LAW REFORM COMMISSION OF NOVA SCOTIA

The Rule Against Perpetuities

Discussion Paper - July 2010

LAW REFORM COMMISSION OF NOVA SCOTIA

Discussion Paper

The Rule Against Perpetuities

Law Reform Commission of Nova Scotia
July 2010

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

The Commissioners are:

Anthony R. Chapman Q.C., President
Justice Kevin Coady
Robert J. Currie
Brian Joseph
Darlene Jamieson Q.C.
Ronald MacDonald
John McMullin

The staff of the Commission are:

John E.S. Briggs,
Executive Director and General Counsel

Angus Gibbon
Legal Research Counsel

William H. Charles, Q.C.
Special Counsel

Andrea Davidson
Administrative Assistant

The Commission offices are located at:

Law Reform Commission of Nova Scotia
1484 Carlton Street
Halifax, Nova Scotia B3H 3B7

Telephone: (902) 423-2633
FAX: (902) 423-0222
Email: info@lawreform.ns.ca
Web Site: www.lawreform.ns.ca

The Law Reform Commission receives funding from the Law Foundation of Nova Scotia and from the Government of Nova Scotia. The Commission gratefully acknowledges this financial support.

WHAT DO YOU THINK?

The Law Reform Commission is interested in what you think about the issues raised in the Discussion Paper on *The Rule Against Perpetuities*.

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law should deal with this rule.

If you would like to comment on the Discussion Paper, you may:

- Fax the Commission at (902) 423-0222
- Send an email to info@lawreform.ns.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the following address:

  Law Reform Commission of Nova Scotia
  2nd Floor, 1484 Carlton Street
  Halifax, Nova Scotia B3H 3B7

In order for us to fully consider your comments before we prepare our Final Report, please contact us by **September 7, 2010.**

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments given. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information, including personal information, contained in submissions.

CONTENTS

EXECUTIVE SUMMARY

In September of 2008 the Attorney General for the Province of Nova Scotia requested the Commission's advice and recommendations concerning the rule against perpetuities ("the Rule"). This followed a request from the Nova Scotia Barristers' Society to the Nova Scotia government, that the province develop legislation to abolish the Rule. This Discussion Paper sets out the Commission's preliminary proposals for reform, and invites comments as to those proposals and related matters.

The rule against perpetuities limits the duration of certain restrictions on the use and transfer of property. The Rule is to the effect that no legal interest in property is valid unless it is certain, at the time when the disposition (*e.g.*, a trust) takes effect, that the interest must vest within a life or lives in being plus twenty-one years.[1] In other words, property may not be tied up in trust, subject to restricted use, or otherwise held subject to any contingency, for longer than twenty-one years after the death of a person who is alive at the time of the disposition and identifiable by the terms of the instrument of disposition. The Rule applies to all sorts of property interests - *e.g.*, options to purchase, conditional easements, remainder estates, etc. - but today arises most commonly in connection with trusts.

The Rule is generally understood to serve the purpose of balancing the rights of property owners to impose conditions on the use and exchange of their property with the importance of having property under the control of living persons, so that it may be put to its best contemporary use.

The common complaint is that the Rule is simply too complex and abstract in its application, resulting in a substantial risk that beneficiaries or grantees will be deprived of their interests through inadvertent errors in drafting. In the estate planning context, a great number of vesting conditions may offend the Rule, most often unintentionally, and often only hypothetically in any event. The consequence of a breach is very real, however; the intended gift or transfer will generally be entirely invalid.

In practice, the difficulty arises largely from the Rule's preoccupation with remote hypotheticals. The question of whether a disposition offends the rule is decided at the time that the disposition takes effect (*e.g.,* in the case of a will, upon the death of the testator). At that point, it must be certain that there is no possible contingency upon which the legal interest in the property may not vest within the perpetuity period. Even if it can be anticipated that later events will likely foreclose the possibility of the interest failing to vest, the gift will nonetheless be invalid at the outset. In order to be certain, at the time when the disposition is effective, that the interests it creates are valid, all contingencies possible as of that time must be canvassed. If one of them results in an interest vesting beyond the perpetuity period, or not at all, the disposition is void at the outset.

The complexity of the Rule is compounded by the concept of identifying a 'life or lives in being', and the not always clear distinction between vested and contingent property interests.

[1] Donovan W.M. Waters, *Waters' Law of Trusts in Canada* (Scarborough: Thomson Carswell, 2005) at 346, citing *Duke of Norfolk v. Howard*, (1682) 3 Ch. Cas. 1, 22 E.R. 931, known as the *Duke of Norfolk's Case*.

The Rule is also marked by a series of exceptions that depend in many cases on very subtle distinctions in language; *e.g.*, the distinction between conditions subsequent (bound by the Rule) and determinable fees (not bound). These aspects of the Rule lead to a series of traps for the drafter of a postponed, restricted or conditional property transfer. Only with a complete grasp of the Rule, including all of its exceptions and partial exceptions, and a thorough canvasing of all remote and unlikely possibilities of lifespan and life events of all possible 'lives in being' and their offspring, can the drafter have confidence that perpetuities problems have been avoided.

Given these difficulties, the Rule has been subject to significant reform in most jurisdictions other than Nova Scotia. The most common sort of reform - referred to generally as 'wait and see' - maintains the substance of the Rule, but allows the disposition to run its course for the perpetuity period, rather than declaring it to be invalid at the outset. An unlikely, but possible contingency which under the common law Rule would invalidate the transfer at the outset may be foreclosed within the perpetuity period. If so, under 'wait-and-see' the transfer will be saved. Wait and see reforms are often accompanied by saving provisions, allowing the court to modify the terms of the transfer only so much as is necessary to save it from invalidity under the Rule.

A more significant wait-and-see reform, which still substantially preserves the Rule's bar on long-term unvested interests, imposes an absolute limit for the vesting of such interests, rather than the nebulous concept of a 'life in being plus twenty-one years'. England and Wales have recently adopted the Law Commission of England's recommendation for a straightforward 125-year perpetuities period, on a wait-and-see basis.

A more radical reform, adopted in Manitoba, South Australia, Saskatchewan, Ireland, a number of US states and certain Caribbean nations, is to simply abolish the Rule, relying on other laws to serve the purposes the Rule was designed to fulfill. In particular, the abolitionist jurisdictions have relied on taxation of long-term trusts, as well as the courts' power to vary trusts and other property dispositions, in order to discourage long-term conditions on the use and exchange of property, or to modify or terminate such conditions where appropriate.

For discussion purposes, we propose abolition. We are not persuaded that there is anything necessarily objectionable about all long-term trusts and other sorts of conditional property interests. Certainly in some cases they will present inconvenience or hardship, but in those cases we see the value of a court power to modify or terminate the interest, with due consideration for the benefit of the holder where appropriate. The experience of the courts under variation of trusts legislation strengthens our impression that a case-specific approach to the problem of unvested, contingent property interests is preferable to a categorical rule which deems all such interests void after a certain period of time.

Along with our proposal for the abolition of the rule against perpetuities, we propose the expansion of the courts' power to vary trusts. In particular, we would not require the consent of all adult, capacitated beneficiaries, as the *Variation of Trusts Act* now effectively does. The requirement for consensus puts too much power in the hands of a recalcitrant

beneficiary, with no recourse to have a dispute about a proposed variation of the terms of the trust to account for changing circumstances properly adjudicated.

We further propose a new variation power in respect of non-trust unvested property interests, along the lines of the variation of trusts legislation. These interests may present inconvenience or hardship to the present-day holders of property, and we think the court ought to be able to deal with them in such cases. We propose certain limits on the exercise of the power - in particular that notice be given to the holder of such interest if at all possible, that the intentions of the transferor, if objectively ascertainable, be respected, and the requirement for compensation in some cases to be paid or held in trust for any ascertained or ascertainable interest holder. We would not impose any requirement that a certain period of time must pass before the power may be exercised.

Finally, we propose that the abolition of the Rule be made retrospective, so as to apply to any interest which might be held invalid under the Rule, regardless of when the transferring instrument (*e.g.,* will or deed) was effective. The proposed retrospectivity would be subject to any interest which has vested, as well as prior judicial decisions and acts taken in reliance on the Rule (*e.g.*, a property purchase on the basis of a solicitor's opinion that a remote interest in the property was void under the Rule), prior to the effective date of the abolishing legislation.

We invite comment as to all or any of these proposals, and request that comments be delivered on or before **September 7, 2010**.

THE RULE

Introduction

In September of 2008 the Attorney General for the Province of Nova Scotia requested the Commission's advice and recommendations concerning the rule against perpetuities ("the Rule"). This followed a request from the Nova Scotia Barristers' Society to the Nova Scotia government, that the province develop legislation to abolish the Rule. This Discussion Paper sets out the Commission's preliminary proposals for reform, and invites comments as to those proposals and related matters. The Commission was assisted by an Advisory Committee composed of practitioners Timothy Matthews, Q.C., John Arnold, Q.C., Roberta Clarke, Q.C. and R. Daren Baxter. The Commission took further advice from Catherine Walker, Q.C., and Professor Diana Ginn, concerning issues with the Rule specific to real property practice.

The rule against perpetuities is a legal rule which limits the duration of certain restrictions on the transfer of property. By various means of estate planning - particularly trusts - and other forms of property disposition, a settlor or testator or grantor may postpone the time when property may be possessed and used freely by a beneficiary or grantee. The Rule insists that such inheritances - and indeed, many other sorts of postponed, restricted or contingent transfers of property - can only be postponed for so long. At some definite point the property must be fully transferred to its beneficial owner, free of restrictions. A transfer of property subject to a delay, restriction or contingency that might result in the full transfer occurring later than the allowable perpetuities period is void from the beginning. The postponed, restricted or contingent transfer simply fails at the outset, and the property will be received by someone other than the intended recipient, as though the offending transfer had not been made at all.

The common law rule against perpetuities[2] is to the effect that no legal interest in property is valid unless it is certain, at the time when the disposition (*e.g.*, a trust) takes effect, that the interest must vest within a life or lives in being plus twenty-one years.[3] In other words, property may not be tied up in trust, subject to restricted use, or otherwise held subject to any contingency, for longer than twenty-one years after the death of a person who is alive at the time of the disposition and identifiable by the terms of the instrument of disposition. If there is no such identifiable life or lives in being, the period is twenty-one years from the disposition.

The Rule applies to all sorts of contingent future interest in property, real or personal, whether by trust, power, estate, option to purchase, easement or otherwise. In the typical scenario of a will, which may gift certain property to be held in trust until the happening of a certain event, it must be certain that the property will absolutely vest in the entitled person or persons before twenty-one years has passed since the death of a person who is identifiable by the terms of the will, and who was alive at the time of the testator's death. If not, with

[2] The common law rule has been abolished or substantially reformed in most Canadian jurisdictions, other than the Atlantic provinces.

[3] Waters, *supra,* note 1 at 346, citing *Duke of Norfolk, supra*, note 1.

limited exceptions, the entire gift is declared invalid. For example, a gift to be held in trust for 'the first of my grandchildren to turn 25', would be void at the outset, because the gift might vest outside the perpetuities period. Plainly, a grandchild might reach the age of 25 more than 21 years after the death of the last of the testator's children or grandchildren alive at the time of the testator's death.

Similarly, a succession of life interests ("to A for life, then to B for life, then to C for life") will fail at the logical point when the next gift might conceivably vest outside the perpetuities period. If A is alive at the time of the testator's death, but B is not, then the gift of the remainder interest to C is invalid because it might occur (if at all) more than 21 years after the death of A.[4] B receives an absolute interest upon A's death.

Charitable gifts - i.e., a gift to a person or organization to be held in trust and used for one or more charitable purposes - are exempt from the Rule in one way: property may be donated, to be held in trust indefinitely for a charitable purpose.[5] But the Rule[6] deems invalid non-charitable purpose trusts - that is, property held for a purpose rather than for persons - that may last longer than the perpetuity period. The law is sceptical of non-charitable purpose trusts in general, and permits only certain purposes[7] - others are simply void regardless of duration. The typical example of a permitted purpose is a trust for the upkeep of a grave. But even the permitted purpose trusts are nevertheless subject to the Rule. Thus, if indefinite, or for any period longer than the perpetuities period, the trust is invalid. In the case of purpose trusts there is typically no 'life in being' unless one is specifically referenced in the instrument, and so the period is twenty-one years.

Powers of appointment - the transfer of property with general or specific instructions to further transfer ("appoint") it among one or more persons, with some measure of discretion afforded to the donee as to when and to whom - are also subject to the rule. A general power of appointment is akin to ownership, since the donee may decide to appoint the property entirely to him or herself. For that reason it is only necessary to be certain that the property must pass to the donee within the perpetuities period; not that it be further appointed by the exercise of the donee's power within that time.[8] A specific ('special' or

---

[4] See Law Commission [England], *The Rules Against Perpetuities and Excessive Accumulations*, (Report No. 251, 1998) [England Report 1998] at para. 3.2.

