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ALBERTA LAW REFORM INSTITUTE

# ABOLITION OF PERPETUITIES LAW



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## **ABOLITION OF PERPETUITIES LAW**

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# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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## WH Hurlburt QC LLD (1927–2016)

It is appropriate in this Report to acknowledge the fifty year contribution that Bill Hurlburt made to the work of the Alberta Law Reform Institute. Bill was instrumental in the negotiations to establish a full-time, independent law reform agency for Alberta. Bill went on to serve ALRI as Board Member, Chair, Director and Special Counsel. He was also accorded the distinctions of Director Emeritus and Special Advisor.

Bill's last attendance at a Board meeting was in September 2016, when the core policy decisions for this 110th Final Report were formulated. Though no longer a voting member, when asked his opinion whether the rule against perpetuities should be abolished, Bill's advice was "off with its head!"

It has been an honour and a pleasure to work with someone who so dearly loved the law, who worked passionately for its betterment and who encouraged the expression of different views to achieve that end.

# Summary

The Alberta Law Reform Institute (ALRI) recommends the abolition of perpetuities law in Alberta. Abolition has already occurred in Manitoba, Saskatchewan and Nova Scotia. Canada-wide abolition has been recommended by the Uniform Law Conference of Canada.

The common law rule against perpetuities (RAP) originated in England in the 17th century as a way to prevent landowners from using future or contingent interests to tie up property for generations. RAP creates a perpetuity period for such interests based on the length of a life or lives in being in existence at the creation of the interest, plus 21 years. At common law, a contingent interest is void if there is any uncertainty at the outset whether it will vest within the perpetuity period. Over the centuries the courts expanded the common law RAP to apply to virtually all future or contingent interests in property, regardless of whether the interest is real, personal, legal or equitable.

In 1972, Alberta enacted the *Perpetuities Act* (the Alberta Act) to reform the worst complexities and excesses of the common law RAP, based on recommendations from ALRI. The Alberta Act's central reform is the adoption of the "wait and see" principle. Instead of judging at the outset whether a contingent interest will vest within the perpetuity period, such a determination now waits until the perpetuity period expires. This saves many interests from invalidity.

Many view the modern social or legal purpose of perpetuities law as creating a balance between past and present, so that a settlor or testator may provide for the disposition of his or her property, but not control it so far into the future that the beneficiaries cannot appropriately respond to changed times and circumstances. However, others are of the view that certain modern legal mechanisms now exist which are sufficient substitutes for perpetuities law, namely, the income tax system and court variation of trusts legislation.

The 21-year deemed disposition rule in Canada's federal income tax system states that the majority of trusts are deemed to dispose of and reacquire all trust property at fair market value every 21 years. The practical result of this rule is that, every 21 years, the trust is faced with a large tax bill. To avoid this, trust interests will not usually remain unvested for longer than 21 years. While this is indeed a major disincentive to create a long-lasting trust with unvested interests, ALRI is reluctant to rely solely on this as a complete substitute for perpetuities law.

ALRI has much more confidence in court variation of trusts legislation as an adequate substitute. This remedy is based in trust law and aimed at the same kinds of matters often found in perpetuities issues. The legislation

allows a trust to be varied or terminated if all the beneficiaries of the trust are of full capacity and in agreement, or if the court provides substitute consent for dissenting beneficiaries or beneficiaries who are otherwise incapable of providing consent. If ALRI's recent recommendations for a new *Trustee Act* are implemented, they will only strengthen the effectiveness of trusts variation legislation. In appropriate circumstances and with appropriate controls, a court will be able to override a dissenting beneficiary. In ALRI's opinion, variation of trusts legislation is the true modern source of balance between the competing interests of the settlor or testator and their present and future beneficiaries, not traditional perpetuities law based on RAP.

As a substitute for RAP, variation of trusts legislation still has one shortcoming, however. It does not apply to non-trust equitable and common law interests that are otherwise subject to perpetuities law. ALRI recommends that a separate court variation statute be enacted to deal with these interests, with similar powers and safeguards as enacted in Nova Scotia's equivalent legislation. The new statute should clearly apply only to private interests, however, not to commercial ones. It should not apply to any interest arising out of a "commercial disposition" defined as "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time."

With court variation statutes governing trusts and non-trust interests available to address perpetuities issues, ALRI believes it is time to abolish the common law RAP and repeal the Alberta Act which reforms it. Other Canadian provinces have abolished perpetuities law without any apparent major problems resulting from that decision. ALRI's consultation feedback, coming largely from the legal profession, judiciary and trusts and estates professionals, indicates majority support for abolition. While these results are not scientific, they do at least anecdotally suggest that many professionals working in the area are now comfortable with the idea of doing away with specialized perpetuities law.

ALRI recommends that the abolition of perpetuities law be applied retrospectively to contingent interests regardless of when they were created unless, before the effective date of abolition: (1) an interest was previously void at common law for violating RAP, or (2) the perpetuity period of an interest has already expired.

# Recommendations

## RECOMMENDATION 1

Perpetuities law should be abolished in Alberta. .... 44

## RECOMMENDATION 2

In order to provide for court variation of future contingent common law and non-trust equitable interests, a statute based on Nova Scotia's *Real Property Act* should be enacted in Alberta. .... 53

## RECOMMENDATION 3

The new variation statute should not apply to any interest arising out of a commercial disposition, defined as "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time." ..... 53

## RECOMMENDATION 4

The abolition of the rule against perpetuities and the repeal of Alberta's *Perpetuities Act* should be applied retrospectively to contingent interests regardless of when those interests were created, subject to two exceptions..... 58

## RECOMMENDATION 5

The retrospective abolition and repeal of perpetuities law in Alberta should not apply in two situations:

- (1) where a contingent interest was already void at common law for violating the rule against perpetuities before the effective date of abolition,
- (2) where the perpetuity period governing a contingent interest has already expired before the effective date of abolition. .... 59



# Table of Abbreviations

## TERMINOLOGY

RAP	Rule Against Perpetuities
DDR	Deemed Disposition Rule

## LEGISLATION

Alberta Act	<i>Perpetuities Act</i> , RSA 2000, c P-5.
England Act	<i>Perpetuities and Accumulations Act 2009</i> (UK) 2009, c 18.
Uniform Trustee Act	Uniform Law Conference of Canada, Uniform Trustee Act (2012), online: < <a href="http://www.ulcc.ca/en/2012-whitehorse-yk/599-civil-section-documents-2012/1255-uniform-trustee-act">http://www.ulcc.ca/en/2012-whitehorse-yk/599-civil-section-documents-2012/1255-uniform-trustee-act</a> >.

## LAW REFORM PUBLICATIONS

Alberta Report	Institute of Law Research and Reform (Alberta), <i>Report on the Rule Against Perpetuities</i> , Report 6 (1971), online: < <a href="https://www.alri.ualberta.ca/docs/fr006.pdf">https://www.alri.ualberta.ca/docs/fr006.pdf</a> >.
England Report	Law Commission (England), <i>The Rules Against Perpetuities and Excessive Accumulations</i> , Report 251 (1998).
Manitoba Report	Manitoba Law Reform Commission, <i>The Rules Against Accumulations and Perpetuities</i> , Report 49 (1982).
Nova Scotia Report	Law Reform Commission of Nova Scotia, <i>The Rule Against Perpetuities</i> , Final Report (2010).
New Zealand Issues Paper	Law Commission (New Zealand), <i>Perpetuities and the Revocation and Variation of Trusts</i> , Issues Paper 22 (2011).
New Zealand Report	Law Commission (New Zealand), <i>Review of the Law of Trusts: A Trust Act for New Zealand</i> , Report 130 (2013).
Saskatchewan Report	Law Reform Commission of Saskatchewan, <i>Proposals Relating to the Rules Against Perpetuities and Accumulations</i> , Final Report (1987).



