Chapter 12.3.2); Nova Scotia Law Reform Commission's 2015 document "Final Report *Powers of Attorney Act*"
Subject:	Applications; Application to appoint substitute attorney; Death of donee; Enduring Power of Attorney—substitution; Statutory Interpretation

Summary: Mrs. Prince prepared an Enduring Power of Attorney. Following her incapacity, both alternate attorneys named by her predeceased her. Her nephew applied to be named as a substitute attorney pursuant to s. 5(1)(c) of the *Powers of Attorney Act*. The judge denied his application on the basis the common law rendered the Power of Attorney void on the death of both attorneys.

Issues: Does s. 5(1)(c) of the *Powers of Attorney Act* permit the substitution of an attorney where the attorney appointed to act is already deceased?

Result: Applying a pragmatic approach to the interpretation of s. 5(1)(c), pursuant to the direction in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 permits the relief. The word "substitution" in s. 5(1)(c) is not restricted by any language or preconditions in the subsection that require the named attorney in a Power of Attorney to apply for their substitution.

The appeal is allowed and Mr. Kirkpatrick is to be named as a substitute attorney for Mrs. Prince pursuant to her December 2014 Enduring Power of Attorney.

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Ex Parte Appeal by Timothy Kirkpatrick — Appellant

Judges:	Derrick, Fichaud and Beaton JJ.A.
Appeal Heard:	May 18, 2021 (by written submission only)
Held:	Appeal allowed per reasons for judgment of Beaton J.A.; Derrick and Fichaud JJ.A. concurring
Counsel:	Rebecca Hiltz LeBlanc, for the appellant

Reasons for judgment:

[1] Does an Enduring Power of Attorney become void upon the death of the person(s) appointed to act? The Appellant Mr. Timothy Kirkpatrick maintains it is saved by operation of s. 5 of the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352 ("the *Act*"). He asks the Court to overturn the dismissal of his application to the Supreme Court of Nova Scotia to act as attorney for his aunt. For the reasons that follow, I would allow the appeal.

[2] In September 2020, Mr. Kirkpatrick filed an application heard by the Honourable Justice Diane Rowe ("the judge"). He sought to be appointed as attorney under the December 4, 2014 Enduring Power of Attorney ("EPA") of Constance Prince. Mrs. Prince later became incapacitated and incompetent. Her EPA named her husband Benjamin Prince, or her friend and accountant Douglas Woodman as attorney to act in the event of her incapacity.

[3] Mr. Prince died in February 2019. Mr. Woodman then attended to Mrs. Prince's affairs. Unfortunately, his health declined in the summer of 2020, to the point he felt he could no longer continue to act on Mrs. Prince's behalf. Discussions ensued between Mr. Woodman and Mrs. Prince's extended family members. With the support of all concerned, Mr. Kirkpatrick provided instructions to legal counsel in late August 2020, with a view to being appointed in place of Mr. Woodman.

[4] Three days later, while documentation was being prepared to effect Mr. Kirkpatrick's application to the court, Mr. Woodman died. Eventually, Mr. Kirkpatrick filed the application, which included supporting affidavits from family members. Mr. Kirkpatrick asked the court's approval, pursuant to s. 5(1)(c) of the *Act*, to assume carriage of his aunt's affairs under her EPA. Although the application was filed *ex parte*, a copy of an email was placed before the judge confirming the Public Trustee had already determined it would not be involved in the matter.

[5] The judge dismissed Mr. Kirkpatrick's application on September 16, 2020 and issued an Order to that effect on November 2, 2020. In her oral decision, the judge concluded, on application of the common law, that the death of the named attorneys Mr. Prince and Mr. Woodman had voided Mrs. Prince's 2014 EPA. The judge was not prepared to appoint Mr. Kirkpatrick as a substitute, given her

interpretation the *Act*, in light of the common law, was no longer operational once Mr. Woodman died.

[6] Mr. Kirkpatrick asserts the judge erred in declaring the EPA voided as a result of the death of both attorneys, and by failing to properly interpret and apply the provisions of s. 5 of the *Act* to effect his appointment.

[7] A correctness standard of review applies to our task: "when interpreting and applying the law the judge must be right" (*Laframboise v. Millington*, 2019 NSCA 43 at para. 14).