[5] In most other ways the Rule applies to charities as to other private entities - such as when a charity is in a position to receive the property after some delay which may be longer than the perpetuity period, or when a private person stands to become invested with the property at some remote time, following an initial gift to charity in trust; see Waters, *supra* note 1 at 649-50; Manitoba Law Reform Commission, *Report on the Rules Against Accumulations and Perpetuities*, (No. 49, 1982) [Manitoba Report] at 18-19; England Report 1998, supra note 4 at paras 3.47 - 3.50.

[6] Sometimes described as a separate rule against inalienability; see, e.g., England Report 1998, supra note 4 at paras. 1.14, 4.5.

[7] Namely, a few recognized by English courts in the nineteenth century; *e.g.*, the maintenance of gravesites or the care of certain animals; see Waters, *supra* note 1 at 648.

[8] *Bray v Hammersley* (1830) 3 Sim. 513; 2 Cl. & F. 453, discussed in R.H. Maudsley, *The Modern Law of Perpetuities* (London, Butterworths, 1979) at 62, Megarry & Wade, *The Law of Real Property*, 7th ed., (London: Sweet & Maxwell, 2008) at para. 9-108; England Report 1998, supra note 4 at para. 4.21.

'particular') power, by contrast, comes with some instruction from the donor, typically as to the class of people who are or may be entitled to some share. It is in this way similar to a discretionary trust, and it must be certain at the outset that the appointment must be made by the donee within the perpetuities period.[9] The common law Rule also applies to administrative powers; *e.g.*, the power of a trustee to sell, mortgage or lease the trust property.

The Rule also applies outside the trust and estate planning context, where an interest in property may be held in abeyance for longer than the rule allows. For example, an owner, person A, may transfer property to B, unless the property is to be used for certain purposes (*e.g.*, a gambling house), but if so, then to C (or for that matter back to A). The conditional interest of C (or A) to re-enter the property upon breach of the condition conceivably could vest outside the perpetuity period, and so that interest is held wholly invalid[10] from the outset - B receives the property absolutely. Similarly, options for the purchase of land or an interest in land are bound by the Rule, as are conditional easements, remainder estates following a life tenancy, and perhaps rights of first refusal as well.[11] The Rule generally applies to property interests of all kinds,[12] and the list of circumstances in which it may arise to thwart an intended transfer or transaction is not closed.[13]

Origins & Purpose

Though the courts have long had an interest in limiting the restrictions that may be imposed on the free use and exchange of property, the Rule in its modern form derives from the late seventeenth century, in the *Duke of Norfolk's case*.[14] The classic statement of the rule in that case is Gray's: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the instrument."[15]

An older version of the Rule, which came to be known as the rule in *Whitby v Mitchell*[16] - that no gift may be made to the unborn child of an unborn person - may be considered a

---

[9] Megarry & Wade, *supra* note 8 at para. 9-107; Maudsley, *supra* note 8 at 61. See discussion in England Report 1998, *supra* note 4 at paras. 4.25 - 4.26; Manitoba Report, *supra* note 5 at 16-18.

[10] Waters, *supra* note 1 at 649.

[11] Manitoba Report, *supra* note 5 at 19-20; Saskatchewan Law Reform Commission, *Proposals relating to the Rules Against Perpetuities and Accumulations* (1987) [Saskatchewan Report] at 13-16; England Report 1998, *supra* note 4 at paras. 3.34 - 3.38, 3.43-3.46; Law Reform Commission [Ireland], *Report on the Rule Against Perpetuities and Cognate Rules* (No. 62, 2000) [Ireland Report] at chap. 3. The matter of rights of first refusal, somewhat uncertain in other jurisdictions, may be more settled in Canada, owing to the decision in *Canadian Long Island Petroleums Ltd. v. Irving Wire Products*, [1975] 2 S.C.R. 715 (rule not applicable); see also the decision of the English Court of Appeal in *Pritchard v Briggs* [1980] Ch. 338.

[12] The exceptions are succintly explained in England Report 1998, *supra* note 4, at paras. 3.23 - 3.62; see generally Anne W. La Forest, ed., *Anger & Honsberger: Law of Real Property*, 3d ed., loose-leaf (Aurora, ON: Canada Law Book, 2006) at §10:20.50-§10:20.60; Megarry & Wade, supra note 8, at chap. 9.

[13] *Sibley v Ashforth* [1905] 1 Ch. 535 at 545; Manitoba Report, *supra* note 5 at 21.

[14] *Duke of Norfolk's case, supra* note 1.

[15] John Chipman Gray, *The Rule Against Perpetuities*, 4th ed., (Boston: Little, 1942) at 191.

[16] *Whitby v Mitchell*, (1890) L.R. 44, Ch D 85 (C.A.).

variation on the general theme and is now generally subsumed within the Rule as stated in *Duke of Norfolk's case*.[17] The fit is not perfect[18] but for purposes of this discussion the rule in *Whitby v Mitchell* will be considered along with the rule of perpetuities.

A related law against accumulations, which limits the period during which property must be held for the accumulation of income, has no application in Nova Scotia. The accumulations rule is solely statute based, and has no common-law dimension except as a by-product of the rule against perpetuities. The original *Accumulations Act* was passed in England in 1800, and was therefore received into law only in those colonies which received English statute law as of or later than that time.[19] Other Canadian jurisdictions have expressly adopted the English *Act* or passed their own.[20] Nova Scotia ceased to automatically receive English statute law in 1758,[21] and has not passed its own *Act*; therefore we need not deal separately with accumulations in this discussion paper.

The Law Reform Commission of Saskatchewan described the origins of the modern common law rule against perpetuities this way:

> The rule was devised in the late seventeenth century, when family settlements designed to keep property within aristocratic families from generation to generation came into vogue. In a society in which wealth and status were bound up with land ownership, it was perhaps to be expected that the aristocracy would seek to protect its fortunes against improvident heirs and their creditors. Attempts to do so effectively prevented the encumbrance or alienation of land for substantial periods of time. The courts thought it necessary to place some restraint on schemes that tie up land 'in perpetuity'.[22]

Indeed, the Rule arose in its present, general form largely because of the continuing efforts of wealthy landowners to control the future use of their land - in effect to create or continue so-called 'family estates' against the potential imprudence of future offspring. As a

[17] Waters, *supra* note 1, at 346-47.

[18] See Saskatchewan Report, *supra* note 11 at 22; it is possible to run afoul of the rule in *Whitby v Mitchell* but not the modern rule of perpetuities, *e.g.*, when a grant of a life estate is made to a person who has no children at the time of the grant, remainder to his first born son for life, remainder to the first born son of that son to be born within 21 years of A's death. The last remainder interest is 'vested' in the last-mentioned first born son within the perpetuity period, but the gift would be invalid as a gift to the unborn child of an unborn person.

[19] Namely, Newfoundland, Manitoba, British Columbia, Saskatchewan and Alberta, and the territories. It has since been abolished in Manitoba, and reformed by later legislation in Alberta and British Columbia; see Waters, *supra* note 1 at 657.

[20] Ontario adopted the original English *Act* by referential statute, and has reformed its rule over the years. Prince Edward Island adopted a statutory accumulations rule that conformed to its lives-in-being plus sixty years statutory perpetuities period; see Waters, supra note 1 at 657.

[21] See *Velensky v. Hache*, (1981) 121 D.L.R. (3d) 747 (N.B.Q.B.), at para. 7, citing Bora Laskin, *The British Tradition in Canadian Law*, (London: Stevens & Sons Ltd, 1969) at 5-6; J.H.C. Morris & W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (London: Stevens, 1962) at 268-69; J. E. Coté, "The Reception of English Law" (1977) 15 *Alta. L. Rev.* 29 at 87 (noting some ambivalence about the exact date, but which would not affect the reception of the *Accumulations Act*).

[22] Saskatchewan Report, *supra* note 11 at 1.

succession of specific legal and equitable strategies were undone by legislation and the courts, new ones arose. Over hundreds of years the contest continued until finally the general rule, applying to 'all interests', was stated in the *Duke of Norfolk's Case*.[23] In some ways it is the effective generality of the rule that now occasions calls for its reform; it is impossible to draft around, even in contexts in which it ought not to apply.[24]

The purpose of the Rule has shifted somewhat, and cannot simply be attributed to the need to limit the duration of restrictions on the free use and exchange of property. The problem of family settlements is virtually unknown in Nova Scotia, fees in tail have been abolished, and the common law prohibits conditions which restrict the free alienation of property interests.[25] In the more common contemporary case of trust funds, the assets are typically freely invested and exchanged as the trust is administered. The purpose of the Rule as it is now understood is to balance the law's general concern to respect the intentions of property owners, on one hand, with the competing concern to ensure that living persons may freely use and enjoy the property they possess. The Manitoba Law Reform Commission put it this way:

> ... [M]ost commentators appear to agree, in whatever way they phrase them, that the rule has two central purposes. The first is to bring about the availability of land, and possibly some forms of personalty, within regular and sufficiently frequent periods of time. The second is to strike a fair balance between the desires of present absolute owners to regulate beyond their own mortality the enjoyment of their property in the years to come, and the wishes of those living tomorrow to have the same, or at least effective control over the enjoyment of property which they have inherited. It is the second of these two purposes which has probably the widest acceptance in terms of why we have, and need, the rule today, though both are forcefully argued to be relevant to today's scene.[26]

Morris and Leach explain:

> ... '[T]he Rule Against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy'. It is a natural human desire to provide for one's family in the foreseeable future. The difficulty is that if one generation is allowed to create unlimited future interests in property, succeeding generations will receive the property in a restricted state and thus be unable to indulge the same desire. The dilemma is thus precisely what it has been throughout the history of English law, namely, how to prevent the power of alienation from being used to its own destruction. In this idea of a compromise between two competing policies - freedom of disposition by one generation and freedom of

[23] *Duke of Norfolk's case, supra* note 1. See England Report 1998, *supra* note 4 at paras. 2.2 - 2.10.

[24] England Report 1998, *supra* note 4 at para. 1.3.

[25] In particular through the rule against restraints on alienability; see La Forest, *supra* note 12 at §4:40.10 and §8:20.10.

[26] Manitoba Report at 23.

> disposition by succeeding generations - the Rule against Perpetuities seems to the present authors to find its best justification ...[27]

Deech suggests further:

> "The liberty to make fresh rearrangements of assets is necessary not only in order to be rid of irksome conditions attached by earlier donors to the enjoyment of income but also in order to be able to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of the beneficiaries, unforeseeable by the best intentioned and most perspicacious of donors."[28]

To this general rationale in favour of control of property by the living, known as the 'dead hand' argument, it has been more recently added that there is a general economic interest in limiting the pool of property tied up in trust. Emery puts it this way:

> ... [I]t is economically and socially undesirable to have property tied up in trust funds for too long a period. Trustees are limited by their office in what investment risks they may take with trust assets, and national economies cannot grow as fast as they might if the supply of risk capital is unduly limited by trust investment restrictions.[29]

By means of the Rule, the law provides that a settlor may bind property to his or her intentions for some period of time, but no longer. In the seventeenth century the rule of a life or lives in being plus twenty-one years, in effect, was to confine the duration of a trust to the lifetime of the testator's children and the childhood years of his grandchildren.

The Rule in Practice

The abstract complexity of the Rule itself is suggested even by the bare outline given above, and even greater difficulty arises from the various exemptions and partial exemptions the law has created around the Rule. We will only summarize the variety of circumstances in which the Rule may arise to thwart a conditional or delayed property transfer or gift. More complete accounts of the Rule in its original and reformed varieties, and the problems it creates for grantors, testators, settlors, legal counsel and beneficiaries, are to be found in a number of texts[30] and the work of the various law reform agencies that have studied the issue.[31]

---

[27] Morris & Leach, *supra* note 21 at 17-18.

[28] Ruth Deech, "Lives in Being Revived" (1981) 97 *L.Q.R.* 593 at 594.

[29] Carl Emery, "Do We Need a Rule Against Perpetuities?" (1994) 57 *M.L.R.* 602 at 603.

[30] Among others, Waters, *supra* note 1, La Forest, *supra* note 12 at chap. 10; Moffat et al., *Trusts Law*, 6th ed. (2009); Maudsley, *supra* note 8; Morris & Leach, *supra* note 27; W. Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 *L.Q.R.* 35.

[31] *E.g.*, Law Commission [England], *The Rule Against Perpetuities* (Rep. No. 4, 1956); Ontario Law Reform Commission (Rpts. No. 1 and 1A, 1965); Alberta Institute of Law Research and Reform, *Report on the Rule Against Perpetuities* (Rep. No. 6, 1971); Manitoba Report, *supra* note 5; South Australia Law Reform Committee, *Report relating to the Reform of the Law of Perpetuities*, (No. 73, 1984) [South Australia Report]; Saskatchewan Report, *supra* note 11; Northern Territory Law Reform Committee [Australia], *Report on the Rules Against Perpetuities and*

The common complaint is that the rule is simply too complex and abstract in its application, resulting in a substantial risk that beneficiaries or grantees will be deprived of their interests through inadvertent errors in drafting. In the estate planning context, a great number of vesting conditions may offend the Rule, most often unintentionally, and often only hypothetically in any event. The consequence of a breach is very real, however; the intended gift or disposition will generally be entirely invalid. The property interest meant to be held in trust will instead fall into the residue of an estate, or be subject to intestacy. In the non-trust context the interest meant to be held on condition will simply be void. The property will be distributed differently than the testator or grantor intended, and in many cases[32] the intended beneficiary or grantee will be deprived of property he or she was meant to receive.