## CHAPTER 1

# Introduction

## A. Perpetuities Law in Alberta

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[1] English courts created the common law rule against perpetuities (RAP) in the 17<sup>th</sup> century to control and limit how settlors and testators were using future and contingent estates to postpone vesting of the fee simple estate in land for an unreasonably long and indefinite period.<sup>1</sup> The courts honed and expanded RAP in the following centuries and applied it broadly to both real and personal property, creating in the process an extremely complex and arcane body of law. As in the rest of Canada, this law was received and became part of the law of Alberta.

[2] With the passage of the *Perpetuities Act* in 1972, Alberta extensively reformed the common law of RAP.<sup>2</sup> This reform was based on recommendations from the Institute of Law Research and Reform, now the Alberta Law Reform Institute (ALRI).<sup>3</sup> The new Act was in line with reform carried out elsewhere in Canada and the Commonwealth. Since then, however, three Canadian provinces have completely abolished RAP and no longer have any perpetuities law. The Uniform Law Conference of Canada (ULCC) has recently recommended that all Canadian jurisdictions should follow suit.

[3] Following research, consultation, discussion and much consideration, ALRI recommends in this Report that perpetuities law should also be abolished in our province.

## B. How This Project Arose

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[4] ALRI's project to examine the continued viability of perpetuities law in Alberta arose in 2015 from two sources. First of all, ALRI had at that time recently prepared and published preliminary recommendations in another

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<sup>1</sup> *Duke of Norfolk's Case* (1682), 22 ER 931 (Ch).

<sup>2</sup> *Perpetuities Act*, RSA 2000, c P-5 [Alberta Act].

<sup>3</sup> Institute of Law Research and Reform (Alberta), *Report on the Rule Against Perpetuities*, Report 6 (1971), online: <<https://www.alri.ualberta.ca/docs/fr006.pdf>> [Alberta Report].

project concerning implementation of the ULCC's new Uniform Trustee Act.<sup>4</sup> The ULCC recommended the abolition of RAP as part of the overall legislative scheme in this area.

[5] Coincidentally but independently, a letter was also received during that same period from the then Minister of Justice requesting that ALRI consider reviewing the continued need for RAP.<sup>5</sup> The Alberta Act had recently been amended to exempt mineral leases<sup>6</sup> and qualifying environmental trusts<sup>7</sup> from its application, following concerns about RAP's effect on these areas. The former Minister of Justice was therefore concerned that RAP "may be causing some difficulties in this province's dynamic economic environment" and so inquired whether ALRI would examine the "potential abolishment or modification of the rule."<sup>8</sup>

### C. Framework of the Project

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[6] In our 2016 Report for Discussion, ALRI re-examined RAP, the Alberta Act and perpetuities law in general, discussed the legal policies present in various jurisdictions, outlined potential models of abolition or reform, and solicited input about how Alberta should best proceed in this area of the law today.<sup>9</sup> We sought feedback from stakeholders, including the legal profession, the judiciary and those involved in relevant areas of business and property transactions. Consultation methods involved making presentations on our Report for Discussion, publication of an electronic survey for completion and receipt of written comments. The quality of the feedback that ALRI received was of great assistance in formulating the recommendations contained in this Final Report.

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<sup>4</sup> Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Report for Discussion 28 (2015), online: <<https://www.alri.ualberta.ca/docs/rfd028.pdf>>.

<sup>5</sup> Letter from Jonathan Denis QC, Minister of Justice, to Peter Lown QC, ALRI Director (22 August 2014).

<sup>6</sup> *Statutes Amendment Act, 2013*, SA 2013, c 10, s 3, amending s 19 of the Alberta Act.

<sup>7</sup> *Justice Statutes Amendment Act, 2014*, SA 2014, c 13, s 9, adding s 22.1 to the Alberta Act.

<sup>8</sup> Letter from Jonathan Denis QC, Minister of Justice, to Peter Lown QC, ALRI Director (22 August 2014).

<sup>9</sup> Alberta Law Reform Institute, *Perpetuities Law: Abolish or Reform?* Report for Discussion 29 (2016), online: <<https://www.alri.ualberta.ca/docs/rfd029.pdf>>.

## D. Outline of the Report

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[7] Following Chapter 1's general introduction, Chapter 2 examines current perpetuities law in Canada and Alberta, while also comparing recent English reform and proposals for change in New Zealand.

[8] Chapter 3 contains ALRI's main recommendation to abolish perpetuities law in Alberta and our analysis of why this should occur. This chapter also explores the central reliance that will be placed on court variation of trusts legislation to address perpetuity problems which may arise in the future.

[9] Chapter 4 discusses how best to address any future perpetuity problems involving non-trust equitable and common law interests. Enactment of a separate variation statute is recommended for these interests.

[10] Finally, the Report concludes in Chapter 5 with an examination of the legislative steps necessary to abolish perpetuities law, the transitional provisions that are needed and consequential amendments to be made to other legislation.



## CHAPTER 2

# Overview of Perpetuities Law

## A. Introduction

---

[11] This chapter examines the general law of perpetuities as it currently exists in Canada and Alberta. As mentioned in Chapter 1, RAP was created and refined by the courts of England starting in the 17<sup>th</sup> century and came to Canada as received law. Our courts and legislatures have further shaped this law in the Canadian context. This chapter also summarizes the current law in England, as well as the reform recently recommended for New Zealand.

## B. Perpetuities Law in Canada

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### 1. THE UNREFORMED RULE

[12] The essential purpose of RAP is to “strike a balance between the interests of property owners seeking to control the future disposition of their land and that of future property owners to control and alienate the land.”<sup>10</sup> In other words, RAP regulates how long the law will allow someone to tie up property through the creation of any contingent interest. The common law allows it only for the limited time of the perpetuity period so that a person may basically control assets in the hands of their children and grandchildren, but no further.<sup>11</sup>

[13] RAP applies to virtually all future or contingent interests in property, regardless of whether the interest is real, personal, legal or equitable.

[14] At common law, RAP has two formulations which serve the same purpose in different settings. The first formulation is the rule against remoteness of vesting. The second is the rule against indefinite duration or perpetual trusts.<sup>12</sup>

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<sup>10</sup> Halsbury's Laws of Canada, *Real Property* (Markham, Ont: LexisNexis Canada, 2012) at HRP-33 “The rule against perpetuities” [Halsbury's RP].

<sup>11</sup> AH Oosterhoff et al, eds, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed (Toronto: Carswell, 2009) at 580 [Oosterhoff].

<sup>12</sup> Oosterhoff, note 11 at 313.

**a. Rule against remoteness of vesting**

[15] The rule against remoteness of vesting “invalidates an interest which may possibly vest beyond a period of a life or lives in being at the creation of the interest plus 21 years.”<sup>13</sup> A person qualifies as a life in being if they are alive or conceived in the womb at the time of the creation of the interest.<sup>14</sup>

[16] When RAP arose in the 17<sup>th</sup> century, “[c]ommon law property interests were essentially based on the length of lives.”<sup>15</sup> Also, because property rights were conferred upon vesting of an interest, regardless of when actual possession of the land occurred, the intricacies of vesting were important legal issues. Since property law was so focused on these two concepts, lawyers and courts of the time naturally thought in terms of lives in being and vesting when crafting RAP’s restriction of perpetuities. As a result, RAP’s main formulation as the rule against remoteness of vesting is concerned with:<sup>16</sup>

... the *commencement* of interests rather than with their duration, though by restricting the time within which future interests may be created, the rule may (and commonly will) have the effect of limiting the life of a trust.