[8] Section 3 of the *Act* contemplates the validity and coming into force of an enduring power of attorney:

> 3 A power of attorney, signed by the donor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the donor, is
>
> (a) an enduring power of attorney;
>
> (b) not terminated or invalidated by reason only of legal incapacity that would, but for this Act, terminate or invalidate the power of attorney; and
>
> (c) valid and effectual;
>
> subject to any conditions and restrictions contained therein that are not inconsistent with this Act. *R.S., c. 352, s. 3.*

[9] The record includes a copy of Mrs. Prince's EPA, as appended to Mr. Kirkpatrick's application evidence. The pertinent portions, as found in its opening and closing paragraphs, are reproduced below:

> THIS ENDURING GENERAL POWER OF ATTORNEY is given by CONSTANCE L. PRINCE, of Digby, Digby County, Nova Scotia.
>
> A. I appoint you, my spouse, J. Benjamin Prince or you, Douglas O.L. Woodman, to be my attorney, in accordance with the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352 and to do on my behalf anything that I can lawfully do by an attorney.
>
> B. In accordance with the *Powers of Attorney Act*, I declare that this Power of Attorney may be exercised during any subsequent any [*sic*] legal incapacity on my part. It is an enduring power of attorney within the meaning of the *Powers of Attorney Act* (Nova Scotia) and similar laws of other provinces of Canada and other jurisdictions.

> […]
>
> AND I HEREBY UNDERTAKE to ratify everything which my attorney or any substitute or substitutes or agent or agents appointed by him under the power in that behalf hereinbefore contained shall do or purport to do by virtue of These Presents.

[10] In making his application, Mr. Kirkpatrick relied on s. 5 of the *Act*, which gives the court broad jurisdiction in relation to donors and attorneys:

> 5(1) Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,
>
> (a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
>
> (b) require the attorney to attend to show cause for the attorney's failure to do anything that the attorney is required to do as attorney or any order made pursuant to this Act;
>
> (c) substitute another person for the attorney;
>
> (d) allow or disallow all or any part of the remuneration claimed by the attorney;
>
> (e) grant such relief as the judge considers appropriate;
>
> (f) make such provision respecting costs as the judge considers appropriate.

[11] Section 7 of the *Act* contemplates the specific situation in which one of jointly named attorneys is unable to act:

> 7(1) Subject to the provisions of the enduring power of attorney, where two or more attorneys are appointed to act jointly and one or more of the attorneys
>
> (a) dies;
>
> […]
>
> the remaining attorney or attorneys may continue to act without that attorney or attorneys.

[12] Section 7 was added to the *Act* in 2010, after the decision of the Supreme Court of Nova Scotia in *Wilson Estate (Re)*, 2008 NSSC 418. In *Wilson*, one of co-attorneys had died, and the remaining attorney sought to continue. The judge in that case was satisfied that by operation of ss. 5(1)(c) and (e) the co-attorney could be permitted to continue to act.

[13] Section 7 was of no assistance to Mr. Kirkpatrick in his application, because the presenting problem was different than in *Wilson*. Here, both alternate attorneys contemplated in Mrs. Prince's EPA had died. He sought relief under s. 5(1)(c) of the *Act*, asking to be named as a substitute attorney.

[14] In her oral decision rejecting the application, the judge explained:

> Mr. Woodburn's [*sic*] intentions are not in evidence before the court. **If that substitution had been executed by Mr. Woodburn [*sic*] prior to his passing** on August 23, 2020, then section 5(1)(c) of the *Powers of Attorney Act* permitting an **exercise of the court's discretion, as referenced before, to appoint a substitute attorney would be appropriate** in the circumstances and on the evidence that was filed. However, that is not the case here.
>
> Where it appears that **Ms. Prince's Enduring Power of Attorney was voided upon the passing of Mr. Woodburn [*sic*] prior to such an act of substitution** being completed. (Emphasis added)

[15] In effect, the judge concluded that because the death of both of Mrs. Prince's attorneys had already voided the EPA, Mr. Kirkpatrick could not then be a subsequent substitute in place of Mr. Woodman.

[16] At common law, a power of attorney ends upon the death of the attorney, as recognized by the judge. In *Wilson*, the court considered the common law presumption:

> [12] Other provinces have provisions in their *Powers of Attorney Act* legislation which appear to be drafted so as to prevent and avoid the power of attorney failing in the event of death of one of the attorneys.
>
> […]
>
> [17] The court in *R. v. Hammond, supra*, referred to the text of Gerald R. Robertson entitled Mental Disability and the Law in Canada, 2nd Edition, 1994, at p. 185, which states:
>
> > An enduring power of attorney terminates:
> >
> > (1) on being revoked by a mentally capable principal;
> >
> > (2) on the death of the principal;
> >
> > (3) on the death, mental incapacity or resignation of the attorney (unless there are joint or alternate attorneys);
>
> [18] This passage from Gerald Robertson has been cited in two cases: *Potasky v. Potasky*, 2002, MBQB 146, and *Glenn v. Brennan*, 2006, 144 ACWS, 3rd 976.