The problems arise most often not from intentional efforts to create perpetual settlements, but rather from errors in drafting. As Leach observed:

> "Perpetuities cases that have arisen in the courts, English or American, in recent decades do not deal with testators and settlors who have long-term designs which press against the limits of the Rule against Perpetuities. Rather they deal with persons who, starting from reasonable plans for the support of their families, have run afoul of the Rule through the ignorance or oversight of the particular member of our profession to whom they have entrusted their affairs. I do not recall a single twentieth-century case, English or American, in which the will or trust could not have been so drafted as to carry out the client's essential desires within the limits of the Rule. This means that our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept."[33]

Though virtually every aspect of the Rule - from the concept of a life in being to the focus on vesting of interests - seems purposely designed to create needless complexity, it may be said that in practice, the difficulty arises largely from the Rule's preoccupation with remote hypotheticals. The question of whether a disposition offends the rule is decided at the time that the disposition takes effect (*e.g.,* in the case of a will, upon the death of the testator). At that point, it must be certain that there is no possible contingency upon which the legal interest in the property may not vest within the perpetuity period. Even if it can be anticipated that later events will likely foreclose the possibility of the interest failing to vest, the gift will nonetheless be invalid at the outset. In order to be certain, at the time when the disposition is effective, that the interests it creates are valid, all contingencies possible as of that time must be canvassed. If one of them results in an interest vesting beyond the perpetuity period, or not at all, the disposition is void at the outset. Better to be absolutely certain, when a trust is initially constituted, that it will be valid - goes the thinking - than to

---

Accumulations (Report No. 15, 1993); England Report 1998, *supra* note 4 at Part IV; Ireland Report, *supra* note 11.

[32] But not all - it may be that the intended beneficiaries, notwithstanding being deprived of the void gift in trust, are fortunate enough to take some or all of the property under residuary dispositions, or on intestacy.

[33] Leach, *supra* note 30 at 36.

make the ultimately fruitless effort of constituting and administering an invalid trust.[34] A gift to 'those of my grandchildren who may go to work in overseas development" would be void from the outset, if the testator still had living children at the time of his or her death. There is the possibility that one such grandchild might undertake aid work more than 21 years after the death of the last of the testator's children or grandchildren alive at the time of the testator's death. At common law, the grandchild who undertakes overseas service within a year or two of the testator's death will nonetheless be deprived of the gift.

Quite apart from the basic question why the law should absolutely bar such a gift, the required 'certainty of prediction' in some cases exceeds the ridiculous. Since perpetuities problems frequently resolve upon questions of lifespan,[35] it may become important to anticipate when a person may die, or a child may be born. A gift to the first grandchild of A to reach the age of 21 would be void if A is alive at the time of the disposition. A may have a further child after the testator has died, and that person's child (A's grandchild) may be the first to reach 21 if all of A's older grandchildren die at an early age.[36] But in assessing the prospect of further children after the date of the disposition, courts have not limited themselves to the practical child-bearing years of women. Instead they have considered that the only absolute legal certainty as regards child-bearing is that one must be female to do it. Depending on the wording of the instrument, the technical possibility of a female person, as such, bearing a child at four years old, or eighty, may determine whether the disposition is valid at its creation. Thus, a simple gift to "my wife's children, upon the youngest reaching the age of twenty-five" requires the court to anticipate *whether* the testator's wife may have children. But not *when* she may do so. The gift is void, and it does not matter that she is eighty at the time of the testator's death.[37] The legal possibility of her having one or more children after the testator's death means that the gift to the children could conceivably vest outside the perpetuities period. This problem of legal, rather than practical possibilities,[38] challenges the drafter to anticipate and avoid a wider array of remote and unlikely contingencies than the rule itself, more practically construed, would require.

There is uncertainty too regarding the concept of 'lives in being'. It means, certainly, that the person in question must be alive at the time of the disposition. But not all such persons are relevant lives in being; rather, any such person must be identified or identifiable by the terms of the disposition, in the sense that their lives validate the gift because it is possible to say that it will vest if at all within 21 years of their death. The person(s) need not be related to, or even acquainted with, the testator or settlor,[39] but more typically, the lives in being are

---

[34] See generally Waters, *supra* note 1 at 347-48; England Report 1998, supra note 4 at paras 2.09 - 2.10.

[35] Saskatchewan Report, *supra* note 11 at 8: "Application of the rule is ... largely a matter of searching for hypothetical sequences of births and deaths which might cause an interest to vest outside the perpetuity period."

[36] England Report 1998, *supra* note 4 at para 4.16.

[37] See *Ward v Van der Loeff* [1924] A.C. 653.

[38] See generally Waters, *supra* note 1 at 347. Manitoba Report, *supra* note 5 at 10. England Report 1998, *supra* note 4 at paras. 4.8, 5.3 - 5.4.

[39] See England Report 1998, *supra* note 4 at para. 4.13 - 4.15, discussing the use of 'royal lives' clauses - i.e., providing for any gift to vest absolutely no more than 21 years after the death of the last to die of the lineal

connected with the gifted property in some way (*e.g.*, spouses in relation to postponed gifts to children, or children in relation to grandchildren); their lives in one way or another determine whether or when the interest is to vest. But there is no universally accepted test for determining which lives are relevant; i.e, the nature of their connection to the gift.[40]

Finally, the complexity is compounded by the distinction between a vested and a contingent interest. It is not always clear whether a future interest is vested or contingent, nor why the lines between them are drawn as they are. A remainder interest following a life tenancy is considered to be vested, but an interest held in trust for the life of the current occupant is not.[41]

The distinction is critical too in assessing whether a condition on the future use of property is void as against the Rule. A grantor who wishes to confine the future use of a property for some purpose (*e.g.*, that the property shall be used as a church) may do so by conveying a limited estate called a determinable fee. Upon the breach of the restriction the property automatically reverts back to the grantor. Because the interest of the grantor, called the possibility of reverter, is automatic, it is considered vested, rather than contingent - even though the property only actually reverts on the happening of a contingency (the property ceasing to be used as a church). Being vested at the time of the grant, the possibility of reverter is not subject to the rule against perpetuities, and so a condition imposed by way of determinable fee need not be restricted as to time.[42] By contrast, such a restriction imposed by way of a condition subsequent ("unless the property ceases to be used as a church") creates in the grantor a right of re-entry. In that case the grantor's right is triggered by the breach of the condition, but only when the grantor exercises the right will the property actually return to him or her. The grantor's interest in the property is therefore contingent (on the exercise of the right), rather than vested, and is subject to the Rule.[43] It must be time-limited so that it is certain to vest within the perpetuities period, or else it will be void. In effect, the grantee will receive a fee simple without condition. And this simply because the wording of the instrument conveys an interest subject to a condition subsequent (an "unless" sort of condition) rather than a determinable fee (a "for so long as" sort of limitation). It is no mystery why various jurisdictions, in cleaning up the Rule by way of 'wait-and-see' reforms, have done away with this distinction for purposes of the Rule's application.[44]

---

descendants of a certain monarch, who were alive at the time of the testator's death. For a more local attempt, see David A. Howlett, *Estate Matters in Atlantic Canada* (Scarborough: Carswell, 1999) at 205.

[40] England Report 1998, *supra* note 4 at paras. 4.16 - 4.17.

[41] Ireland Report, *supra* note 11 at para. 4.30. And this is to brush over a long-standing argument about the means of identifying lives in being, set out at some length in Maudsley, *supra* note 8 at 94-100, and summarized in England Report 1998, *supra* note 4 at paras. 4.16-4.17.

[42] La Forest, *supra* note 12 at §10.20.50(e).

[43] La Forest, *supra* note 12 at §8.10.30(b); §10.20.50(d).

[44] See, *e.g.*, *Perpetuities Act*, R.S.O. 1990, c. P.9, s.15, *Perpetuities Act*, R.S.A. 2000, c.P-5, s.19, *Perpetuity Act*, R.S.B.C. 1996, c.358, s.23. For discussion of some problems that arise in connection with such reforms, see La Forest, *supra* note 12 at §10:50.30(e).

All of this creates a series of hurdles in drafting dispositions of future interests. In such cases, only with a complete grasp of the Rule, including all of its exceptions and partial exceptions, and a thorough canvasing of all remote and unlikely possibilities of lifespan and life events of all possible 'lives in being' and their offspring, can the drafter have confidence that perpetuities problems have been avoided.

The courts have attempted to blunt the sharper edges of the Rule in certain instances. Class gifts, for example, may be saved by excluding out those recipients who would conceivably receive their shares outside the perpetuities period.[45] As the Rule is commonly understood the entire class gift would fail because of the prospect that some might receive a share outside the perpetuities period. With the courts' innovation some later recipients may be disentitled, but others will at least receive something. But such limited saving rules aside, the courts have been generally reluctant to modify the basic features of the Rule, which continue to furnish numerous traps into which a property disposition may fall.

Amongst students and practitioners alike the rule is notorious - the quintessential example of "lawyer's law".[46] The consequence of even the finest error in legal drafting may be to deprive persons of an interest in property or income that ought to be theirs. For this reason the Rule has been subject to significant reforms or abolition in many jurisdictions. In those jurisdictions where it is retained, in its original or reformed versions, calls for reform continue.

Though in principle and on occasion the Rule's effect is harsh, however, there is very little indication that it has resulted in widespread problems of disentitlement to property. The last reported Nova Scotia decision in which the Rule was held to invalidate an interest was in 1974.[47] Of course, in other cases parties may have simply given up their claims without a reported decision having been rendered, but we have no evidence of this, and invite public comment on the point.

The Manitoba Law Reform Commission remarked:

> It is an odd fact that among a gathering of practitioners mention of the rule against perpetuities always evokes smiles. It seems that the rule is associated in many lawyers' minds with the academic world; it is a rule which is no doubt educationally of value, but surely something of limited real significance for the busy practitioner. Lawyers who attend wills and trusts section meetings, and those who specialize in estate planning and administration of estates, seem often to hold views which are not very different. Essentially they make the comment that the likelihood of their today drawing trusts where vesting ... will not occur within the span of all the possible lives in being, plus twenty-one years, is about as likely as the abolition of taxation.[48]

---

[45] *Andrews v. Partington*, (1791), 3 Bro. C.C. 401; See discussion in Manitoba Report, *supra* note 5 at 16.

[46] Saskatchewan Report, *supra* note 11 at 1.

[47] *MacLeod v. Amherst (Town)* (1974), 8 N.S.R. (2d) 491 (A.D.).

[48] Manitoba Report, *supra* note 5 at 28.

Rather, Waters concludes that in the present Canadian context, the significance of the Rule has largely been as a nuisance.[49] On the other hand, for those few who may yet be deprived of an interest in property that ought to be theirs, as well as the counsel responsible and his or her insurer, the significance will be much more profound than this. But regardless, the question is whether the nuisance is justified. The Manitoba Law Reform Commission called it, "yesterday's device for solving yesterday's problems."[50] In calling for its abolishment, Waters argued that the Rule:

> ... arose in the days when some machinery was required in order to implement the policy of keeping property in commercial circulation, and of limiting the control upon the future beyond their own lives which was otherwise open to settlors and testators. Then came the volume of modern taxation. The result today is that a succession of limited interests will yield such a rich haul to the Crown that the Crown itself, rather than the *cestui que trust*, will in effect be the chief beneficiary of the trust. It is difficult to see who among the intending settlors and testators would wish to create this result. Moreover, in recent years, at the behest of the beneficiaries, the court consenting on behalf the incapacitated, the variation of trust legislation has allowed the beneficiaries to make vast inroads upon the schemes of beneficial interests as contrived by settlors and testators.[51]

Moreover, it remains the case that the Rule interferes with transferor's intentions, and may do so more than is necessary. Or, not enough; just as the Rule prevents long-delayed dispositions, in the interim it permits grantors to deprive inheriting generations of the use of property they might otherwise put to better use.[52] And of course, there are the Rule's own built-in exceptions - the variety of delayed or contingent property interests which are not subject to the Rule at all, including liens, resulting and constructive trusts, and determinable fees simple.

It has therefore been widely asked, assuming that an intergenerational compromise is a valid purpose today, whether a categorical Rule, of great complexity, arising from a different time and in respect of an obsolete social problem, represents the best such compromise.[53] The Rule has nothing to say about a disposition that completely deprives the immediately inheriting generation(s) of any ability to use or benefit from the property. It is no *compromise* for them that later generations will not be so encumbered once they reach the age of majority.[54] On the other hand, the Rule completely prevents any attempt to safeguard

---

[49] Waters, *supra* note 1 at 351.

[50] Manitoba Report, *supra* note 5 at 41.