[17] Validity or invalidity of an unvested or contingent interest is judged when the devise or transfer of property takes effect, i.e., the effective date of an *inter vivos* transfer or the date of a testator’s death. If there is any possibility, however unlikely, that a future interest may not vest in time, it will fail and be void *ab initio*.<sup>17</sup> RAP’s focus on mere possibility, not probability, has created its own system of illogical logic. In striking down property arrangements for violation of RAP, case law formulated the “doctrine of possibilities.” Creatively named examples of the doctrine defy common sense, such as the fertile octogenarian, the precocious toddler, the unborn widow and the magic gravel pit.<sup>18</sup> As noted by Canada’s leading expert, Donovan Waters, QC:<sup>19</sup>

<sup>13</sup> Oosterhoff, note 11 at 313.

<sup>14</sup> Oosterhoff, note 11 at 580.

<sup>15</sup> Manitoba Law Reform Commission, *The Rules Against Accumulations and Perpetuities*, Report 49 (1982) at 10 [Manitoba Report].

<sup>16</sup> Law Commission (England), *The Rules Against Perpetuities and Excessive Accumulations*, Report 251 (1998) at para 1.6 [emphasis in original] [footnote omitted] [England Report].

<sup>17</sup> Halsbury’s RP, note 10 at HRP-33.

<sup>18</sup> For a full explanation of these doctrines, see Halsbury’s RP, note 10 at HRP-33.

<sup>19</sup> Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters’ Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 376-377 [footnote omitted] [Waters on Trusts].

The reason for this approach, however, is not perversity. The courts took the view that it must be certain when a disposition takes effect, whether the interests created by the disposition are valid or invalid.... Initial certainty is much prized in some quarters as an attribute of the unreformed rule. Indeed, an attribute it is, but the price paid is the incredible, if logical, doctrine of possibilities which has had two results. First, it has meant that interests have been declared invalid on the grounds of possibilities, and in so many instances as it happened the contingency subsequently occurred within the perpetuity period. The policy of the rule, to prevent vesting in interest outside the perpetuity period, is thus perverted; many more contingent interests are invalidated than the policy requires. Secondly, the doctrine of possibilities, because it permits such extraordinary assumptions as to what may happen, has made the perpetuity rule a series of traps for the unwary draftsman.

#### **b. Rule against indefinite duration or perpetual trusts**

[18] In contrast to the first rule, the rule against indefinite duration or perpetual trusts is framed precisely in terms of duration, not vesting, because it is designed to deal with purpose trusts. This aspect of RAP:<sup>20</sup>

... renders a trust void, even though it creates an interest which takes effect immediately, if it lasts or may last beyond the perpetuity period. Because there is rarely a relevant life in being, the perpetuity period is 21 years.

[19] This rule has a very narrow and specific application. It applies *only* to non-charitable purpose trusts, such as a trust to maintain a testator's grave or a beloved pet. It does not apply to charitable trusts, which are allowed to endure forever because of their beneficial social value.<sup>21</sup> It also has no application to trusts with real beneficiaries and lives in being.

#### **c. Status of RAP in Canada**

[20] In Canada, the unreformed common law RAP currently applies to dispositions in Newfoundland and Labrador and in New Brunswick. Recently, while preparing a new *Trustee Act* based on the ULCC's uniform work, New Brunswick decided against abolishing RAP and chose to retain it unchanged.<sup>22</sup>

<sup>20</sup> Halsbury's Laws of Canada, *Trusts* (Markham, Ont: LexisNexis Canada, 2011) at HTR-92 "Rule against infinite duration."

<sup>21</sup> Halsbury's Laws of Canada, *Trusts* (Markham, Ont: LexisNexis Canada, 2011) at HTR-92 "Exceptions."

<sup>22</sup> See *Trustee Act*, SNB 2015, c 21 [in force June 1, 2016]. There is no published Report concerning this decision.

Prince Edward Island also retains the basic unreformed rule but has legislated a longer perpetuity period of a life in being plus 60 years.<sup>23</sup> Apart from these three jurisdictions, most Canadian jurisdictions have either fundamentally reformed RAP or abolished it.

[21] RAP does not, of course, apply to the civil law jurisdiction of Quebec. However, the Civil Code of Quebec has its own system of limiting the duration of trust and trust-like property dispositions based on ranks of beneficiaries (typically limited to spouse, children and grandchildren in succession) and/or by a set number of years. For example, a gratuitously-created personal trust to benefit one or more persons can designate only two successive ranks of income beneficiaries in addition to the capital beneficiary. No individual interest can remain contingent for more than 100 years, and the total duration of the trust cannot exceed 200 years.<sup>24</sup>

## 2. THE REFORMED RULE

[22] Many jurisdictions in the Commonwealth and United States have reformed the common law RAP by substituting a “wait and see” principle for the doctrine of possibilities. Initial certainty of vesting is foregone for greater fairness by invalidating only those dispositions which are proven, in time, to actually vest outside the perpetuity period. The traps for the unwary have been eliminated – for example, actual childbearing capacity can now be assessed rather than superhuman fertility being assumed.<sup>25</sup>

[23] When it comes to measuring the wait and see perpetuity period, most reform jurisdictions retain the concept of lives in being plus 21 years but many attempt to identify, clarify and limit which lives are to be used in calculating that period. As stated in the Alberta Report, the statutory list of lives in being:<sup>26</sup>

... is at the heart of the Act. It does not do away with the lives that may be used at common law to determine whether a disposition is valid. It is still necessary to apply the common law rule to determine whether “wait and see” need be invoked. Once “wait and see” applies then the statutory list of lives is used. As Professor Maudsley has

<sup>23</sup> *Perpetuities Act*, RSPEI 1988, c P-3, s 1.

<sup>24</sup> Arts 1271-1272 CCQ. For a detailed discussion of the law in Quebec, see Waters on Trusts, note 19 at 1409-1444.

<sup>25</sup> Waters on Trusts, note 19 at 377.

<sup>26</sup> Alberta Report at 20-21.

said, “wait and see” saves dispositions which fail to comply with the certainty rule rather than abolishing the certainty rule as such.

[24] In addition to the wait and see approach, reform legislation typically enacts “a series of saving techniques, each of which alters the offending provisions of the instrument in a particular way, and is designed by changing the disposition to bring those provisions within perpetuity period vesting.”<sup>27</sup> All these reform measures are aimed at curbing the worst excesses of the rule against remoteness of vesting.

[25] As for the rule against perpetual trusts and the non-charitable purpose trusts to which it applies, reform legislation provides that such a trust’s “specific purpose” is to be construed, not as a trust of property, but as a power to appoint property instead. This immediately solves perpetuity problems and also increases the kinds of non-charitable purposes to which property may be directed.<sup>28</sup>

[26] In Canada, six jurisdictions have reformed RAP in this way – Alberta, Ontario, British Columbia, Northwest Territories, Nunavut and Yukon.<sup>29</sup> All continue to use RAP’s concept of a life or lives in being plus 21 years as the basic perpetuity period (subject to a statutory list of lives, when needed), although this measure is occasionally replaced by a fixed perpetuity period in selected circumstances.

[27] For example, British Columbia enacted a general option allowing the choice of a perpetuity period of up to 80 years, if desired.<sup>30</sup> Some jurisdictions legislate different perpetuity periods for specific kinds of interests or transactions. By way of example, Ontario specifies a 40 year perpetuity period for easements, *profits a prendre* or other similar interests.<sup>31</sup> For commercial transactions only, Alberta sets an 80 year perpetuity period.<sup>32</sup> Where there is a possibility of reverter, resulting trust or right of re-entry on breach of condition

<sup>27</sup> Waters on Trusts, note 19 at 378.

<sup>28</sup> Waters on Trusts, note 19 at 377-378.

<sup>29</sup> Alberta Act; *Perpetuities Act*, RSO 1990, c P.9; *Perpetuity Act*, RSBC 1996, c 358; *Perpetuities Act*, RSNWT 1988, c P-3; *Perpetuities Act*, RSNWT 1988, c P-3, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Perpetuities Act*, RSY 2002, c 168.

<sup>30</sup> *Perpetuity Act*, RSBC 1996, c 358, s 7.

