

1972 Bill 20

First Session, 17th Legislature, 21 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 20

The Perpetuities Act

THE ATTORNEY GENERAL

First Reading

Second Reading

Third Reading

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BILL 20

1972

THE PERPETUITIES ACT

(Assented to _____, 1972)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1. In this Act,

- (a) "court" means the Supreme Court of Alberta;
- (b) "disposition" includes the conferring of a power of appointment and any provision whereby any interest in property or any right, power or authority over property is disposed of, created or conferred and also includes a possibility of reverter or resulting trust, and a right of re-entry on breach of a condition subsequent;
- (c) "in being" means living or en ventre sa mere;
- (d) "perpetuity period" means the period within which at common law as modified by this Act an interest must vest;
- (e) "power of appointment" includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration.

2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

3. No disposition creating a contingent interest in real or personal property shall be treated as or declared to be void as violating the rule against perpetuities by reason only of the fact that there is a possibility of the interest vesting beyond the perpetuity period.

4. (1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish

- (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest,

Explanatory Notes

General. This Bill will provide for the reform of the rule of law known as "the rule against perpetuities" or the rule against remoteness of vesting of property. The rule says: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." It is one of the most complex fields of the common law.

The Bill is based on the recommendations of The Institute of Law Research and Reform and in its Report No. 6 entitled "Report on the Rule Against Perpetuities" and published in August, 1971. Appendix A to the Report contains a draft Act that has been followed for the most part in this Bill.

A reference in an explanatory note to a Recommendation is to the numbered recommendation in the Institute's Report.

Following reform in England, the first major reform of the rule in Canada occurred in Ontario in 1966 when its Legislature passed The Perpetuities Act which in turn was largely the result of two reports of the Ontario Law Reform Commission. The Institute's draft Act and this Bill for the most part follow the Ontario Perpetuities Act. For the convenience of those who wish to compare this Bill with the Ontario Act, the explanatory notes indicate whether the provision is the same as or a variation of an equivalent provision in the Ontario Act, or whether the provision is one not found in the Ontario Act. Minor drafting modifications from the Ontario Act are not indicated where they do not affect substance.

1. Definitions. Recommendation No. 20.

Same as Ontario section 1 except that Ontario does not define "power of appointment" but does define "limitation" as follows:

- (c) "limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred.

2. The rule against perpetuities continues except as varied. Recommendation No. 1.

Same as Ontario section 2.

3. Possibility of vesting beyond period. Recommendation No. 3. Same as Ontario section 3.

4. Presumption of validity; - "Wait and See". Recommendation Nos. 4, 5 and 6.

Subsection (1) is the same as Ontario section 4 (1) except for the reference to section 8 added in clause (a).

Subsection (2) is the same as Ontario section 4 (2).

Ontario section 4 (3) reads:

- (3) A limitation conferring any power, option or other right, 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 presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period.

unless validated by the application of section 6, 7 or 8, shall be treated as void or declared to be void, or

- (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

(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 presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

(3) A disposition conferring any 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 presumptively valid and shall be declared or treated as void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period.

5. (1) Where section 4 applies to a disposition, the perpetuity period shall be determined as follows:

- (a) where any persons falling within subsection (2) of this section are persons in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within subsection (2), clause (b) or (c) shall be disregarded if the number of persons of that description is such as to render it impractical to ascertain the date of death of the survivor;
- (b) where there are no lives under clause (a), the perpetuity period is 21 years.

(2) The persons referred to in subsection (1) are as follows:

- (a) the person by whom the disposition is made;
- (b) a person to whom or in whose favour the disposition was made, that is to say,
 - (i) in the case of a disposition to a class of persons, any member or potential member of the class;
 - (ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

5. Determination of perpetuity period. Recommendation No. 7.

As to subsection (1) and subsection (2) (b) (i) see Ontario section 6 which reads:

6.—(1) Except as provided in section 9, subsection 3 of section 13 and subsections 2 and 3 of section 15, the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

(3) Where there is no life satisfying the conditions of subsection 1, the perpetuity period is twenty-one years.

The Age of Majority Act, Statutes of Alberta 1971, c. 1 expressly stated (in section 11) that it did not affect the law relating to perpetuities.

Subsection (2) (e) is the same as Ontario section 9,

- (iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;
- (iv) where, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the perpetuity period, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;
- (v) in the case of a power of appointment, the person on whom the power is conferred;
- (c) a person having a child or grandchild within clause (b), subclauses (i) to (iv), or such a person any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent, fall within those subclauses;
- (d) any person who takes any prior interest in the property disposed of and any person on whose death a gift over takes effect;
- (e) where a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the perpetuity period, or where an interest is created by reference to the death of the spouse of such a person, or by reference to the death of the survivor, the same spouse whether or not he or she was in being or ascertainable at the commencement of the period.

6. (1) Where a disposition creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding 21 years, and actual events existing at the time the interest was created or at any subsequent time establish,

- (a) that the interest, but for this section, would be void as incapable of vesting within the perpetuity period, but
- (b) that it would not be void if the specified age had been 21 years,

the disposition shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

(2) One age reduction to embrace all potential beneficiaries shall be made pursuant to subsection (1).