[51] Waters, *supra* note 1 at 350.

[52] "Dynasty Trusts and the Rule Against Perpetuities," (2003) 116 *Harv. L. Rev.* 2588 ["Dynasty Trusts"] at 2600.

[53] *E.g.*, Moffatt et al., *supra* note 30 at 321. Manitoba Report, *supra* note 5 at 39. Saskatchewan Report, *supra* note 11 at 5.

[54] It is at best a means to effect a utilitarian balancing of conflicting interests on a broad societal scale, rather than as between individuals; see T.P. Gallanis, "The Rule Against Perpetuities and the Law Commission's Flawed Philosophy," (2000) 59 *Camb. L.J.* 285 at 287. Gallanis goes on to note that there is no evidence to

property against certain disadvantageous contingencies that may occur outside the perpetuities period. In between these two intended effects, its complexity may result in any number of beneficiaries being unintentionally deprived of property that ought to be theirs.

LAW REFORM

Notwithstanding the Rule's many difficulties, and the seeming expiry of the social problem of 'family estates' which prompted it, significant legislative reform has been pursued only in the last fifty years, and in a piecemeal fashion. The Manitoba Law Reform Commission attributed the inertia to a variety of factors:

> Not until two hundred years after its commencement did any legislature become interested in its existence, and then the only concern was to remove some obvious excesses or contemporary inconveniences of a rule, which was by then luxuriant in growth, complex to an extreme, and hallowed by time. Few in the legislatures understood it, there was a vague sense that on the whole something like it was probably necessary, and lawyers who worked with it would naturally think in terms of a 'tune up' as all that was required.[55]

Among Canadian jurisdictions there have been two principal approaches to reform of the Rule. The most basic is outright abolition. The second, more common approach is to adopt a 'wait and see' regime. The latter postpones the application of the Rule, by allowing that the interest may be held in trust, or pending some contingency, during the perpetuity period while events on the ground establish themselves. This eliminates the necessity of holding a disposition invalid at the outset, even though subsequent events may eliminate all contingencies that would exceed the perpetuities period. In the modern Canadian context, few trusts actually exceed the perpetuities period if allowed to run their course.[56]

There are other elements that may be included in any legislative reform short of abolition. Legislation may take a practical approach to the problem of possibilities; for example, by providing for the practical/medical reality of women's child-bearing years. The perpetuity period may be extended,[57] or cast as an absolute number of years rather than depending on the indeterminate duration of any lives in being.[58] Or the law may make provision for *cy-près* ("as near as possible") by which the court may in effect amend the offending provisions of a trust instrument to give greatest effect to the testator's intentions without violating the Rule. There are general and particular versions of *cy-près*, the former providing for general judicial discretion to amend as the court sees fit, the latter applying a series of specific amending devices, such as reduction in specified ages (e.g., "to the first child of A to attain 25 years of

---

support the claim that the Rule creates such an optimal societal balance, and more fundamentally rejects the aggregate utilitarian basis for the rule on normative grounds, at 290.

[55] Manitoba Report, *supra* note 5 at 22. See also "Dynasty Trusts", *supra* note 52 at 2597.

[56] Waters, *supra* note 1 at 348.

[57] *Perpetuities Act*, R.S.P.E.I., 1988, c.P-3, s.1.

[58] This was the main recommendation of the English Law Commission in 1998. See generally Manitoba Report, *supra* note 5 at 24.

age" is deemed to specify the age of 21 instead). The court may thereby save the trust by ensuring that the property interest will absolutely vest within the perpetuities period, while preserving as much as possible the gist of the testator's intentions.

Reform may also expressly exempt certain forms of disposition, such as pensions and commercial transactions, from application of the Rule.[59]

Finally, legislation may deal with the issue of non-charitable purpose trusts, in effect saving them by imposing a time for the absolute vesting of the property in the persons who would otherwise have received it. The current maximum is twenty-one years from the creation of the trust. Such legislation also widens the list of permitted purposes, requiring only that such purposes be "specific".

In Canada, the original common law rule applies in Nova Scotia, New Brunswick, and Newfoundland & Labrador. Prince Edward Island retains the Rule but has extended the period to a life in being plus sixty years.[60] Manitoba and Saskatchewan have abolished the Rule entirely. Each of the other provincial and territorial jurisdictions have adopted 'wait and see' reforms.

Wait and See

England's first effort at modern reform was the *Perpetuities and Accumulations Act*, 1964. The *Act* retained the Rule but adopted a wait and see approach, with defined *cy-près* saving techniques to be applied in cases where a perpetuity problem remained after the expiry of the perpetuity period, or earlier if it was certain to do so (*e.g.*, rules for age reduction and for the exclusion of late-coming class members, and other means of tinkering in order to save most gifts). The *Act* further imposed a practical approach to contingencies such as capacity for child-bearing. The 1964 *Act* provided for an express stipulation of a perpetuities period, not to exceed eighty (80) years, as an alternative to the 'lives in being plus 21' period. These saving measures did not apply retrospectively; that is, to interests created prior to the *Act*'s coming into force.

The first Canadian province to enact reform was Ontario, in 1966, which more or less adopted England's Act. Alberta, British Columbia, the Yukon, Northwest Territories and Nunavut have all adopted versions of the wait and see approach, and the model is now widespread among Commonwealth jurisdictions. The operative provisions of British Columbia's *Perpetuity Act*,[61] adopted in 1975, are as follows:

[59] *E.g, Trustee Act*, R.S.N.S. 1989, c.479, s.67: "The rules of law and statutory enactments relating to perpetuities and to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries." For a proposal to effectively exempt commercial transactions, see England Report 1998, *supra* note 4, at Part VII.

[60] *Perpetuities Act* (PEI), *supra* note 57, s.1.

[61] *Perpetuity Act*, R.S.B.C. 1996, c.358, as amended.

> 8. No disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period.
>
> 9(1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumed to be valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 11, 12 or 13, becomes void.
>
> 9(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumed to be valid until the time, if any, it becomes established by actual events that the power cannot be exercised within the perpetuity period.
>
> 9(3) A disposition conferring a power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumed to be valid and becomes void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period.

Like the others in Canada, the B.C. *Act* provides for a series of evidentiary presumptions and saving techniques in case an interest may prove to be incapable of vesting within the perpetuity period, and defines their order of application in section 3, as follows:

> 3. The remedial provisions of this Act must be applied in the following order:
>
> (a) section 14 (capacity to have children);
> (b) section 9 (wait and see);
> (c) section 11 (age reduction);
> (d) section 12 (class splitting);
> (e) section 13 (general *cy pres*).

British Columbia, following the approach in England, also provides the option to define a maximum vesting period of eighty (80) years, as an alternative to relying on the more indeterminate term defined by a life or lives in being. This approach was specifically rejected by the law reform agencies in Ontario and Alberta.

Only PEI has opted to simply extend the perpetuities period to a life or lives in being plus sixty years,[62] leaving the complexity and potential for perverse results of the Rule more or less intact. In Quebec's civil law system the perpetuities period is defined in terms of degrees of relation - i.e., limited to great-grandchildren, or great-grand-nieces and nephews. This resolves some of the complexity of the common law Rule but retains its interference with testators' and settlors' intentions. In some cases the interference is greater, as when the

[62] *Perpetuities Act* (PEI), *supra* note 57, s.1.

generations closely succeed each other and the actual period of time entailed by the limit may be quite short.[63]

Revisiting the English reform study in the 1950s,[64] the Law Commission of England, in its 1998 Report concluded that the 'wait and see' reform, by itself, had not cured the unnecessary difficulties arising from the Rule. The Rule remained highly abstract and complex, and therefore difficult to understand and apply. Its general application was creating frustration and hardship, particularly in the real estate field, far beyond its proper ambit. The Commission decided to abandon the complex concept of a life in being plus twenty-one years entirely. Reasoning that in practice, the maximum period that one might attempt to specify by virtue of the common law rule (by use of a 'royal lives' clause)[65] would be some period greater than 120 years,[66] the Commission recommended a single, straightforward perpetuity period of 125 years, along with a wait and see approach during that period.[67] The Commission further considered that the perpetuity rule should apply only in the context of estate planning (i.e., trusts and powers),[68] and not to commercial real estate transactions or property dispositions in general. In 2009 England passed the *Perpetuities and Accumulations Act 2009*[69] to enact the Law Commission's 1998 recommendations.

Abolition

In mind of the continuing difficulties with 'wait and see', the Manitoba Law Reform Commission in 1982 issued a ground-breaking report,[70] recommending outright abolition of the Rule. It was followed by the law reform agencies in South Australia, Saskatchewan, and Ireland. Legislation abolishing the Rule has been adopted in each of those jurisdictions, and in several US states and certain Caribbean nations as well.[71] Section 3 of Manitoba's *Perpetuities and Accumulations Act*[72] provides simply:

> 3. The rules of law against perpetuities, sometimes known as the rule in Whitby and Mitchell and the modern rule against perpetuities, are no longer the law of Manitoba.

---

[63] See discussion in Manitoba Report, *supra* note 5 at 76-78.

[64] England Law Reform Committee, *The rule against perpetuities* (Fourth Report, 1956) Cmnd 18.

[65] See discussion above, at note 39.

[66] England Report 1998, *supra* note 4 at paras. 8.12 - 8.13.

[67] *Ibid*., at Part VIII.

[68] *Ibid*., at Part VII.

[69] *Perpetuities and Accumulations Act 2009* (U.K.) 2009, c.18, s.1.

[70] Manitoba Report, *supra* note 5.

[71] For a review of the distinctive aspects of US state legislation abolishing or partially abolishing the Rule, see "Dynasty Trusts", *supra* note 52, at 2590-95.

[72] *Perpetuities and Accumulations Act*, R.S.M. 1987, c. P33, as am.

Variation of Trusts

Having recommended abolition, the law reform agencies in Manitoba, South Australia, Saskatchewan and Ireland were left to consider what means should be available to address the contemporary mischief the Rule imperfectly addressed. Again, the contemporary rationale for the Rule is to balance respect for transferors' intentions against the importance of having present generations being able to freely use the property they inherit. Saskatchewan's Law Reform Commission put it as follows:

> The rule against perpetuities was designed primarily for the benefit of beneficiaries. It recognizes the fallibility of human judgment; no settlor can so perfectly foresee future conditions as to justify perpetual operation of the trust. It is because rigidity in trust arrangements may adversely affect beneficiaries that the community also has an interest in prohibiting perpetuities. If a business fails or land cannot be sold because of a perpetual trust, the economic and social interests of the community as a whole are indirectly affected.[73]

But this is not a blanket rationale for striking down long-term trusts as a general matter. Neither does it suggest on the other hand that where a good case can be made for its termination or variation, the trust ought nevertheless to persist until the expiry of the perpetuities period. Rather, it requires attention to the present-day claims of the living that the restrictions on the property are inefficient or unjust.

The answer first proposed by the Manitoba Law Reform Commission's report of 1982, and followed by Saskatchewan and Ireland, was to rely on existing variation of trusts legislation. Such legislation, originating in England in 1958 and very soon adopted in most other commonwealth jurisdictions,[74] permits the court to consent, on behalf of certain beneficiaries, to a termination or variation of a trust. The operative provisions of Nova Scotia's *Variation of Trusts Act*,[75] are as follows:

> 2. Where property, real or personal, is held on trusts arising before or after the coming into force of this Act under any will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
>
> > (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting;
> > (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date

[73] Saskatchewan Report, *supra* note 11 at 24.

[74] In Canada, only Newfoundland and Labrador remains without variation legislation. The American states have largely eschewed a variation power, rejecting the courts' almost unlimited power to interfere with settlors' and testators' intentions for *disposition* of beneficial interests, in preference for an expanded statutory authorization to vary trustees' management or administrative *powers* under the prudent man rule; see Waters, *supra* note 1 at 1293.

[75] *Variation of Trusts Act*, R.S.N.S. 1989, c. 486.

> or on the happening of a future event, a person of any specified description or a member of any specified class of persons;
> (c) any person unborn; or
> (d) any person in respect of any interest of his that may arise by reason of any discretionary power given to any one on the failure or determination of any existing interest that has not failed or determined,
>
> any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property, subject to the trusts.
>
> 3. The Court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of Section 2, unless the carrying out thereof appears to be for the benefit of that person.

In effect, the Court is authorized to consent on behalf of incapacitated or unborn beneficiaries[76] to almost unrestricted forms of variation, provided that some consideration is made for the beneficiaries on whose behalf the court consents. Provided that all of the capable beneficiaries consent, the Court has the power to vary or wind up the trust, including for purposes of ridding the trust of inconvenience or hardship that might arise from unreasonably postponed vesting of interests.