<sup>31</sup> *Perpetuities Act*, RSO 1990, c P.9, s 14.

<sup>32</sup> Alberta Act, s 18.

subsequent or an equivalent right in personal property, Alberta has legislated a perpetuity period of 40 years.<sup>33</sup>

[28] The reformed rule will be discussed below in greater detail when Alberta's current law is outlined.

### 3. THE ABOLISHED RULE

[29] Three Canadian jurisdictions have now abolished RAP completely – Manitoba, Saskatchewan and Nova Scotia.<sup>34</sup> Accordingly, their legal landscape has no perpetuities law or perpetuity period whatsoever, either at common law or in legislation. These provinces regard the historical social and economic conditions underlying RAP as being largely obsolete today. To the extent that any control may still be required, they are content to rely on modern taxation law and variation of trusts law to handle the situation.<sup>35</sup> Citing the example of these provinces, the ULCC recommended in 2012 that RAP be abolished right across Canada because:<sup>36</sup>

... the social and economic conditions of landed society that gave rise to the rules no longer obtain. It is no longer a significant concern that a settlor would seek to control trans-generational dispositions in perpetuity. It is more likely to be the case that a bequest might fail due to inadvertence as a result of the application of the rules. A potential instance, however unlikely, of someone endeavouring to exercise such perpetual control is better addressed by means of modern legislative provisions respecting variation of trusts, rather than by reliance on the application of a complicated rule and technical body of case law.

## C. Perpetuities Law in Alberta and ALRI's Past Involvement

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[30] As already noted, Alberta extensively reformed the common law of RAP with passage of the Alberta Act in 1972, based on recommendations from the

<sup>33</sup> Alberta Act, s 19(2).

<sup>34</sup> *The Perpetuities and Accumulations Act*, CCSM, c P33, s 3; *The Trustee Act, 2009*, SS 2009, c T-23.01, s 58; *Perpetuities Act*, SNS 2011, c 42, s 3.

<sup>35</sup> These were the main rationales enunciated in provincial law reform reports recommending such abolition: Manitoba Report and Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (2010) [Nova Scotia Report].

<sup>36</sup> Uniform Law Conference of Canada, *Uniform Trustee Act: Final Report of the Working Group*, Proceedings of the Ninety-fourth Annual Meeting (2012) at para 34, online: <[http://www.ulcc.ca/en/component/jifile/?filename=images/stories/2012\\_pdfs\\_eng/2012ulcc0028.pdf](http://www.ulcc.ca/en/component/jifile/?filename=images/stories/2012_pdfs_eng/2012ulcc0028.pdf)>.

Institute of Law Research and Reform (now ALRI). The Institute rejected abolishing RAP and saw instead ongoing value in its basic policy purposes, so long as major reforms eliminated RAP's excesses and traps for the unwary.<sup>37</sup>

[31] On the Institute's recommendation, Alberta left the common law RAP in place to determine initial validity of a disposition. When attempting to save an invalid disposition using the wait and see principle, the Alberta Act measures the perpetuity period as a life or lives in being (defined by a statutory list) plus 21 years. Alberta does not offer the choice provided to disposition-makers in England, British Columbia and various Australian jurisdictions of specifying a different perpetuity period up to a maximum period of 80 years.<sup>38</sup>

[32] The central statutory reform enacted by the Alberta Act is the adoption of the wait and see principle in substitution for the common law doctrine of possibilities.<sup>39</sup> This reform saves many dispositions which do in fact vest within the perpetuity period, but which would have failed under the old common law doctrine of possibilities.<sup>40</sup> As Waters notes, the wait and see principle means that:<sup>41</sup>

... initial certainty of the validity or invalidity of an interest is lost, but a great many interests are thus saved by awaiting actual events rather than guessing at what could happen in the future. Few present day trusts do in fact create interests which would vest in interest beyond the perpetuity period if actual events are allowed to establish this fact.

[33] Additional statutory reforms aimed at saving dispositions include:

- rebuttable presumptions that males and females under a certain age and females over a certain age are not capable of having children.<sup>42</sup>
- *cy-pres* reduction of age contingencies so that the disposition will vest within the perpetuity period.<sup>43</sup> Essentially, this allows a court to vary the terms of the disposition instrument.

<sup>37</sup> Alberta Report at 2-3.

<sup>38</sup> Alberta Report at 12-13. As previously noted, however, Alberta does set a fixed 80 year perpetuity period for commercial transactions.

<sup>39</sup> Alberta Act, ss 3-5.

<sup>40</sup> Halsbury's Laws of Canada, *Wills and Estates*, 2012 Reissue (Markham, Ont: LexisNexis Canada, 2012) at HWE-210 "No mere possibilities."

<sup>41</sup> Waters on Trusts, note 19 at 377.

<sup>42</sup> Alberta Act, s 9.

<sup>43</sup> Alberta Act, s 6.

- general *cy-pres* authority for a court to vary whatever terms of the disposition threaten the timely vesting of interests, provided that the court can ascertain the creator's "general intention originally governing the disposition."<sup>44</sup>
- class-splitting rules, so that an entire class gift will no longer fail if one class member's interest fails to vest in time.<sup>45</sup>
- a deeming provision that a trust for a specific non-charitable purpose that is not illegal or contrary to public policy shall be treated as a power to appoint income or capital and will be valid so long as it is performed within 21 years of its creation.<sup>46</sup> This greatly expands the types of non-charitable purposes which can now be funded using trust dispositions. The common law recognized only a very few types, such as short-term trusts for pet or cemetery maintenance.

[34] The Alberta Act excludes certain trusts from the application of RAP if such an exemption is needed for wider social purposes. For example, the Act has always had a statutory exemption for employment-related pension, retirement and other employee benefit plans.<sup>47</sup>

[35] Two further exemptions not related to trusts were recently enacted which facilitate the operation of Alberta's resource-based economy. Mineral leases are now exempt from RAP's application to the possibility of reverter and rights of re-entry associated with a lessor's interest under a mineral lease.<sup>48</sup> RAP also does not apply to any "qualifying environmental trust" created after December 31, 2013.<sup>49</sup> These are reclamation trusts, established as long-term funding mechanisms for environmental cleanup in the oil and gas industry. Exempting them from RAP allows such trusts to exist well beyond the perpetuity period as needed. Otherwise, these trusts would be forced to "work around" RAP by being

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<sup>44</sup> Alberta Act, s 8.

<sup>45</sup> Alberta Act, s 7.

<sup>46</sup> Alberta Act, s 20.

<sup>47</sup> Alberta Act, s 22.

<sup>48</sup> Alberta Act, s 19(0.1), (5), enacted in 2013.

<sup>49</sup> Alberta Act, s 22.1, enacted in 2014.

wound up and having the trust monies resettled in a new reclamation trust once every 75 years, before the end of the Alberta Act's wait and see period.<sup>50</sup> For trusts serving such an important social and environmental purpose, it is better to simply provide an "up front" exemption.

[36] The Alberta Act also provides that the *Accumulations Act, 1800*, an old English statute received into Alberta law which forbade accumulations of income beyond a very short specified period, no longer applies in this province.<sup>51</sup> This inapplicability means that Alberta now relies on the perpetuity period of the reformed RAP to control that situation instead.<sup>52</sup>

[37] Finally, it should be noted that any instrument which took effect before July 1, 1973, the date on which the Alberta Act came into force, continues to be exclusively governed by the unreformed common law RAP.<sup>53</sup>

[38] Since the enactment of the Alberta Act, reported court decisions have been few and rarely are any dispositions struck down for violation of perpetuities law. In that 44 year period, there have been only eleven related court decisions reported in Alberta. Four cases involved estates and trusts situations. Seven cases involved commercial transactions (primarily options to purchase). Of the total eleven cases, the courts found that four did not turn on perpetuities issues or arguments on those issues were not raised or were abandoned.<sup>54</sup> Five cases were saved by the Alberta Act.<sup>55</sup> Only two cases were invalidated – both commercial transactions and both because they were subject to the pre-1972 common law RAP and so could not be saved by the Alberta Act's wait and see rule.<sup>56</sup>

<sup>50</sup> See the discussion of this issue in: National Energy Board of Canada, *Reasons for Decision: Set-aside and collection mechanisms*, MH-001-2013 (May 2014) at para 2.9.3, pp 32-33, online: <<https://apps.nerb-one.gc.ca/REGDOCS/File/Download/2477576?nodeid=2477576&vernum=-2>>.