> […]
>
> [23] In *Potasky, supra,* the court further stated:
>
> > I agree with counsel for the applicant that s.13(d) is not about the termination of the power of attorney; rather it deals with the termination of the authority of an individual to exercise a power, not the termination of the power.
>
> […]
>
> [28] In the *Potasky* case, the court qualified the common law rule to some extent when it stated:
>
> > There is no reference in the Act that has the effect, directly or even indirectly, of changing the common law principle that the death of a sole attorney terminates an enduring power of attorney.

[17] In his factum Mr. Kirkpatrick argues the legislative provisions in various other provinces stand in contrast to the *Act*, in that they specifically make provision for both an attorney's duty to act and the need to secure court approval to renounce. Those features are absent from the Nova Scotia legislation. Mr. Kirkpatrick asserts s. 5(1)(c) of the *Act* provides authority for a court to substitute another person for a named attorney, regardless of who makes the application, or when.

[18] In *Houston v. Houston*, 2012 BCCA 300 the British Columbia Court of Appeal discussed the common law surrounding the donor–attorney relationship:

> [26] […] To begin with, a power of attorney is a type of agency. At common law, where an agency was granted by deed giving specified authority to the agent, it was called a "power of attorney". […] (Emphasis in original)
>
> [27] Being a type of agency, the power of attorney is subject to various rules, some of which are codified in the Act, for the protection of the agent. As Professor G. Fridman notes in *Canadian Agency Law* (2009), although at common law a power of attorney was strictly construed, the ordinary rules of construction of documents are employed in determining the scope of the agent's authority where the document is not under seal or where the authority is given orally. Thus Fridman writes:
>
> > If the document involved is not a deed, or the contract of agency is parol, the agent's authority is to be construed having regard to the purposes of the agency, i.e., the surrounding circumstances and the usual course of the business in which the agent is concerned. In particular, where general words are used, they must be construed and understood in light of the usual course of the agent's business.

> Writing which contains the agent's authority is of prime importance, but if there is any ambiguity about the wording of the agent's authority then, as long as the agent acts in good faith and in accordance with a reasonable construction of his authority (if there is more than one possible), he will be considered to have acted within his authority, whether or not in fact what he did was what the principal intended he should do. [At 64.]

(See also Adlington, *Atlantic Canada Estate Administration Manual* (Thomson Reuters: Online), Chapter 12.3.2.)

[19] Does the *Act* permit a different result than that contemplated at common law? Mr. Kirkpatrick argues there is no language in the *Act* limiting or prohibiting the relief he seeks, and the *Act* does not address an attorney's ability to renounce, nor provide any restrictions as to who can make an application for substitution. In this way, says Mr. Kirkpatrick, the *Act* is distinguishable from the legislation applied in *Potasky v. Potasky*, 2002 MBQB 146 as referred to in *Wilson*.

[20] The Manitoba legislation, under which *Potasky* was decided, contained a provision relating to the duty of an attorney to act, and preventing renunciation by an attorney while subject to that duty, unless with approval of the court. Mr. Kirkpatrick maintains the absence of such features in the *Act* demonstrates a lack of intention to impose those types of restrictions on an attorney in Nova Scotia. He argues the *Act* does not require an attorney to renounce by making application to the court, and furthermore it gives the court the authority to substitute one attorney for another. In addition, the *Act* does not require that the substitution must be completed prior to the former attorney's renunciation.

[21] Mr. Kirkpatrick relies on the content of s. 5 of the *Act* as providing "… a legislative mechanism available to fill a vacancy so as to prevent the enduring power of attorney from being rendered void". Mr. Kirkpatrick urges that the *Act*'s grant of power to the court in s. 5(1)(c) to appoint a "substitute" remedies the difficulty created for Mrs. Prince at common law by the death of her attorneys. I agree.

[22] As directed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (para. 21). With respect, the judge's restrictive and narrow interpretation of s. 5(1)(c) of the *Act* runs contrary to this purposive or functional approach.

[23] Section 5(1)(c) specifically contemplates a judge "… may for cause, on application … substitute another person for the attorney". A plain reading of that subsection contemplates the appointment of a different attorney than the one named by the donor. The word "substitute" is not limited or restricted to requiring an attorney such as Mr. Woodman to act up to the moment of their substitution.

[24] The events unforeseen by Mrs. Prince—the death of both attorneys—left her in the very position she demonstrated an intention to avoid when she executed her EPA. If the judge's interpretation of s. 5(1)(c) was correct, it would ignore the absence of any statutory pre-conditions to the appointment of a substitute attorney. The judge's interpretation would have required Mr. Woodman himself to seek permission to secure a substitute attorney. The *Act* imposes no such requirement.