Notwithstanding the apparent vagueness of these provisions, both the Manitoba and Saskatchewan Commissions considered that the well-developed jurisprudence under variation provisions across the commonwealth provided sufficient guidance to courts and estate planning counsel.[77] Generally courts have determined that the testator's intentions ought to be followed as a guide, so that a variation which skews close to the original trust will be preferred, all else being equal.[78] Further, the concept of 'benefit' in s.3 has to be applied with attention to context. The proposed arrangement may make relatively scant provision for an interest which is remote and hypothetical.[79]

The Saskatchewan Commission explained the operation of variation legislation in the context of perpetuities as follows:

> Applied to perpetuities problems, variation of trusts legislation would operate in much the same manner as a general *cy-près* jurisdiction. It would permit the court to examine a trust document as a whole in the light of the settlor's purposes.

[76] There was some doubt whether any contingent beneficiary falls within ss.2(b); see *Knocker v Youle*, (1985), [1986] 2 All E.R. 914 (Eng. Ch. Div.), holding that a merely contingent interest would be excluded, such that a capable contingent interest holder would have to consent. In *Bentall v Canada Trust Co.*, (1996) 26 B.C.L.R. (3d) 181 (S.C.) it was held otherwise, but that position was reversed, and *Knocker* followed, in *Buschau v Rogers Communications Inc.* (2004) D.L.R. (4th) 18 (B.C.C.A.).

[77] Manitoba Report, *supra* note 5 at 54-55, Saskatchewan Report, *supra* note 11, at 24.

[78] Saskatchewan Report, *supra* note 11 at 24-25.

[79] Waters, *supra* note 1 at 1326; Saskatchewan Report, *supra* note 11 at 25.

> Provisions that may create practical difficulty for the beneficiaries as a group because they create remote contingencies could be modified. The court would possess considerable flexibility in this exercise, particularly since it would be entitled to provide less protection in the rearrangement of the interests of remote beneficiaries than for the interests of other beneficiaries. At the same time, unlike the *cy-près* provisions contained in reform legislation, a variation of the trust would not force a rearrangement simply to bring the trust within the rule against perpetuities. A variation would be justified only when it could be demonstrated that existence of remote interests is a source of real inconvenience for the trust as a whole.[80]

While the Manitoba report considered that the established jurisprudence - especially that requiring fidelity to the testator's intentions as far as reasonably possible, and attention to present-day circumstances - should be codified in a series of amendments to the basic variation provision in Manitoba's *Trustee Act*,[81] the provisions eventually adopted required only a general attention to the circumstances at the time of the application to court. Manitoba's legislation also provides for enhanced jurisdiction, increasing the classes of persons on whose behalf the court may consent, and providing guidance as to the manner in which a proposed arrangement ought to benefit the beneficiary. Saskatchewan's Report did not consider it necessary to codify the jurisprudence,[82] and Saskatchewan's implementing legislation, the *Trustee Act 2009*,[83] makes no attempt to do so.[84]

DISCUSSION & PROPOSAL

Reform of the Rule should aim to cure the familiar ills - namely: complexity, risk of unjust disentitlement, unnecessary interference with transferors' intentions - while respecting the policy of ensuring that property is controlled by living persons. And it must be borne in mind that transfers of property which actually thwart the latter policy for longer than the perpetuity period are now rare, typically resulting from eccentricity or inadvertence.

Considering among other things that trust property in the typical form of trust funds will continue to be invested and exchanged as the trust is administered, [85] the Manitoba Law Reform Commission argued that the complexity and general nuisance of the Rule simply could not be justified. Its report cautioned that a reformed perpetuities law should, "catch the instances of eccentricity, and ... be seen clearly to be doing nothing else."[86] The Commission concluded that even the reformed 'wait and see' approach, along with the saving rules, evidentiary presumptions and *cy-près* jurisdiction, nevertheless unjustifiably

[80] Saskatchewan Report, *supra* note 11 at 25.

[81] Then section 61, now section 59 of the *Trustee Act*, C.C.S.M. c. T160; see Manitoba Report, *supra* note 5 at 56 and Appendix C.

[82] Saskatchewan Report, *supra* note 11 at 26-26.

[83] *Trustee Act 2009*, S.S. 2009, c. T-23.01.

[84] *Ibid*., s.49.

[85] Manitoba Report, *supra* note 5 at 32.

[86] *Ibid*., at 39.

retained the abstract complexity of the old rule. Counsel would still be required to know the rule in order to give competent advice, notwithstanding that a court might later save an approximation of the transferor's intentions in case of counsel's drafting error. In the trust context, abolition permits the simpler variation of trusts regime to deal with the rare instances of unreasonable postponement of vesting. In turn, clients need not have to grasp an exceedingly difficult concept in order to be properly advised as to the validity of a complex estate plan. And of course, the risk of unjust disinheritance is virtually eliminated.[87]

The wait and see approach also leaves the ultimate validity of a disposition in limbo until vesting within the required period is certain to occur. In most cases it will be so, but only after a certain period of time. Long closed estates may have to be opened up, once the perpetuity period expires and an interest remains unvested, or perhaps sooner if it becomes clear that such an outcome will occur.[88] Not only may the validity of the transfer remain in doubt, but also the proper recipient of any income generated by the property in question.[89]

This is not to understate the important contribution that wait and see, along with *cy-près* jurisdiction and the evidentiary presumptions in the reform legislation, have made in resolving many of the problems the common law Rule created. The appeal of this approach explains its adoption in most commonwealth jurisdictions that have undertaken reform.

But the Manitoba Commission's report in 1982 was the first to seriously consider the option of abolition; the law reform agencies which had gone previously (England, Ontario, and Alberta) had by and large assumed the continuing need for some version of the Rule.[90] Since the Manitoba Commission's Report, however, a significant number of law reform agencies which have studied the Rule (in South Australia, Saskatchewan and Ireland), has recommended abolition. Most recently, the Scottish Law Commission rejected any type of new perpetuities rule (Scotland having none to start with) and proposed abolition of the two rules that had comparable effect, in favour of an expanded court power to modify or terminate trusts.[91] Amongst the commonwealth jurisdictions, only the Law Reform Commission of Tasmania, in 1983,[92] Northern Ireland Land Law Working Group, in 1990,[93] Australia's Northern Territory Law Reform Committee, in a brief report in 1993,[94] and the English Law Commission, in 1998,[95] considered that there was some need for a continuing

[87] *Ibid*., at 37-40.

[88] *Ibid*., at 73, citing Terence Sheard, Q.C., (1966) *Chitty's L.J.* 3 at 5-6; see also Saskatchewan Report, *supra* note 11 at 11.

[89] Ireland Report, *supra* note 11 at 18.

[90] Manitoba Report, *supra* note 5 at 35.

[91] The Scottish statutory rules against accumulations and successive 'liferents'; Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts* (Discussion Paper No. 142, 2010) at paras. 5.22-5.56.

[92] Law Reform Commission of Tasmania, *Report and recommendations upon perpetuities and accumulations* (Report No. 34, 1983).

[93] Northern Ireland Land Law Working Group, *Final Report* (Belfast: H.M.S.O., 1990).

[94] Northern Territory Report, *supra* note 31.

[95] England Report 1998, *supra* note 4.

perpetuities rule. We consider the arguments against abolition, which some of those reports address, in a moment. It is significant in any event that the English Commission, which pioneered the 'wait and see' reforms, by 1998 had rejected wait-and-see by itself. The Commission favoured replacing the Rule of a 'life in being plus twenty-one years' with a simplified 125-year limit for vesting, on a wait and see basis, limited to the estate planning context.

In the United States, while approximately half of the states had by 2006 adopted the Uniform Statutory Rule Against Perpetuities (USRAP), a 90-year, wait-and see vesting rule, promulgated by the National Conference of Commissioners on Uniform State Laws in 1986,[96] twenty-one states have instead simply abolished the Rule.[97]

The Manitoba report considered five general options for reform; retention of the Rule, the wait and see approach, a new statutory vesting rule, a new rule of absolute duration (or degree of familial relation), and abolition. Discounting the first as untenable by any measure, the Commission ultimately favoured the last. It observed that with variation of trusts legislation there was simply no reason to retain, for the benefit of frustrated beneficiaries, a categorical rule against unduly postponed vesting of interests.[98]

Similarly, the Law Reform Commission of Ireland considered the Rule ill-suited to accomplish its supposed present-day purpose of ensuring that property will be used to best effect by living generations:

> But surely, in this context, the Rule against Perpetuities is of very limited use. All it does, is to preclude extremely remote contingent interests. It has no effect, for instance, in regard to interests which have vested in interest but have yet to vest in possession. Secondly, when one considers the sort of vicissitudes which may strike a family – in terms of illness; reduction of income from the family business; or disparity of income as between one beneficiary of the settlement and another – it is evident that the Rule is of assistance in a very small fraction of the possible circumstances. Most fundamental of all, the Rule's operation is not a reaction to changed circumstances. The Rule focuses not on the suitability of the settlement as times change, (on which, indeed, it has nothing to say) but on the remoteness of vesting. Thus, whether or not a trust is void by reason of the Rule has nothing to do with whether or not that trust has become impractical or imprudent. The Rule operates in a blunt fashion and can apply equally to workable as to unworkable trusts.[99]

---

[96] Max M Schanzenbach & Robert H. Sitkoff, "Perpetuities Or Taxes? Explaining The Rise Of The Perpetual Trust" (2005-2006) 27 *Cardozo L. Rev.* 2465 at 2473.

[97] *Ibid.*, at 2465. This has much to do with federal US estate tax law, which in 1986 introduced sizeable exemptions for long-term trusts.

[98] Manitoba Report, *supra* note 5 at 51-53.

[99] Ireland Report, *supra* note 11 at para. 4.10.

Like the Manitoba Commission, the Irish Commission considered that variation of trusts legislation was far better suited to accomplishing this objective,[100] and likewise recommended abolition. In a separate report,[101] released concurrently, it recommended adoption of variation of trusts legislation.

Non-trust dispositions

We consider many of these arguments in favour of abolition to be apt in respect of non-trust dispositions as well. The Rule is a complex and arbitrary means to deal with case-specific problems that may, or may not, arise from long-term options, conditional easements, rights of re-entry following a condition subsequent, or successive remainder interests. It purposefully thwarts transferors' long-term intentions, not all of which will be unreasonable, and is just as prone to invalidate interests that, with more careful wording, would be unobjectionable. If a suitable means can be found to deal with cases of undue inconvenience or actual hardship arising from a long-term unvested property interest - which we consider in a moment - it appears to us that there is no better justification for the reformed Rule outside the estate planning context than within it. Indeed, even less so, for often dispositions of property outside the estate planning context - *e.g.*, options to purchase - will be made as part of a bargain, for consideration. In principle, we find the undoing of a bargain even more objectionable than the Rule's interference with a conditional gift.

Why not abolition?

Abolition has not proven universally popular. In particular, the Law Commission of England, which in 1998 recommended substantial reform of even the 'wait and see' regime adopted there in 1964, stopped short of abolition. There are at least two major objections.

The most significant is the most obvious - that with abolition of the Rule there will again arise the problem of unreasonably lengthy trusts and other sorts of postponed dispositions. Though the social ills which are considered to arise from perpetuities may be less evident today, the desire of wealthy testators to direct their assets towards certain ends in perpetuity has not disappeared.

The matter is not at all speculative. Indeed, this was precisely the testimony of certain law firms in England who responded to the English Law Commission's consultation paper of 1993, which preceded its report of 1998; that they had clients who specifically wished to create estate plans which would be prohibited under the reformed English perpetuities period.[102]

It is the desire to attract long-term trusts that has led to repeal of the Rule in some 21 US states and certain Caribbean jurisdictions.[103] In 2006 a Canadian investment advisor trade

[100] Ireland Report *supra* note 11 at para. 4.12.

[101] Law Reform Commission [Ireland], *Report on the Variation of Trusts* (Rep. No. 63, 2000).

[102] England Report 1998, *supra* note 4 at para. 2.25.

[103] See "Dynasty Trusts", *supra* note 52 at 2590.

journal devoted a column to the advantages of Manitoba as a haven for perpetual trusts. It noted in part:

> According to Winnipeg estate and succession law specialist John Poyser, both the trust-planning strategy and Manitoba's unique position are garnering attention internationally. In early 2005, Poyser read an article in the Wall Street Journal describing this planning tool. He also attended a conference in the U.K. dealing with international trusts, where two presenters discussed perpetuities planning. "Both of them made passing reference to Manitoba in their speeches," he noted.
>
> Poyser, whose law practice specializes in tax-effective estate planning and legacy assistance to financial advisors and their clients, provided background and other information on the uses of, and options for, perpetual trusts. "I found it surprising that planners in other countries would consider this as a planning option, while domestic practitioners here in Canada were largely ignorant as to its existence. This is an emerging area that has dramatic potential for high-net-worth clients," he said.
>
> According to Poyser's research, there is at least one international trust situated in Manitoba containing more than $20 million. "Manitoba was selected as the jurisdiction of choice for the trust because [creators of the trust] were looking for a country where a trust could have perpetual duration, but did not fancy some of the Caribbean destinations or the United States," he said.[104]

The column went on to describe the typical sorts of clients who might wish to create perpetual trusts, as follows:

> The legacy-driven - Some individuals have built up a substantial fortune, but believe their children and grandchildren will squander it in short order. A perpetual trust provides a way to assure that their wealth, or a significant portion of it, will be retained indefinitely under professional management and will be there for the lasting advantage of heirs. The trust will also serve as a lasting testament to their personal achievements as generators of the capital. This is similar to charitable planning, but is focused on the client's own bloodline, as opposed to a philanthropic organization or the general public.
>
> The education-minded - Such a person would establish a perpetual trust to cover the costs of higher education for his or her heirs. It would ensure lineal descendants have access to the best available education, and that the rising cost of education would never stand between the heirs and this distinct advantage.
>
> The entrepreneurial-minded - They might choose to use a perpetual trust to fund business start-ups by lineal descendants, ensuring the creative genetic capital in the family has the future financial wherewithal to express itself. If the children have no business acumen, and it's too early to tell about the grandchildren, then this would

[104] David Christianson, "Toolbox: Prairie Perpetuity" *Advisor's Edge* (February 2006) 13 at 13 <on-line: http://www.advisor.ca/images/other/ae/ae_0206_toolbox.pdf> (date accessed: 30 Nov 2009).