<sup>51</sup> *Accumulations Act, 1800* (UK), 39 & 40 Geo III, c 98.

<sup>52</sup> Alberta Act, s 24.

<sup>53</sup> Alberta Act, s 25.

<sup>54</sup> *Estate of Russell (Re)* (1978), 9 AR 427 (SC); *Friends of the Calgary General Hospital Society v Canada*, 2000 ABQB 43, aff'd 2001 ABCA 162 at para 5; *Peace Hills Trust Co v Canada Deposit Insurance Corp*, 2007 ABQB 364; *Sprague-Rosser Contracting Co Ltd v 572757 Alberta Ltd et al*, 2013 ABQB 205 (Master), aff'd 2013 ABQB 363.

<sup>55</sup> *Roberts v Hanson* (1981), 28 AR 271 (CA); *Caplan Estate v Alberta (Public Trustee)*, 1984 CarswellAlta 585 (Surr Ct); *BCE Development Corp v Cascade Investments Ltd* (1987), 80 AR 386 (QB), aff'd (1987), 56 Alta LR (2d) 349 (CA); *Hay v Edmonton Savings & Credit Union Ltd* (1989), 103 AR 123 (QB Master); *Thiessen v Savage* (1996), 190 AR 154 (QB).

<sup>56</sup> *Sullivan v Newsome* (1987), 78 AR 297 (CA); *PanCanadian Petroleum Ltd v Husky Oil Operations Ltd* (1994), 163 AR 367 (QB).

[39] This small number of reported cases may indicate that perpetuity problems do not often arise in Alberta, or that the Alberta Act is effective as a balancing mechanism to curb the worst excesses of RAP, or both.

[40] One inescapable downside of the Alberta Act, however, is that it still requires lawyers to learn and understand RAP in order to apply the statute to save those dispositions which contravene it. As noted by the Law Reform Commission of Saskatchewan:<sup>57</sup>

The rule against perpetuities is perhaps the most notorious example of “lawyer’s law”. It is a complex and technical body of law apparently beyond the grasp of most laymen, and not a few lawyers.

## D. Perpetuities Law in England

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[41] England pioneered the wait and see principle in a reformed RAP model. It also allowed the testator or settlor to choose whether to use RAP’s perpetuity period calculated by reference to lives in being as their default perpetuity period or, alternatively, to specify in the instrument a fixed perpetuity period (typically 80 years) within which interests must vest.<sup>58</sup> This model is also available in some Australian states.<sup>59</sup>

[42] Implementing subsequent recommendations of its Law Commission, however, England has now moved to a different model which codifies RAP and legislates a fixed perpetuity period of 125 years within which interests must vest. No longer is RAP a common law rule modified by statute but still subject to centuries of case law. It is now completely codified and exists only as statutorily provided in the *Perpetuities and Accumulations Act 2009*.<sup>60</sup> All the law concerning lives in being and how to determine the perpetuity period using this concept is now obsolete.<sup>61</sup> The concept of vesting is still central to the codified perpetuities

<sup>57</sup> Law Reform Commission of Saskatchewan, *Proposals Relating to the Rules Against Perpetuities and Accumulations*, Final Report (1987) at 1 [Saskatchewan Report].

<sup>58</sup> *Perpetuities and Accumulations Act 1964* (UK), c 55, based on the work of the Law Reform Committee (England), *The Rule against Perpetuities*, Fourth Report (1956).

<sup>59</sup> See, e.g.: *Perpetuities and Accumulations Act 1968* (Vic), s 5 and *Perpetuities and Accumulations Act 1992* (Tas), s 6.

<sup>60</sup> *Perpetuities and Accumulations Act 2009* (UK), c 18, s 1 [England Act].

<sup>61</sup> England Report at para 7.30. The Law Commission noted that, since lives in being are now irrelevant under its recommended model, there is also no need to consider issues arising from modern reproductive technology: England Report at paras 8.32-8.34. Even where lives in being are used to calculate the perpetuity period, however, ALRI has already concluded that an after-born child need not be considered when applying gift-saving rules in Alberta’s perpetuity legislation: Alberta Law Reform Institute, *Assisted*

model but the perpetuity period for vesting is now a fixed number of years set solely by statute. The wait and see principle and certain other savings techniques remain in place, however, to save potentially troublesome interests.

[43] England sought to legislate a rational perpetuity period which would strike an appropriate balance between the rights and needs of the past and present but would also do so “with a far greater degree of simplicity than does the present law.”<sup>62</sup> The Law Commission recommended a single, fixed perpetuity period for vesting of 125 years for two reasons. First, it probably represents the longest vesting period that could be obtained under RAP using a royal lives clause, rather than the shorter average length of a life in being and 21 years.<sup>63</sup> Second, “the adoption of a long perpetuity period gives some recognition to the views of those who considered that the rule should be abolished altogether.”<sup>64</sup> As the Commission noted:<sup>65</sup>

The effect of adopting a 125-year period is to place a limited restriction – a long stop – on what settlors and testators wish to do, while recognizing that other factors, such as taxation, are likely in most cases to lead to the final vesting of property under a trust or settlement long before the end of the 125-year period.

[44] Moreover, England has significantly reduced the ambit of perpetuities law by eliminating the application of RAP to commercial dispositions. A primary reason for this reform is that the English Commission was of the opinion that making commercial dispositions subject to RAP is an unnecessary and unwarranted interference in parties’ freedom to contract.<sup>66</sup> To be precise:<sup>67</sup>

The real reason for exempting commercial transactions (whatever they may be) from the rule against perpetuities is that they are outside the mischief which the rule seeks to contain. The need to control the dead hand “in order to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal

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*Reproduction After Death: Parentage & Implications*, Final Report 106 (March 2015) at paras 100-104, online: <<https://www.alri.ualberta.ca/docs/FR106.pdf>>.

<sup>62</sup> England Report at para 8.9.

<sup>63</sup> A “royal lives clause” establishes a long perpetuity period by using as lives in being the survivors of a named royal person’s issue alive at the effective date of the instrument. Typically, these clauses implicate a large set of lives, thereby creating a greater likelihood that one member of that class might live until 90 or even 100. Such a survivor’s age plus 21 could result in a perpetuity period of 111 or 121 years, respectively.

<sup>64</sup> England Report at para 8.13.

<sup>65</sup> England Report at para 8.13.

<sup>66</sup> England Report at paras 7.17-7.18.

<sup>67</sup> England Report at para 7.42, quoting Ruth Deech, “Lives in Being Revisited” (1981) 97 LQR 593 at 594.

circumstances of the beneficiaries” simply does not arise in the commercial context.

[45] In formulating this recommendation, the English Law Commission ran into conceptual difficulties about how to effectively express the exclusion of RAP’s application to commercial dispositions. It solved the difficulty by deciding to completely codify RAP and then statutorily:<sup>68</sup>

... adopt an *inclusionary* rather than an *exclusionary* approach. In other words, we decided to define those interests to which the rule should apply rather than those to which it should not.

[46] In implementing this approach, the England Act carefully restricts RAP to specified types of estates, interests and rights arising under trusts or wills.<sup>69</sup> This approach also serves to exclude RAP’s application to all future easements, future restrictive covenants, options and rights of pre-emption.<sup>70</sup>

[47] It is arguable that the new English approach simply does not address the hard central issue of abolition. The long perpetuity period, combined with the generous wait and see principle and the narrowed scope of the law’s applicability significantly reduce the scope of perpetuities law in that jurisdiction.