(3) Where in the case of any disposition different ages exceeding 21 years are specified in relation to different persons

6. Reduction of age. Recommendation No. 8

Subsection (1) is the same as Ontario section 8 (1).

Subsections (2) and (3) are not in the Ontario Act.

- (a) the reference in subsection (1), clause (b) to the specified age shall be construed as a reference to all the specified ages, and
- (b) that subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

7. (1) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become potential members of the class, prevents section 6 from operating to save a disposition from being void for remoteness, those persons shall be excluded from the class for the purposes of the disposition and that section has effect accordingly.

(2) Where, in the case of a disposition to which subsection (1) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, but for this subsection, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, such persons shall for all the purposes of the disposition be excluded from the class.

8. (1) Where it has become apparent that, apart from the provisions of this section, any disposition would be void solely on the ground that it infringes the rule against perpetuities, and where the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence, the disposition shall, if possible and as far as possible, be reformed so as to give effect to the general intention within the limits of the rule against perpetuities.

(2) Subsection (1) does not apply where the disposition of the property has been settled by a valid compromise.

9. (1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

- (a) it shall be presumed
 - (i) that a male is able to have a child at the age of 14 years or over, but not under that age, and
 - (ii) that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years,but
- (b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

7. Exclusion of class members to avoid remoteness. Recommendation No. 9.

Subsection (1) is the same as Ontario section 8 (2).

Subsection (2) is the same as Ontario section 8 (3).

8. General cy-pres provision to save dispositions otherwise offending the rule. Recommendation No. 10.

Ontario's Act has no equivalent provision.

~~**9. Presumptions and evidence of future parenthood. Recommendation No. 11.**~~

Subsections (1), (2) and (3) are the same as Ontario section 7 (1), (2) and (3).

Subsection (4) is a variation of Ontario section 7 (4) which reads:

(4) The possibility that a person may at any time have a child by adoption, legitimation or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection 3 applies to such child or children.

(2) Subject to subsection (3), where any question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same disposition notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

(3) Where a question is decided by treating a person as unable to have a child at a particular time and that person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption or legitimation shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children.

(1)

10. An executor or a trustee of any property or any person interested under, or in the validity or invalidity of, an interest in that property may at any time apply to the court by way of originating notice of motion for the opinion, ~~advice or direction of the court as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property and with respect to the application of any provision of this Act.~~

11. The remedial provisions of this Act shall be applied in the following order:

- (a) section 9; (*capacity to have children*)
- (b) section 4; (*wait and see*)
- (c) section 6; (*age reduction*)
- (d) section 7; (*class splitting*)
- (e) section 8. (*general cy-pres*)

12. Pending the treatment or declaration of a presumptively valid interest within the meaning of section 4 as valid or invalid, the income arising from that interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the disposition will ultimately prove to be void for remoteness shall be disregarded.

(2) An executor or trustee acting upon the opinion, advice or direction of the court given under this section shall be deemed, so far as regards his own responsibility, to have discharged his duty as executor or trustee in respect of the subject matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify an executor or trustee in respect of any act done in accordance with the opinion, advice or direction of the court given under this section if the executor or trustee has been guilty of fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

10. Application to the court for its opinion, advice or direction.
Recommendation No. 12.

This varies Ontario section 5 (1) which reads:

5.—(1) An executor or a trustee of any property or any person interested under, or on the validity or invalidity of, an interest in such property may at any time apply to the court for a declaration as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

11. Order of application of remedial provisions. Recommendation No. 12.

Not in the Ontario Act.

12. Interim income. Recommendation No. 13.

Same as Ontario section 5 (2).

13. (1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not such disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid disposition.

(2) Where a prior interest is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest.

14. (1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

(a) in the instrument creating the power it is expressed to be exercisable by one person only, and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

(2) A power that satisfies the conditions of subsection (1), clauses (a) and (b) shall, for the purpose of the rule against perpetuities, be treated as a general power.

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed.

15. (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before that time.

13. Saving provision and acceleration of expectant interests.
Recommendation No. 14.

Same as Ontario section 10.

14. Powers of appointment. Recommendation No. 15.

Same as Ontario section 11.

15. Administrative powers of trustees. Recommendation No. 16.

Same as Ontario section 12.

16. Where a disposition inter vivos would be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy lies in contract or otherwise for giving effect to it or making restitution for its lack of effect.

17. (1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, whether the lease or renewal is of real or personal property,

- (a) if the option is exercisable only by the lessee or his successors in title, and
- (b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease or renewal.

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

(3) Subsection (1) applies to a right of first refusal or pre-emption as it applies to an option.

(4) The rule against perpetuities does not apply to options to renew a lease of real or personal property.

18. (1) In the case of a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time, the perpetuity period is 80 years from the date of the contract, and if the contract provides for the acquisition of such an interest at a time greater than 80 years, then the interest may be acquired up to 80 years and not thereafter.

(2) In particular and not so as to restrict the generality of subsection (1), that subsection applies to all contracts relating to a future sale or lease, to options in gross, rights of pre-emption or first refusal, and to future profits a prendre, easements and restrictive covenants.