> allow the entrepreneurialminded to put the family fortune into suspension until a descendant proved to have the same Midas touch as the patriarch or matriarch.
>
> The security-minded - And then there are those who believe the medical system is going to come under increasing stress and someday be unable to cover the high costs of advanced interventions. For these people, setting a sum of money in a perpetual trust would ensure their lineal descendants were always able to secure first-rate medical attention, and be less likely to suffer a loss of quality of life or die early because medical care had become unaffordable.
>
> The reincarnation-minded - Get a load of this, and no, we're not kidding. People who intend to come back to live another life, such as those who have been cryogenically frozen until a cure is found for their particular disease, will need assets upon their return. A perpetual trust suits the needs of this group (and yes, they're out there), as no one can set the timetable for their recovery. It is, however, an advisor's duty to convince the client, on the offchance that things don't work out as expected, to have some alternative plans for the funds. The client should be reminded he or she is banking on medical technologies that have yet to be developed and accept the advisor's need to have options so that the funds won't remain in limbo forever.[105]

As concerned with funds rather than real property, this is not necessarily counter to the original purposes of the Rule, that being to ensure the free use and exchange of property. Trust funds are invested in the normal course. But it is said that trust funds are held under more conservative investment conditions than private funds, and that the general availability of risk capital is correspondingly restricted.[106] The Law Reform Commission of Ireland gave little credence to this view:

> However this argument has probably been overstated. Realistically, the aggregate of money at issue must be extremely small relative to the entire economy. And, anyway, as a matter of principle, this contention rests on a highly political and controversial basis. It rests on the speculative assertion that the uses to which risk capital might be put would be better for the common weal than the alternative forms of investment which would be utilised, if the Rule were abolished. Apart from everything else, risk capital may be good at one stage of the economic cycle and not at another. In any case, it must be doubted whether this economic argument is correct in a small, open economy, like ours.[107]

Similarly, the Law Commission of England noted that in Scotland (described as a "perpetuities free zone") it was rare to find a private trust purporting to apply longer than 100 years,[108] and concluded:

---

[105] *Ibid*., at 14.

[106] Emery, *supra* note 29 at 603; England Report 1998, *supra* note 4 at para. 2.30.

[107] Ireland Report, *supra* note 11 at para. 4.06.

[108] England Report 1998, *supra* note 4 at para. 2.36.

> The mere fact that the law allows the creation of perpetual trusts does not lead settlors to create them. In Scotland few do. Other factors, such as taxation, or the risk of the disposition eventually failing for uncertainty, tend to encourage trusts to be set up for a comparatively short duration. The Scottish experience has fortified us in our conclusion that the rule against perpetuities should operate as no more than a long stop to prevent unreasonable dispositions ..."[109]

The Commission was unable to determine empirically whether and to what extent there might be disadvantageous economic consequences arising from abolition, but considered that the 'in principle' purpose of restricting transferors' long-term property conditions was sufficient.[110] For their parts, on the other hand, the Irish and Manitoba Commissions considered that, practically speaking, modern day tax legislation now served the appropriate checking mechanism against such desires,[111] and that where it did not, variation of trusts legislation afforded a better remedy. Regardless of which view is correct, it seems clear enough that while taxes and variation of trusts legislation may not completely restrict the possibility of perpetual trusts, they do a great deal to ensure that the pool of property held pursuant to such trusts (and thus removed from the available pool of risk capital) will be relatively small. This would seem the best answer to the concern about disadvantageous social and economic effects of permitting an ever-growing pool of capital to be held in perpetual trusts.

The English report favoured retention of some rule, for reasons mainly having to do with preserving the balance between the wishes of testators and the needs of present-day beneficiaries. The English Commission decided that variation of trusts legislation was an undesirable or inadequate alternative to its preferred solution of imposing a specified duration (125 years), but, conspicuously, did not explain why.[112] The fact that a majority of those who offered comment on the Commission's consultation paper disapproved of abolition appears to have inclined the Commission against a more thorough-going assessment of the option.[113]

To the second major objection that leaving perpetuities problems to variation of trusts legislation replaced the certainty of the Rule with the unpredictability of judicial discretion,

---

[109] *Ibid*., at para 2.37. It bears mentioning that Scots law retains maximum accumulations periods, which the English Commission considered one of the main disincentives to perpetual trusts in Scotland; *ibid*., at paras. 2.35, 2.38.

[110] *Ibid*., at paras. 2.30 - 2.32. See also Joel C. Dobris, "Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Undoing Dynasty Trusts" (2005-2006) 27 *Cardozo L. Rev*. 2537. For a contrary view - that the unknown economic effects are critical to the assessment of abolition as a policy option - see Gallanis, *supra* note 54. Gallanis suggests that the experience of abolition jurisdictions should be studied closely, to gather the necessary data for a proper analysis.

[111] Manitoba Report, *supra* note 5 at 28-38; Ireland Report, *supra* note 11 at para. 4.21.

[112] England Report 1998, supra note 4 at paras. 2.19, 2.25. The omission of any substantive discussion of the Commission's recommendation against abolition is striking, given the relatively good summary of the arguments for and against abolition in its earlier Consultation Paper, *The Rules Against Perpetuities and Excessive Accumulations* (Consultation Paper No. 133, 1993) at 65-77.

[113] England Report 1998, *supra* note 4 at para. 2.25.

the Manitoba Commission gave several answers. While such legislation does not generally provide specific guidance as to when it may be appropriate for the court to vary or revoke a trust, or what sort of means will be sufficient to protect the interests of those beneficiaries on whose behalf the court is supposed to consent, the Commission remarked that caselaw, foreign and domestic, was now sufficiently developed to give appropriate guidance to estate planners and the parties to any such application.[114] The Commission suggested that the caselaw might even be codified in the legislation, and provided draft provisions to this effect.[115] Beyond this, the Commission remarked that such discretion was necessary to account for the variety of circumstances in which variation applications might be made, and was in any event preferable to a categorical rule.[116]

The Saskatchewan Report considered that discretion was involved under a wait and see provision as well, particularly with the application of *cy-près*, and was less troubled by the type of discretion entailed by variation provisions:

> Any reform or abrogation of the rule against perpetuities which recognizes a continuing need to prevent property from being rendered virtually inalienable for long periods of time must substitute discretion for the rigid rule. The reformed rule relies upon discretion to place worthy cases outside the rule, but retains it in its modified form. When the rule is infringed, the court will be required to depart from the intention of a testator or settlor. If the rule is abolished, the testator or settlor's intentions must also give way in some cases to a policy against perpetuities. But it is important to recognize that the nature and impact of the discretion is different under these two regimes. To the extent that the reformed rule imperfectly embodies the policy against inalienability, intentions will be thwarted even where there is no real affront to that policy simply in order to place a will or trust outside the rule. The *inter vivos* trust for grandchildren must still be modified, while the will to benefit the same persons will be left alone.[117] If on the other hand the rule is abolished, the court's discretion will be exercised only to modify a trust that is unreasonable on its face, or has become unreasonable through changed circumstances. It will be necessary to depart from a settlor or testator's intention in fewer cases, and in a less radical fashion. Moreover, final decisions will be made as the estate is being administered, rather than waiting to see if a technical perpetuities problem emerges.[118]

---

[114] Manitoba Report, *supra* note 5 at 55-56.

[115] *Ibid*., at 57 and Appendix C.

[116] *Ibid*., at 54-55.

[117] Another of the difficulties arising from the complex formulation of the Rule: upon death, the testator of a will can have no more children - thus, as a class, children are 'lives in being' and a gift made to their children (the grandchildren) prior to the age of 21 will be valid. The settlor of an *inter vivos* trust, however, may have more children after the trust is constituted. A gift made to his grandchildren upon reaching the age of 21 might therefore occur longer than twenty-one years after the death of those of his children who were alive at the time the trust was created, and is therefore void at common law.

[118] Saskatchewan Report, *supra* note 11 at 13.

Of these two principal objections to abolition of the Rule in Nova Scotia, we are troubled only by the first. The possibility of long-term restrictions on property use and transfer, and schemes to tie up wealth and property in trust for long periods of time, represent cause for legitimate concern. We consider the distinctive issues arising with respect to non-trust dispositions in the next section. But with regard to trusts, it needs to be asked whether in the modern context the possibility of becoming yet another North American haven for perpetual trusts is really objectionable. Is there any good reason to discourage the various wealthy settlors described in the above excerpt from locating their perpetual trusts here? Particularly in light of tax law, which effects substantial public redistribution of assets held in trusts of sufficient duration, as well as the capacity for the courts to limit the burden on living beneficiaries under variation legislation?[119] We know of no better compromise in consideration of such beneficiaries than this; certainly not wait and see, which is no compromise at all, whether applied to the common law rule or a defined period such as England's 125 years. There may be certain hazards in permitting perpetual trusts, including the concentration of wealth in conservative investment vehicles, the potential erosion of independence and entrepreneurship among a growing class of beneficiaries, and an increasing share of income going to management of such trusts as the beneficiaries increase in number over time. [120] But these are conjectural objections to abolition - we do not have data or analysis to confirm their power as against the well-known difficulties with the Rule as it stands. A variety of jurisdictions have now abolished the Rule, and we can expect such issues to receive better empirical study, but for now we are left to decide the matter based on an unsatisfactory experience with the Rule to date, and a strong sense that it is an awfully blunt device to solve a vanishingly rare problem.

A final sort of objection may be considered in relation to the prospect of large numbers of 'dynasty trusts' setting up here. It is evident that in the jurisdictions which allow them, such trusts are now generally employed as means of tax saving and creditor proofing.[121] Thus, it has been observed that in the modern context, rather than promoting inter-generational conflict (the so-called "dead hand" rationale for the Rule), long-term trusts tend to reflect a kind of intergenerational collusion.[122] The evident problem of tax and creditor evasion is not one restricted to so-called perpetual trusts, however. We consider that it is endemic to the use of trusts as asset protection mechanisms in general. We cannot recommend retention of the Rule, which applies only to certain trusts, and clumsily at that, as a means to deal with that problem, or as a bulwark against the arrival of dynasty trusts which may compound it. The legislative treatment of trusts so as to ensure that creditors (including spouses and revenue agencies) are not unjustly evaded is a matter deserving of study. But it can hardly be imagined that a legislator seriously looking at this problem today would prescribe the Rule or anything like it as the proper remedy.

---

[119] Indeed, American commentators disapproving of the 'race to the bottom' among US repeal states point to a broad variation-type jurisdiction as one means to effectively undo the repeal; see, *e.g.*, Dobris, *supra* note 110 at 2543-47.

[120] See *ibid.*, at 2539-41; Gallanis, *supra* note 54 at 284-285

[121] "Dynasty Trusts", *supra* note 52.

[122] *Ibid.*

Non-trust dispositions

Similar sorts of arguments apply in respect of non-trust dispositions mentioned earlier; *e.g.*, options, future easements, successive remainder estates, and rights of re-entry following a condition subsequent. If the Rule is abolished, we can expect greater use of these sorts of devices for restricting the use or transfer of property for the long term, particularly in light of the absence of the tax disincentives that apply to long-term trusts. With them will come an increase in the problems that attend such conditions and restrictions - most notably limiting the best contemporary use or transfer of the property. As well, we can expect practical difficulty simply in ascertaining the holders of long-postponed interests, such as rights of re-entry upon the breach of a condition subsequent. Within the realm of possibility, an adventurous testator may attempt to re-create a semblance of the fee in tail, by use of successive remainders or other sorts of contingent interests.

But many such long-term interests are unobjectionable in principle, or are key to a bargain reached for the sale or development of land.

There is certainly no justification for the abstract complexity of the unreformed Rule as applied to such interests. Through poor drafting of a disposition, persons may be deprived of property interests that ought to be theirs, just as in trust law. But here the challenge of reform is more acute, since there is no variation of trusts legislation to deal with those contingent property interests which are obsolete, objectionable, inconvenient or otherwise disadvantageous to the present-day holders of property or society in general. It may be that the preferable course is to adopt a reformed vesting rule, along the lines of England's new 125-year absolute limit, for perpetual property interests that would not be subject to the *Variation of Trusts Act*.