## E. Perpetuities Law in New Zealand

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[48] New Zealand currently has a reformed, “wait and see” RAP statute based on the former English model.<sup>71</sup> In its 2013 review of trust law, the New Zealand Law Commission rejected abolishing perpetuities law altogether because, in its opinion, prudent social policy requires the presence of some kind of perpetuity period. Nor would New Zealand tax law suffice to curb perpetual trusts.<sup>72</sup>

[49] However, the Commission rejected further reliance on RAP and its central concepts of vesting and lives in being because that body of law is complex, uncertain, not well understood and causes problems in both drafting and

<sup>68</sup> England Report at paras 7.21 [emphasis in original]. See also paras 7.30-7.31.

<sup>69</sup> England Report at para 7.42; England Act, s 1. Exceptions are contained in s 2 for charities and pension schemes. Further exceptions may be specified by regulation under s 3.

<sup>70</sup> England Report at paras 7.7, 7.8, 7.10, 7.15, 7.35.

<sup>71</sup> *Perpetuities Act 1964 (NZ)*, 1964/47.

<sup>72</sup> Law Commission (New Zealand), *Review of the Law of Trusts: A Trust Act for New Zealand*, Report 130 (2013) at paras 17.7-17.8 [New Zealand Report].

practice.<sup>73</sup> While the current statute has ameliorated the worst problems of the unreformed common law RAP, it is still necessary to determine that a trust offends the common law RAP before the wait and see saving provisions of the statute can be applied to save it. Therefore, despite the presence of the reform statute, lawyers and drafters still need to know and understand all the difficult and arcane complexities of the common law RAP.<sup>74</sup>

[50] Moreover, while the wait and see provision can save trusts, it creates its own kind of difficulties:<sup>75</sup>

The wait and see approach does not resolve uncertainty, as whether or not the rule applies is not known at the outset as it is at common law. If it is not clear whether a gift will vest, a court decision as to its validity may well be delayed until near to the end of the period.

[51] The New Zealand Law Commission proposed a more radical solution for setting a perpetuity period. It recommended completely replacing RAP and its concepts of lives in being, vesting of interest and remoteness, and instead legislating a fixed duration period or limit for trusts of 150 years. This approach requires no complicated calculations to determine the perpetuity period. In addition, because the perpetuity period is certain at the commencement of the trust, there is also no need for the wait and see approach or any other saving provisions. Validity or invalidity of a trust will be immediately apparent based on whether it complies with the fixed duration period or not. According to the Commission:<sup>76</sup>

This would address the practical concerns expressed by those who favoured reform or complete abolition, through providing a bright-line rule that is easy to understand and promises certainty in trust dealings. It would prevent perpetual trusts, while allowing a high degree of flexibility for settlors to dispose of property as they choose.

[52] The upper limit of 150 years was chosen because of increasing life expectancies and also to allow existing trusts established for the duration of a life in being plus 21 years to continue until their natural end.<sup>77</sup> While the statute would prescribe a default fixed duration limit of 150 years, the terms of the trust

<sup>73</sup> New Zealand Report at para 17.5.

<sup>74</sup> Law Commission (New Zealand), *Perpetuities and the Revocation and Variation of Trusts*, Issues Paper 22 (2011) at paras 2.33–2.34 [New Zealand Issues Paper].

<sup>75</sup> New Zealand Issues Paper at para 2.35.

<sup>76</sup> New Zealand Report at para 17.9.

<sup>77</sup> New Zealand Report at para 17.12.

could specify a shorter period, if desired. At the 150 year mark (or shorter period specified in the trust), the trust property must pass to an absolute owner in accordance with the terms of the trust or, if none, absolute title will pass by operation of law to all surviving beneficiaries in equal shares.<sup>78</sup>

[53] Although the New Zealand proposals took a very different approach than England's most recent reforms, there is one aspect that is the same. As in the current English model, the New Zealand Law Commission recommended that perpetuities law should no longer apply to non-trust equitable and common law interests, including commercial interests. New Zealand's perpetuities law should focus solely on trusts, the Commission said.

[54] The New Zealand government took all the Law Commission's recommendations about trust law, including perpetuities, under advisement. It appointed seven expert trust lawyers to a Trusts Reference Group, which analysed the proposals and advised the Minister of Justice on the creation of new legislation.<sup>79</sup> A draft Trusts Bill and accompanying consultation document were released by the government for feedback in November 2016.<sup>80</sup> The final version of the Trusts Bill will be introduced for enactment in Parliament in 2017.

[55] The draft Trusts Bill implements the Law Commission's reformed perpetuities model based on a fixed duration rule. Section 11 provides that the maximum duration of a trust is 125 years (25 years less than the Law Commission's recommended 150 years) or a shorter duration if specified or implied by the terms of the trust. A charitable trust may continue indefinitely, however, as may any trust created by an enactment which provides for indefinite duration or duration for a period longer than 125 years. The Bill abolishes the common law RAP and repeals New Zealand's wait and see perpetuities statute.

<sup>78</sup> New Zealand Report, Recommendation R49 at 218. See also New Zealand Issues Paper at para 3.44.

<sup>79</sup> "Minister puts trust law reform on agenda," Scoop Media (29 May 2015), online: <<http://www.scoop.co.nz/stories/PA1505/S00584/minister-puts-trust-law-reform-on-agenda.htm>>; New Zealand, Ministry of Justice, "Government response to Law Commission report 'Review of the Law of Trusts: A Trust Act for New Zealand,'" undated, online: <<https://www.justice.govt.nz/assets/Documents/Publications/government-response-to-law-commission-report.pdf>>.

<sup>80</sup> New Zealand, Ministry of Justice, Media Release, "Trusts Bill exposure draft consultation" (10 November 2016), online: <<https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft/>>;

New Zealand, Ministry of Justice, *A new Trusts Act for New Zealand: Exposure draft of the Trusts Bill*, Consultation Document (November 2016), online: <[https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft/user\\_uploads/exposure-draft-trusts-bill-v13.pdf](https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft/user_uploads/exposure-draft-trusts-bill-v13.pdf)>;

New Zealand, Ministry of Justice, *Draft Trusts Bill*, online: <[https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft/user\\_uploads/trusts-bill.pdf](https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft/user_uploads/trusts-bill.pdf)>.

## CHAPTER 3

# Should Perpetuities Law be Abolished or Retained in Alberta?

## A. Introduction

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[56] As mentioned in Chapter 1, ALRI recommends in this Report that perpetuities law should be abolished in our province. Following extensive research, consultation, discussion and much consideration, ALRI is persuaded that Alberta should follow the examples of Manitoba, Saskatchewan, Nova Scotia and the ULCC in this regard.

[57] This chapter examines the arguments for and against abolition and discusses which have been found most persuasive and why. The consultation feedback received by ALRI on this issue is also outlined and put in context with our recommendation.

[58] Forty-five years ago, Alberta and ALRI concluded that the unreformed common law RAP is uncertain, arbitrary, overbroad and unnecessarily complex. For those precise reasons, RAP's worst excesses were extensively reformed by the Alberta Act. Therefore, all the arguments justifying that initial reform will not be repeated here because they have already been accepted and acted on. At this stage, what needs to be examined is whether any social or legal policy justifications remain for keeping the reformed RAP or, indeed, any perpetuities law at all.

[59] The discussion in this chapter largely relates to the area of estates and trusts, especially the parts concerning alternate legal mechanisms which might now perform RAP's job and support its abolition. Chapter 4 deals with the area of non-trust equitable and common law interests. It discusses in detail how best to eliminate the gap in the effectiveness of trust-based alternate legal mechanisms on abolition of perpetuities law.