(3) This section does not apply to any provision in a will or inter vivos trust.

16. Avoidance of contractual rights in cases of remoteness. Recommendation No. 17.

Not in Ontario Act.

17. Options to acquire reversionary interests. Recommendations Nos. 18 and 19.

Subsection (1) varies Ontario section 13 (1) which reads:

13.—(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease,

(a) if the option is exercisable only by the lessee or his successors in title; and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

Subsection (2) is the same as Ontario section 13 (2).

Subsection (3) is not in the Ontario Act.

Subsection (4) varies Ontario section 13 (4) which reads:

(4) The rule against perpetuities does not apply, nor do the provisions of subsection 3 of this section apply, to options to renew a lease.

18. Commercial transactions. Recommendation No. 20.

As to subsection (1) see Ontario section 13 (3) which reads:

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that according to its terms is exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.

As to subsection (2) see Ontario section 14 which reads:

14 In the case of an easement, profit a prendre or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period is forty years from the time of the creation of such easement, profit a prendre or other similar interest, and the validity or invalidity of such easement, profit a prendre or other similar interest, so far as remoteness is concerned, shall be determined by actual events within such forty-year period, and the easement, profit a prendre or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period.

Subsection (3) is not in the Ontario Act.

19. (1) In the case of

- (a) a possibility of reverter on the determination of a determinable fee simple, or
- (b) a possibility of a resulting trust on the determination of any determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

(2) The perpetuity period for the purpose of a possibility of reverter or a possibility of a resulting trust or of a right of re-entry on breach of a condition subsequent or equivalent right in personal property is 40 years.

(3) Subsection (1) does not apply where the event, which determines the prior interest, or on which the prior interest could be determined, is the cessation of a charitable purpose but in such a case if the cessation of the charitable purpose takes place after the expiration of the perpetuity period the property shall be treated as if it were the subject of a charitable trust to which the cy-pres doctrine applies.

(4) This section does not apply, nor does the rule against perpetuities apply, to a gift over from one charity to another.

20. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended

19. Possibilities of reverter and conditions subsequent. Recommendation No. 21.

Subsection (1) is the same as Ontario section 15 (1).

As to subsection (2), see Ontario section 15 (2) and (3) which read:

(2) In the case of a possibility of reverter on the determination of a determinable fee simple, or in the case of a possibility of a resulting trust on the determination of any determinable interest in any real or personal property, or in the case of a right of re-entry following on a condition subsequent, or in the case of an equivalent right in personal property, the perpetuity period shall be measured as if the event determining the prior interest were a condition to the vesting of the subsequent interest, and failing any life in being at the time the interests were created that limits or is a relevant factor that limits in some way the period within which that event may take place, the perpetuity period is twenty-one years from the time when the interests were created.

(3) Even though some life or lives in being may be relevant in determining the perpetuity period under subsection 2, the perpetuity period for the purposes of this section shall not exceed a period of forty years from the time when the interests were created and shall be the lesser of a period of forty years and a period composed of the relevant life or lives in being and twenty-one years.

Subsections (3) and (4) are not in the Ontario Act.

20. Specific non-charitable purpose trusts. Recommendation No. 22.

Same as Ontario section 16.

within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.

21. The rule of law prohibiting the disposition, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without affecting any other rule relating to perpetuities.

22. 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 persons not being employees engaged in any lawful calling or to their widows, dependants or other beneficiaries.

23. This Act and the rule against perpetuities bind the Crown except in respect of dispositions of property made by the Crown.

24. (1) The Act of the Parliament of Great Britain, 39 and 40 Geo. III (known as the Accumulations Act, 1800) does not apply in Alberta.

(2) Where property is settled or disposed of in such manner that the income thereof may or must be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid but not otherwise.

(3) Nothing in this section affects the rights of any person or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the court to direct payments from accumulations pursuant to any statute.

(4) This section applies to instruments taking effect before or after the commencement of this Act except where the period of accumulation permitted by the Accumulations Act, 1800 has expired before the commencement of this Act.

21. The rule in *Whitby v. Mitchell* is abolished. Recommendation No. 23.

Same as Ontario Section 17.

22. Rules not applicable to employee benefit trusts. Recommendation No. 24.

Ontario section 18 reads:

18. The rules of law and statutory enactments relating to perpetuities 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.

23. Application of Act and rule to the Crown. Recommendation No. 25.

Not in Ontario Act.

24. Accumulations of income. Recommendation No.26.

Not in the Ontario Act.

25. Except as provided in section 15, subsection (2) and section 22 and section 24, subsection (4), this Act applies only to instruments taking effect after this Act comes into force, and such instruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force.

26. The Trustee Act is amended by striking out section 43.

27. This Act comes into force on a date to be fixed by Proclamation.

25. Application of Act. Recommendation No. 27.

Same as Ontario section 19.

26. Section 43 of chapter 373 of the Revised Statutes of Alberta 1970 is struck out as section 22 of this Bill replaces it.

25. Application of Act. Recommendation No. 27.

Same as Ontario section 19.

26. Section 43 of chapter 373 of the Revised Statutes of Alberta 1970 is struck out as section 22 of this Bill replaces it.