We see the advantages of a simple vesting limit, on a wait-and-see basis. But for the reasons that other law reform agencies have given for preferring the variation of trusts regime to a blanket rule,[123] for purposes of this Discussion Paper we lean towards a new variation power in respect of non-trust interests as well. As outlined below, other jurisdictions have preferred a solution along these lines. We reject the idea that the best solution for the case-specific problems that *may* arise from long-term contingent interests in property is an across-the-board rule deeming all such interests void - either immediately or after some years have passed. These interests in many cases represent the fruits of bargaining, or work no substantial harm despite their open-endedness. Where they do represent cause for concern, the solutions are apt to be in some form of accelerated vesting, termination (possibly with compensation), partition, a *cy-près* type rededication of property to similar purposes, insurance or a bond against the later emergence of remote interest holders, or otherwise (what under variation of trusts legislation is generally described as a 'benefit', left to the courts to elaborate on a case-specific basis). Or, it may simply be a matter of ensuring there is no identifiable 'holder' of such interest who may oppose its termination. The whole area cries out for individual determination in specific cases. We will shortly outline our proposal for a variation power in respect of non-trust perpetual contingent interests. For the time

[123] See especially the Ireland Report, *supra* note 11 at para. 4.10, quoted above at page 27.

being we can say that with such a reform in mind, the Rule as applied to such interests loses most, if not all, of its justification.

We therefore propose, for discussion purposes, that subject to our recommendations in respect of variation of property interests (trust and non-trust) set out below, the rule against perpetuities, and the rule in *Whitby v. Mitchell,* be abolished in Nova Scotia.

Implementation

Variation of Trusts

Legislation abolishing the Rule must make provision to deal with the problem it was designed to solve - circumstances where the use and exchange of property is restricted for an unreasonable period. Since the Manitoba Commission's Report, it has been generally recommended that any provision to deal with perpetuities problems following abolition of the Rule in the trusts context should be in the familiar form of a provision for variation of trusts.[124]

Having proposed abolition - and putting aside for the moment the question of non-trust dispositions - it is left to consider whether existing variation of trusts legislation is adequate to the task of dealing with the mischief presented by perpetual trusts. We consider the main problem to be the inability of some long-term trusts to adapt to changing circumstances. The present legislation permits the court to vary a trust to account for such changed circumstances only with the consent of capacitated beneficiaries. The question is whether the court ought to have an expanded power to vary or terminate a trust over the objection of one or more of such beneficiaries.

A number of options present themselves. Most radically, should the Court have jurisdiction to vary or terminate a trust with no regard for the consent of the beneficiaries, but only what it is persuaded will be the best arrangement for all? Or should a majority of the beneficiaries be required to consent? If there is to be such a power to dispense with consent, should it be applicable to all trusts or only those which last for a certain period - say, 125 years? If so, should it be applicable prospectively - that is, to a trust which may last longer than the defined period - or only once the trust has in fact persisted that long?

When Manitoba abolished the Rule, it expanded to some extent the classes of persons or objects on whose behalf the court could consent.[125] But the expanded classes did not include capacitated beneficiaries unless they were unascertained or missing; the unanimous consent of known, capacitated and present beneficiaries would still be required, whether the trust was of long duration or not. The report of the Irish Law Reform Commission on variation of trusts, released concurrently with its report recommending abolition of the rule against perpetuities, similarly recommended that there be no expanded power to override the

[124] In Nova Scotia, pursuant to the *Variation of Trusts Act*, *supra* note 75.

[125] *Trustee Act*, C.C.S.M. c. T160, s.59(5).

consent of capacitated beneficiaries. The Irish Commission would have permitted the court to consent on behalf of capacitated beneficiaries whose interest was contingent only. [126]

In its work on B.C.'s trustee legislation in general (not specific to the rule against perpetuities), the British Columbia Law Institute recently proposed an expanded court power to override consent in certain circumstances. The power could only be exercised as long as: a) the proposed change would not be detrimental to the pecuniary interest of the holdout beneficiary; b) a substantial majority of the beneficiaries consented; and, c) it would be detrimental to the administration of the trust and the other beneficiaries not to approve the variation.[127]

In its report recommending abolition of the Rule, Saskatchewan's Law Reform Commission made no recommendation for an expanded variation of trusts power, but sub-section 51(1) of Saskatchewan's *Trustee Act 2009*[128]*,* which followed the Commission's recommendation for abolition, further provides as follows:

> 51(1) If a will, trust, settlement or other disposition creates an interest in property that might be void if the rules against perpetuities or the *Accumulations Act* were still part of the law of Saskatchewan, the court, on the application of an interested party, may maintain, vary or terminate that interest on any terms that the court considers appropriate.

This provision does not require the consent of the capacitated beneficiaries. For dispositions that might have been void under the Rule, the court can order a variation on the application of any party, and with no limit or guide on the type of provision the new arrangement may make for the beneficiaries.

Most recently, the Scottish Law Commission proposed a variation power in respect of any trust that had been in existence for longer than twenty-five years. [129] The court would have the power - on application by any trustee, beneficiary, or member of the family of the 'truster' - to modify or terminate the trust, including the acceleration or postponement of any vesting of property interests. The court would be bound to have regard to the intentions of the 'truster', where such was objectively ascertainable, and would further have regard for, but not be bound by, the positions of the trustees and other beneficiaries. The exercise of the power would be contingent on the applicant(s) showing a material change in circumstances from the time of disposition. The variation would have to be limited to that necessary to resolve the issues created by the change in circumstances, and would have to be fair as amongst the truster's family and existing beneficiaries, and their children.

---

[126] Law Reform Commission (Ireland), *Report on the Variation of Trusts*, *supra* note 101, at paras. 5.14, 5.17.

[127] See British Columbia Law Institute, *Report on the Variation and Termination of Trusts* (Report No. 25, 2003) at 8; British Columbia Law Institute, *A Modern Trustee Act for British Columbia* (Report No. 33, 2004) at 16, 77-78.

[128] *Trustee Act 2009*, *supra* note 83.

[129] Scottish Law Commission, *supra* note 91, at paras. 5.25-5.56.

We favour, in general, the power of the court to override the consent of beneficiaries who for one reason or another object to a variation that would clearly benefit the trust. In the typical case, such consent is withheld in order to obtain favourable treatment from the other beneficiaries. We are not able to justify the expansion of this power only to those trusts that might offend the Rule, however. In the first place, this would require the hypothetical application of the Rule in order to ground the court's jurisdiction. But even if such a power were limited to trusts that have persisted, or might do so, for longer than, say, 125 years, the more fundamental problem would remain. In our view there is nothing that should make a trust more or less vulnerable to variation, simply by virtue of the passage of an arbitrary number of years. Taxation rules and family circumstances may change in an instant. If an expanded power is justified with regard to such changing circumstances, it has nothing to do with the passage of a pre-determined period of time.

The best that can be said for such an approach is that it permits the testators' intention to govern for a certain period of time. But variation of trusts legislation specifically permits interference with such intentions, provided that all of the capacitated beneficiaries consent. So in the end, the legislation really only guarantees respect for the wishes of the recalcitrant beneficiary. The requirement for consensus, where great sums of money is concerned, of course presents all sorts of moral hazards, and we do not consider it a useful model for dispute resolution where the ability of the trust to provide maximum benefit for all is at stake. We prefer that such disputes be properly adjudicated on the merits of the variation being proposed. Thus, for discussion purposes we propose that the Nova Scotia *Variation of Trusts Act* be amended, to provide that on the application of an interested party, the Court may maintain, vary or terminate a trust on any terms that the court considers appropriate, provided that such variation appears to be for the benefit of any non-consenting party (other than a beneficiary described by s.2(d) of the current Nova Scotia *Act*). For certainty's sake we would codify the courts' current requirement to adhere as closely as possible to the testator or settlor's intention. We invite public comment as to whether additional constraints should be imposed, such as the passage of a certain number of years, the requirement for a majority of beneficiaries to consent, or the showing of a material change in circumstances in order to justify the proposed variation.

Variation of other unvested interests

Less straightforward is the question of non-trust perpetual dispositions. As outlined above, the Rule at present applies to options for purchase of land, future easements, successive remainder estates, rights of re-entry and perhaps to rights of first refusal. The Manitoba report, the Saskatchewan Report, the English Report of 1998, and the Ireland Report all considered that perpetuities restrictions ought not to apply to commercial transactions in general, where parties are free to bargain.[130] Abolition of the Rule is, of course, the simplest means of accomplishing this.

The problem of successive legal interests (*e.g.*, remainders and reversions), the Manitoba Commission thought, could be dealt with by abolishing the common law successive estates

[130] Manitoba Report, *supra* note 5 at 40-42; Saskatchewan Report, *supra* note 11 at 13-16, 20-21, 27; England Report 1998, *supra* note 4 at para. 7.35; Ireland Report, *supra* note 11 at paras. 3.49-3.54.

and deeming any such disposition as constituting a trust in respect of the interest, therefore subject to the variation legislation.[131] Manitoba's *Perpetuities and Accumulations Act* deems successive legal interests to take effect in equity behind a trust, therefore subject to the variation of trusts provision in Manitoba's *Trustee Act*.[132]

The Irish Law Reform Commission noted that Irish courts had not applied the Rule to the possibility of reverter or rights of re-entry under conditions subsequent or determinable fees. Therefore it expected abolition to present no practical difficulty or upheaval in this area.[133] The Commission was highly sceptical of holding such interests subject to the Rule, noting that such would effectively grant the original grantee a fee simple absolute, regardless of the intentions of the grantor.[134] The Commission was, like other law reform agencies, concerned to exclude the Rule entirely from commercial or transactional interests like options and future easements.[135] In a later report on land law reform in general,[136] the Irish Commission followed the model of the U.K. *Law of Property Act 1925* in recommending the abolition of estates other than the fee simple or leasehold estates, and converting life estates into equitable interests held under trust.[137]

The Saskatchewan Report generally recommended that variation legislation should expressly cover future estates, and powers of appointment, without converting them into trusts.[138] In this context it is worth repeating ss. 51(1) of Saskatchewan's *Trustee Act 2009*:

> 51(1) If a will, trust, settlement *or other disposition* creates an interest in property that might be void if the rules against perpetuities or the *Accumulations Act* were still part of the law of Saskatchewan, the court, on the application of an interested party, may maintain, vary or terminate that interest on any terms that the court considers appropriate. [emphasis added]

The significant point is that the variation power applies not just to trusts and estate-related dispositions, but to any disposition which might have offended the Rule. Only pension trusts and other such benefit schemes are expressly excluded from s.51(1)'s reach.[139] The wording of s.51(1) therefore leaves open the potential application of the court's virtually unlimited variation jurisdiction to interests created in the course of commercial bargaining; options, future easements and so forth - not just future estates and powers of appointment, as envisioned by the Commission. This was a major concern that the English Commission

---

[131] Manitoba Report, *supra* note 5 at 58.

[132] *Perpetuities and Accumulations Act*, S.M. 1990-91, c. 11, s. 4.

[133] Ireland Report, *supra* note 11 at para. 2.38.

[134] *Ibid*., at para. 2.40.

[135] *Ibid*., at paras. 3.49-3.54.

[136] Law Reform Commission (Ireland), *Report on Reform and Modernisation of Land Law and Conveyancing Law* (Report No. 74, 2005).

[137] *Ibid*., at 46.

[138] Saskatchewan Report, *supra* note 11 at 26.

[139] *Trustee Act 2009*, *supra* note 83, s.51(2).

sought to address by its report of 1998; i.e., the problem of the inappropriate common law extension of the Rule into areas such as real estate development, where it did not belong and was working real inconvenience in terms of undoing freely-entered bargains. The sentiment is echoed in many reform proposals.[140]

The English Commission's solution, more or less given effect in the UK's implementing legislation, enacted in 2009,[141] was to narrowly define the interests to which its fixed 125-year rule would apply:

> To restore the rule to the circumstances for which it was originally intended, we propose that it should, in essence, be restricted in its application to future estates and interests. It will generally apply only to interests created by or under a trust or a will. We recommend that the rule against perpetuities should only apply—
>
> (1) to successive estates and interests in property, held in trust including an estate or interest which—
>
> (a) is subject to a condition precedent; or
>
> (b) arises under either a right of reverter on the determination of a determinable fee simple, or under a resulting trust on the determination of a determinable interest;
>
> (2) where property is held on trust for an estate or interest subject to a condition subsequent, a right of re-entry (or the equivalent right in property other than land) that is exercisable on breach of that condition;
>
> (3) to powers of appointment; and
>
> (4) where a will limits chattels in such a way as to create successive legal interests in them under the doctrine of executory bequests, to those interests.[142]

The English Commission went on to recommend a list of specifically excluded dispositions, including contingent charitable gifts and pension benefits, and further recommended that the Lord Chancellor ought to be able to exempt other sorts of dispositions.[143] The English Report did not have to separately address the question of successive remainder estates or other future estates, since as applied to land they are only capable of being created behind a trust, following the abolition of legal estates in land other than the fee simple absolute and leaseholds by the *Law of Property Act 1925*.[144] Sub-paragraph (4), above, deals separately with the question of successive estates in personal property.[145]

---

[140] *E.g,* Manitoba Report, *supra* note 5 at 40-42; Saskatchewan Report, *supra* note 11 at 13-16, 20-21, 27; England Report 1998, *supra* note 4 at para. 7.35; Ireland Report, *supra* note 11 at paras. 3.49-3.54.