## B. Are the Policies and Purposes Underlying Perpetuities Law Obsolete?

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### 1. HISTORICAL PURPOSE

[60] When RAP arose in late 17<sup>th</sup> century England, the central foundation of that society's wealth was real property, the ownership and control of which was concentrated in a minority class of aristocrats and landed gentry. By the device of family settlements using successive contingent interests, this class sought to keep its land within the family for generation after generation, protecting its wealth from outsiders, spendthrift heirs and creditors. Limitations on the heirs' interest and postponement of vesting were designed to protect the land from encumbrances or alienation for perpetuity, if possible.<sup>81</sup> This desire to control property long after death was usually referred to as control by "the dead hand." To offset such schemes, the courts created RAP "to strike a balance between the aristocracy's ambitions for its descendants and the commercial reality of a market economy in which land ought to be traded like any other commodity."<sup>82</sup> The battle of wits over perpetuities that went on between drafters of family settlements, parliament and the courts lasted in England until the late 1800s, when legislation finally allowed courts to grant a power of sale to life tenants, bringing an effective end to the days of strict settlements.<sup>83</sup>

[61] Canadian reform agencies leading the repeal movement have been uniformly dismissive of the relevance of English social history to our country, either historically or today. As the Law Reform Commission of Nova Scotia wrote:<sup>84</sup>

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.

Manitoba also "avoided all this history."<sup>85</sup> The Law Reform Commission of Saskatchewan stated bluntly that:<sup>86</sup>

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<sup>81</sup> Saskatchewan Report at 1.

<sup>82</sup> Saskatchewan Report at 2.

<sup>83</sup> Manitoba Report at 26.

<sup>84</sup> Nova Scotia Report at 12.

<sup>85</sup> Manitoba Report at 26.

<sup>86</sup> Saskatchewan Report at 3.

The social conditions which gave rise to the rule against perpetuities no longer exist. In a modern estate practice, a lawyer is rarely called upon to draw an instrument creating interests in persons any more remote from the testator than his children, or occasionally his grandchildren.

[62] Strictly speaking, it seems clear that the historical purpose of RAP and perpetuities law is no longer the justification for today's rule. Sometimes it is argued that the modern equivalent of this historical purpose is to prevent large concentrations of financial wealth from not being used effectively for the greater benefit of the community and the economy, since trust investments are restricted to prudent, limited assets rather than being used as risk capital. Others assert that this argument is overstated, politically controversial and speculative at best.<sup>87</sup>

[63] However, a more generally accepted "modern purpose" has been formulated to support the continuing relevance of RAP and perpetuities law. It will be discussed next.

## 2. MODERN PURPOSE

[64] Although the specific historical conditions which gave rise to RAP are now gone, many still regard it as a good idea to balance a settlor's or testator's desire to control disposition of property far into the future with the need of those who must later use the property in changed times and circumstances. A testator or settlor cannot truly make informed decisions about the future because they cannot predict changes in family circumstances, the law, and social and economic conditions. Therefore, according to this view, RAP is still needed to serve as a general balancing mechanism between past and present.<sup>88</sup> This is said to be the "modern purpose" of perpetuities law.

[65] If indeed such a modern purpose exists, it may be viewed narrowly as operating to balance the individual, bilateral interests of the original property owner with those of the future beneficiaries, or it may be viewed more widely as operating to benefit society by ensuring generally that property will be used to meet contemporary needs, not outdated ones.

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<sup>87</sup> The Law Reform Commission (Ireland), *Report on the Rule Against Perpetuities and Cognate Rules*, Report 62, (2000) at paras 4.05-4.06 [Ireland Report]. The Irish Commission recommended the abolition of perpetuities law.

<sup>88</sup> New Zealand Issues Paper at para 2.4.

[66] When ALRI first considered RAP in 1971, it affirmed the modern purpose's continuing value in Alberta. In doing so, it followed the lead of the English and Ontario law reform bodies. Both had given short shrift to any serious contemplation of abolition and viewed RAP (apart from its excesses) as enjoying general acceptance and satisfaction.<sup>89</sup> ALRI carried on this approach when it stated:<sup>90</sup>

We think the policy of the Rule is sound. Property is for those who are living and the law should in general recognize their right and power to control it. We also think however that the law should recognize the right of an individual to make provision for those immediately succeeding generations in whom he may be expected to have a personal interest. We do not think that a man should be able to give his property to someone alive two hundred years hence, and most would agree that he should be able to give it, for example, to his children after his wife's death or to his grandchildren even though the gift will not vest immediately. In other words the owner of property should have some power to postpone its vesting after it leaves his hands, but that power should not be uncontrolled. As Professor Simes has said, "the 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 they enjoy." To the extent that the Rule achieves a balance between these desiderata it should be retained.

[67] Today, 45 years later, does the modern purpose of RAP and perpetuities law still respond to a pressing need in our society? As the Manitoba Law Reform Commission pointed out:<sup>91</sup>

The law of the province should always be responding to real problems, not fanciful ones, whether it is the making of new law or the abolition of old law that is in question.

[68] While some law reform commissions recommend abolition, others continue to uphold the ongoing need for and effectiveness of RAP's modern purpose. For example, when the Law Commission of England consulted on this question in the late 1990s, a "significant and very distinguished minority of those

<sup>89</sup> Law Reform Committee (England), *The Rule Against Perpetuities*, Fourth Report (1956) at para 4; Ontario Law Reform Commission, *Perpetuities and Accumulations*, Report No 1 (1965) at 4.

<sup>90</sup> Alberta Report at 2.

<sup>91</sup> Manitoba Report at 32.

who responded" favoured abolition.<sup>92</sup> However, the majority of respondents argued for RAP's retention because:<sup>93</sup>

Some respondents considered that the abolition of the rule could have adverse economic consequences. There was a widespread view that, if the rule were abolished, settlors would undoubtedly create future interests which they could not under the present law. Indeed, this was supported by evidence from a number of firms of solicitors who had clients who wished to do just that.

[69] With so-called "dynasty trusts," some wealthy people seek to use perpetual trusts created in non-RAP jurisdictions to keep funds (no longer land) within their family confines for successive generations. As noted by the *Harvard Law Review*, "[i]t is the desire to attract long-term trusts that has led to the repeal of the Rule in some 21 US states and certain Caribbean jurisdictions."<sup>94</sup> Since trust monies are invested, however, such trusts do not hinder economies in the way tying up land did in the old days. But still, dynasty trusts are clear examples of the desire to control property for future generations.<sup>95</sup>

[70] There is a strong financial incentive in the United States to create these perpetual dynasty trusts because they can be used to avoid the federal Generation Skipping Transfer Tax.<sup>96</sup> This has led to the proliferation of such trusts in states without RAP.<sup>97</sup> Although theoretically perpetual, most of these trusts are drafted "so that each generation is given a power to appoint the remainder to the next generation outright or in further trust, meaning the power of the dead hand is well and truly diminished without the need for the rule."<sup>98</sup> But even so, there was an attempt by the Obama administration to limit the Generation Skipping Transfer Tax exemption to 90 years in order to do away with dynasty trusts.<sup>99</sup>

<sup>92</sup> England Report at para 2.25.

<sup>93</sup> England Report at para 2.25.

<sup>94</sup> Notes, "Dynasty Trusts and the Rule Against Perpetuities" (2003) 116 Harv L Rev 2588 at 2590.

<sup>95</sup> For a good discussion of dynasty trusts, see Nova Scotia Report at 29-34.

<sup>96</sup> New Zealand Issues Paper at paras 3.25, 3.28.

<sup>97</sup> New Zealand Issues Paper at para 2.39.

<sup>98</sup> New Zealand Issues Paper at para 2.11, citing as authority RH Sitkoff and MM Schanzenbach, "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes" (2005) 115 Yale LJ 356 at 413.