[25] The only precondition to a substitution found in s. 5(1)(c) of the *Act* is that the donor be incapacitated at the time of the appointment of a substitute attorney, as Mrs. Prince was at the time of Mr. Kirkpatrick's application. The wording signals recognition that after the coming into effect of the EPA, contingencies might occur requiring the intervention of a court so as to safeguard the donor's interests.

[26] The plain meaning of the words used in s. 5(1)(c) is that a judge may appoint a substitute for a dead attorney(s) if the judge is persuaded it is appropriate. *Rizzo*, *supra*, instructs courts to "… take a pragmatic approach to statutory interpretation that is both purposive and contextual": *E.M.Y. v. Nova Scotia (Community Services)*, 2020 NSCA 46 at para. 65. (See also *R. v. Anand*, 2020 NSCA 12 at para. 34; *Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51 at para. 88.)

[27] Under the *Rizzo* approach, it remains to consider the *Act*'s context, scheme and objective. As the *Act* is brief, I consider these points together. The *Act* is comprised of seven sections in total:

- Section 2 states simply that the *Act* "… applies to a power of attorney to the extent that the power of attorney authorizes the management of the estate of the donor."
- Section 3 identifies what constitutes an enduring power of attorney.
- Section 4 validates a provision in a power of attorney that expressly excludes the operation of s. 59(2) of the *Hospitals Act*.

- Section 5 sets out the powers and duties of attorneys and the broad authority of a justice of the Supreme Court of Nova Scotia to make orders in relation thereto.
- Section 6 allows the *Act* to apply retroactively to powers of attorney executed before its coming into force.
- Section 7 allows an attorney to continue acting when their joint attorney, named with them, can no longer act for various reasons including death.

The *Act* has little or no purpose unless it was designed to distinguish or augment existing common law rules.

[28] At common law, a power of attorney ceased to be effective upon the donor's incapacity. Under the circumstances of this case, even an enduring power of attorney would leave an incapacitated donor without the ability to execute any amendment to it, regardless of how obvious and practical. For instance, the incapacitated donor could not appoint a replacement for a named attorney now unable to act, despite the donor's clear intent that an attorney conduct their affairs. The *Act* authorizes a judge to step into the breach and address that unsatisfactory result. Section 5(1) of the *Act* represents the Legislature's measure of pragmatism to ensure the agency by attorney may proceed as the donor intended.

[29] The *Act* does not use language that limits or constrains s. 5(1). To accept the judge's interpretation of "substitution" was correct, such constraint could lead to unreasonable results. Mrs. Prince intended to have someone manage her affairs in the event of her incapacity, under the authority of her EPA. Rejecting a common sense interpretation of the word "substitution" in s. 5(1)(c) or a purposive approach to its objective would have the opposite result.

[30] The unrestricted plain meaning of s. 5(1)(c) is consistent with the pragmatic statutory scheme and legislative objective. A judge has the power to appoint a substitute for the deceased attorney(s) under s. 5(1)(c).

[31] Finally, I consider the material relied upon by the judge in determining Mr. Kirkpatrick's application. The judge took into account the Nova Scotia Law Reform Commission's August 2015 document "Final Report *Powers of Attorney Act*". That report contemplated a scenario in which all named attorneys were deceased. It set out the Commission's view a court should not be permitted to

substitute a party not originally named as an attorney, so as not to interfere with a donor's freedom of choice.

[32] The judge raised the contents of the report with counsel for Mr. Kirkpatrick during the hearing, prior to formulating her oral decision. In her reasons, the judge discussed the report, finding:

> So, they did indicate that they'd permit the court to substitute a named alternate; however, they would not substitute a person who was not named as an attorney or an alternate attorney in the initial Enduring Power of Attorney, **for the policy reasons that were set out**, which for me are quite compelling, despite the difficult situation that the Applicant's family and Ms. Prince are within at this time. (Emphasis added)

[33] Respectfully, the judge was misguided when persuaded by the comments contained in the Commission's paper. The Commission's view did not reflect the provisions of the *Act*. As argued by Mr. Kirkpatrick, this is particularly so "in terms of the court's authority to substitute an unnamed attorney for cause, pursuant to s. 5" of the *Act*. The Commission's "preference" did not reflect the law and the judge gave it too much import.

Disposition

[34] For the foregoing reasons, I would allow the appeal and order Mr. Kirkpatrick be named as a substitute attorney for Mrs. Prince pursuant to her December 2014 EPA.

Beaton J.A.

Concurred in:

Derrick J.A.

Fichaud J.A.