[141] *Perpetuities and Accumulations Act 2009, supra* note 69.

[142] England Report 1998, *supra* note 4 at para. 7.31.

[143] *Ibid*., at Part VII.

[144] *Law of Property Act 1925* (U.K.), 15 & 16 Geo. V, c.20, s.1.

[145] Given effect in s.1(5) of the *Perpetuities and Accumulations Act 2009*, *supra* note 69.

For its part, Saskatchewan's s.51(1) makes any disposition which might have been subject to the Rule prone to judicial variation - limiting the mischief done by the Rule in the commercial setting, but replacing it with an uncertain discretionary jurisdiction of the courts.

South Australia's solution was similar, if more constrained. Following the recommendation of the South Australian Law Reform Committee,[146] section 62 of the *Law of Property Act 1936*, as amended in 1996, provides:

> (1) If, 80 years or more after the date of a disposition of property, there remain interests in the property that have not vested, the court may, on application under this section, vary the terms of the disposition so that the interests vest immediately.
>
> (2) The court may, on application under this section, vary the terms of a disposition of property so that interests that cannot vest, or are unlikely to vest, within 80 years after the date of the disposition, will vest within that period.
>
> ...
>
> (4) In varying the terms of a disposition under this section the court should give effect to the spirit of the original disposition insofar as that is possible given that interests are to vest earlier than contemplated by the person who made the disposition. [147]

This is an apparently more constrained version of the courts' variation of trusts jurisdiction, permitting the court only to order the early vesting of any property interest which has not vested within 80 years of its disposition, or is unlikely to do so, rather than any variation or termination the court may consider advisable. On the other hand, neither ss. (1) or (2) specify in whom the interest may be vested; therefore it may be that the court has virtually unlimited power to effectively terminate the interest as well as re-direct it. Conspicuously, there is no broad jurisdiction to impose appropriate terms on the re-vesting, as in Saskatchewan's s.51(1) - limiting the court's jurisdiction to, among other things, order compensation for the holder of any such interest.

Before addressing the suitability of such a variation power to deal with non-trust unvested interests, we must consider another complication. Despite the general favour for removing commercial dealings from the Rule's ambit, both the Saskatchewan and the English reports acknowledged the practical benefit of having it apply to perpetual property interests such as options to purchase, future easements,[148] and other such contingent or future interests.[149] These sorts of interests, sometimes drafted in mind of a triggering contingency rather than a period of time, may come to 'clog' title, when the holder is no longer ascertainable and has

---

[146] South Australia Report, *supra* note 31.

[147] *Law of Property Act 1936* (S.A.), ss 61-62, as amended by the *Law of Property (Perpetuities and Accumulations) Amendment Act 1996* (S.A.).

[148] An easement which becomes effective upon the happening of a future contingency, such as the building of a road or sewer line.

[149] Saskatchewan Report, *supra* note 11 at 27; England Report 1998, *supra* note 4 at para. 7.9, 7.12.

effectively abandoned the interest. The Rule deems such interests void from the outset, or, in 'wait and see' jurisdictions, imposes a time limit for their vesting. In some circumstances this is a nuisance, or worse; the parties may have had good reason to render the interest contingent on a future happening, rather than exercisable only within a certain period of time. The effect of the Rule is to undermine the parties' bargain. But in others the interest is effectively expired - the holder has moved on and there is no reason to maintain it. In those cases the interest, which might otherwise be difficult to release from title, may be conveniently disposed of as void under the Rule.

The English Report nevertheless considered that the inconveniences arising from such expired interests should not be dealt with by relying on an unintended effect of the Rule's broad scope. Acknowledging that its recommendation that the perpetuities rule should not apply to commercial transactions raised certain risks in respect of open-ended options and future easements, the Commission observed:

> ... [[W]e consider that these risks are best evaluated by the parties to the transactions, who will commonly be acting upon legal advice. ... [W]e consider that it should be no part of the function of the rule against perpetuities to mend bad bargains.[150]

The Saskatchewan Report observed that there were many such 'clogs' on title to which the Rule does not apply - including liens, resulting and constructive trusts, determinable fees simple, and perhaps rights of first refusal[151] - and in the absence of any indication that the inconvenience was working real hardship concluded that the law need not make any special provision for them notwithstanding abolition of the Rule.[152] Evidently the Saskatchewan legislator was persuaded otherwise; under s.51(1) of the Saskatchewan *Act* the courts will have a discretionary jurisdiction to terminate options and similar interests which would have been subject to the Rule.

Rather than leaving such perpetual clogs unaddressed, we consider the choice to be between a simplified rule against perpetuities, such as England's 125-year rule, or a variation power such as has been adopted in Saskatchewan and South Australia, along the lines of variation of trusts legislation. Though we recognize legitimate debate on the subject, we are presently of the mind that a variation power is preferable to a blanket rule. Quite apart from the absurd complexity of the original common law rule of a 'life in being plus twenty-one years,' the variation of trusts option first identified by the Manitoba Report has laid bare the more fundamental problem of any sort of perpetuities rule. As a rule, it applies to the offending property interest whether that interest is actually creating the problems the Rule was designed to guard against (tying up property under obsolete or disadvantageous conditions) or not. And, for those interests to which it does not apply, but which may create similar sorts of problems, it offers no help at all.

---

[150] England Report 1998, *supra* note 4 at para. 7.22.

[151] See La Forest, *supra* note 12, at § 10:20; Saskatchewan Report, *supra* note 11 at 16-17.

[152] Saskatchewan Report, supra note 11 at 27. The Irish Report similarly makes no special provision to preserve the effect of the Rule with regard to such interests.

Therefore, we prefer the apparent intention of Saskatchewan's s.51(1), which is to make such interests subject to the court's variation jurisdiction. We do not suggest, however, that such jurisdiction should be subject to whether the interest would offend the Rule were it still in effect, as s.51(1) does. Having recommended abolition of the Rule we are not anxious to require its hypothetical application in order to ground the court's jurisdiction. Rather, for discussion purposes we propose that the court should have jurisdiction to order a variation (including accelerated or postponed vesting, or termination) of any unvested property interest, other than one subject to the *Variation of Trusts Act*.

We are not inclined to require a certain period of time to pass before the power could be exercised, as South Australia's s.62 does. This is a matter of some debate, and we specifically invite comment on this issue. The actual or expected duration of the delay in vesting should be a factor for the court to consider. But while the difficulties arising from unvested interests are likely to grow more pressing over time - and we can imagine the court being persuaded to vary long-unvested interests much more often than more recent ones - we can see no value in arbitrary line-drawing of the type that would leave interested parties completely powerless to respond to circumstances which render the unvested interest unduly inconvenient or burdensome, simply on account of the number of years it had been in existence.

We would require notice to the holder(s) of the interest, including positive obligations to make efforts to ascertain and locate such holders. We would require the court to have regard for the intentions of the grantor, if ascertainable, and the positions of the interested parties attending on the hearing. We would provide expressly for the power to order such further terms as the court considered just in the circumstances, including the prospect of compensation - either immediate or held on trust - for any ascertainable interest holder, whether contingent or determined. Some means would have to be provided - such as by regulation - to exclude certain types of property interests from the court's jurisdiction in certain circumstances, (*e.g.*, options and conditional easements) or to include others but subject to certain conditions (*e.g.*, the possibility of reverter following a determinable fee).[153] We consider that the circumstances which would justify variation of options and conditional easements would be rare, since they can be expected to arise most often from a private bargain. We are not prepared to exclude them entirely, however, since they are the sort of 'clogs' that may arise once the holder has effectively abandoned them and moved on.

We consider that this would be no more radical a jurisdiction than that under variation of trusts legislation. The courts have had several decades of practice in assessing proposed arrangements for the variation or termination of delayed and restricted interests under trusts. Our indications are that the power would be rarely used; unvested interests that present significant difficulty for the interested parties are not a common occurrence in Nova Scotia real estate practice. But the question cannot go unaddressed if the rule against perpetuities is to be abolished as we propose. The floodgates will be open for whatever volume of pent-up demand for long-term limits on property use and transfer may now exist. As compared to the obvious alternative - a hard-and-fast rule that deems such interests invalid after a certain

[153] Which is considered to be vested even though it for all intents and purposes functions as a contingent right of re-entry upon the breach of a condition subsequent.

period of time, regardless of whether they are burdensome or beneficial, and permits no interference in the meantime - we prefer the model of a variation jurisdiction, with appropriate sensitivity to the circumstances at hand.

Retrospectivity

Legislation which abolishes the Rule must also deal with transitional matters, in particular the extent of retrospective application to acts or decisions taken in the past on the basis of, or in reliance on, the Rule. The Manitoba, Saskatchewan and South Australian Reports recommended retrospective application,[154] but not in respect of any interest that might have already vested, and with protection for actions and decisions taken in reliance on the Rule prior to its abolishment. After an extensive discussion,[155] the Irish report of 2000 similarly concluded that the abolition should be retrospective in effect. The Commission considered that in this context retrospective application would not be arbitrary, since the operation of the Rule is in effect to dispose of the property other than as the transferor intended, and most often to a different person.[156] The Irish Commission noted that it is typically when the Rule would divert the interest to another person that litigation would normally arise.[157]

Of course, one gains and another loses whenever rules change. But we take the starting point to be that property owners should have the right to dispose of their property as they see fit, subject only to such limits as are justified by public policy reasons. With that as a given, it is fair to say that rather than confiscating a pre-existing entitlement, retrospective abolition in this case only preserves an entitlement which would otherwise be wiped out by operation of law.

The Irish Commission considered, like the Manitoba, Saskatchewan and South Australian reform agencies, that there should be a saving provision where a person may have acted to his or her detriment in reliance on the expectation of receiving property, either outright or in the form of an income stream, because of a disposition's invalidity under the Rule; *e.g.*, as the current owner subject to a void interest, through a gift over, as a residuary beneficiary, or as an inheritor under intestacy. The Irish Commission put the problem as follows:

> The remaining and more difficult question is whether it would be unjust or otherwise undesirable to deprive the donee of the gift over of the subject matter of the gift which would have been invalid under the Rule. The first and relatively straightforward point here is that if there has been any element of actual reliance by this person (in the sense of a change of position) on the fact that s/he is to take the subject matter of the invalid gift, then it would be unjust to deprive him or her of it. Straightforward (though in reality rather unlikely) ways in which the donee of a gift over might alter his position in reliance on ultimately receiving the gift would be if he

[154] Manitoba Report, *supra* note 5 at 92; Saskatchewan Report, *supra* note 11 at 27-28; South Australia Report, *supra* note 11 at 16-17.

[155] Ireland Report, supra note 11 at para. 4.33 - 4.48.

[156] *Ibid*., at para. 4.39.

[157] *Ibid*., at para. 4.08.

> were to: sell or mortgage an estate vested in interest; spend money on its repair or improvement; or possibly give up his job or borrow money in reliance on ultimately receiving an interest in possession.[158]

To the question of whether prospective application would be a better solution than retrospectivity with a saving clause, the Irish Commission answered succinctly:

> ... [I]t seems to us that the greater justice lies in applying the change of law retrospectively (though with the saver mentioned already). The choice seems to be between, on the one hand, honouring the settlor's intention and allowing the beneficiary (on whom s/he was [sic] intended to bestow the gift [sic]; and on the other hand, fulfilling (at most) the expectation of a windfall, which X (on the basis of a law which to most lay people and many lawyers would seem antiquated and irrational) entertained. We prefer the first alternative[159]

We too favour retrospective application, for the reasons stated. These apply just as clearly - if not more so - beyond the trusts and estate context. Whether by grant or trust, the interest which stands to be invalidated by the Rule is the expression of the transferor's intention. In many cases outside the estate planning context it will be the result of a freely-entered bargain for which one party will have received consideration. The prospect of an objectionable windfall becomes an unjust enrichment in such a case.

If the unvested interest is objectionable or working some hardship let it be dealt with as such, under the variation powers we have proposed, or the other rules the courts have developed to deal with such circumstances. If a party has taken an interest, or acted to her detriment in reliance on invalidity under the Rule, then the invalidity must stand. Otherwise, there ought not to be a magic date upon which the saving of a transferor's manifest intention from an obscure, complex and arbitrary rule ought to be effective. For discussion purposes we therefore propose retrospective abolition, subject to saving provisions for interests vested in possession as of the effective date of the legislation, as well as judicial decisions and acts taken in reliance on the Rule - such as a purchase for value in reliance on a solicitor's opinion as to the invalidity of some interest or other - prior to the coming into force of the legislation.

[158] *Ibid*., at para. 4.40.

[159] *Ibid*., at para. 4.45.