<sup>99</sup> Deborah L Jacobs, "Obama Budget Takes Aim At Popular Wealth Transfer Tools" *Forbes* (3 April 2014), online: <<http://www.forbes.com/sites/deborahljacobs/2014/03/04/obama-budget-takes-aim-at-popular-wealth-transfer-tools/#640a7c0e10f9>>.

[71] To the extent that RAP's modern purpose is said to serve as a general balancing mechanism between past and present in order to handle future changes in family circumstances, the law, and social and economic conditions, the Law Reform Commission of Ireland has pointed out that:<sup>100</sup>

... 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.

[72] In other words, perpetuities law is not actually designed to address the alleged modern purpose. Therefore, in the opinion of the Irish Commission, "[i]f salvaging and re-modelling trusts which are no longer appropriate to the needs of the time is the objective,"<sup>101</sup> then the most effective way to do so is not to rely on perpetuities law, but to amend the trust using variation of trust legislation which operates in a more finely-tuned and comprehensive way.

### 3. CONSULTATION

[73] ALRI sought feedback concerning the extent to which people believe perpetuities law has a valid modern purpose, formulating the issue as follows:

#### **ISSUE 1**

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What valid social or legal purpose, if any, does perpetuities law serve in today's society? (please indicate all that apply)

- (a) Perpetuities law does not serve a valid social or legal purpose in today's society.
- (b) Perpetuities law benefits beneficiaries by balancing their need to use the property in changed times and circumstances with the settlor's or testator's desire to control disposition of property far into the future.
- (c) Perpetuities law benefits society by ensuring that property will be used to meet contemporary needs, not outdated ones.
- (d) Other (please specify).

<sup>100</sup> Ireland Report, note 87 at para 4.10.

<sup>101</sup> Ireland Report, note 87 at para 4.11.

[74] The electronic survey results were evenly split between those who view perpetuities law as serving no modern social or legal purpose and those who think it does. In addition, one of the written submissions also disputed the existence of any modern purpose for perpetuities law.

[75] Going further, two written submissions indicated ongoing support for the historical purpose of RAP in modern Alberta. One lawyer wrote: “I tell people the reason for the rule is that everyone would tie up their property forever and that would kill business. I think that was true in 1700 and it is true now.” Another lawyer also disputed the obsolescence of RAP’s historical purpose in Canada. He believes the historical purpose of preventing land (in particular) from being tied up indefinitely is “equally as relevant as the modern purpose.” It is crucial for Alberta’s economic development that agricultural and recreational land remains free to change hands. He cited the *Agricultural and Recreational Land Ownership Act* and its *Foreign Ownership of Land Regulations* as evidence of the government’s desire to keep Alberta land available for alienation rather than being tied up or controlled by others.<sup>102</sup> This lawyer additionally noted: “I suggest that that legislation, in conjunction with the rule against perpetuities and our existing tax structure, has served to keep these lands changing hands and available for Canadians.”

[76] Both of those lawyers advise that they rely on perpetuities law to dissuade clients from trying to tie up property indefinitely. One lawyer wrote:

What I can tell you is that about one in ten clients would tie up something permanently if they could. They come in a number of categories but the ones that come to mind are businesses, recreational property and irresponsible relatives.

...

In each case, there would be multiple beneficiaries by the time anyone should have to look to have it wound up. The chances of unanimity seems slim.

[77] The other lawyer wrote:

I have had discussions with my clients for many years about the rule against perpetuities because, as they have been successful in acquiring their wealth, they have naturally wanted to preserve it. However, when I explain the reasons for the rule against perpetuities, and the fact that if Alberta did not have such a rule, they may not

<sup>102</sup> *Agricultural and Recreational Land Ownership Act*, RSA 2000 c A-9; *Foreign Ownership of Land Regulations*, Alta Reg 160/1979.

have been able to acquire the land they now enjoy, they have appreciated its beneficial impact.

[78] Not all lawyers, however, encounter a great demand to tie up property indefinitely. A different lawyer noted: "I have been practising estates and trusts law for 35 years and I can advise that I have rarely been called upon by individuals to create a perpetual trust."

#### **4. ALRI'S POSITION**

[79] ALRI's consideration of this issue reflects the division of opinion among respondents. A minority of the ALRI Board agrees with and supports the modern purpose of perpetuities law. The majority, however, sees perpetuities law as serving no modern social purpose and indeed, as acting instead as a paternalistic infringement on property owners' liberty, especially in a business setting. In farming communities there is admittedly a propensity to amass as much land for as long as possible, even if this behaviour is no longer typically displayed in urban settings. Corporate agribusiness landholdings and religious colonies, for example, are able to hold large properties indefinitely on a continuing basis. It is understandable why individual farmers would desire the same ability.

[80] Ultimately, agreement or consensus is less important on the issue of whether perpetuities law serves a modern social or legal purpose than it is on the determinative issue of whether other legal mechanisms now exist which adequately perform RAP's job. If such mechanisms do exist, then one or both of them can function as an adequate replacement regardless of whatever modern purpose, if any, perpetuities law may serve.

### **C. Do Other Legal Mechanisms Now Perform RAP's Job?**

#### **1. INTRODUCTION**

[81] Even if perpetuities law still serves a valid purpose in some circumstances, does it automatically mean that RAP is still the best legal mechanism to achieve that purpose? Do other legal mechanisms now exist which

could adequately handle any perpetuities problems that may arise? As stated in the Saskatchewan Report:<sup>103</sup>

The case for retention of the rule against perpetuities rests on the assumption that there still is a valid social purpose to be served by prohibiting perpetual clogs on the alienation of property. Although such schemes are rare at present, it is argued that some defence must be available in the event that a testator or settlor with peculiar notions undertakes to implement them. No doubt, the law should provide some protection against attempts to create perpetuities. The question, however, should not be whether such protection is required, but whether the rule against perpetuities is the most appropriate vehicle for implementing that policy. Reform of the rule has addressed some of its obvious inadequacies.... Nevertheless, the reformed rule cannot, by its very nature, eliminate all of the problems that exist under the common law. A British Columbia law professor, commenting on the Province's *Perpetuities Act*, concluded that "[the act] has removed the traps which abound in the common law ... [but] the Act has not made any simpler a technical and complex area of the law."

If mechanisms are available to prevent the creation of perpetuities that do not depend on the inevitably difficult notion of remoteness of vesting, abolition of the rule would be preferable to reform.

[82] In contrast to earlier eras, two legal mechanisms exist today in Canada which many say are preferable to reliance on RAP as ways to control trust-based perpetuity problems stemming from remoteness of vesting, namely, our modern income tax system and court-ordered variation of trusts. This part will examine each of these mechanisms in detail.

[83] As noted in Chapter 2, Alberta has already repealed the old, received English statute forbidding accumulations of income beyond a very short period and now relies on the reformed RAP to control the situation instead.<sup>104</sup> If perpetuities law gets abolished in Alberta, then reliance will similarly have to be placed on the taxation system and variation of trusts legislation to control perpetual accumulations. The other Canadian jurisdictions which repealed or abolished RAP repealed the accumulations statute as well.

<sup>103</sup> Saskatchewan Report at 5-6. The British Columbia law professor's quotation cited in this passage is footnoted as: AJ McClean, "The British Columbia Perpetuities Act - a Primer" (1979) 13 UBC L Rev 240.

<sup>104</sup> Alberta Act, s 24(1)-(2).

## 2. CONTROL OF PERPETUITIES ISSUES IN TRUSTS BY THE INCOME TAX SYSTEM

[84] The Manitoba Law Reform Commission stated, without going into any real detail, that the modern Canadian tax system worked against the long-term viability of successive trust interests:<sup>105</sup>

It may not be the function of the tax laws to prevent perpetuities, but there is little doubt that the chief beneficiary of ... [an] accumulation trust would be the revenue authorities, whatever tax changes the future may bring.

[85] In addition, the Manitoba Law Reform Commission also stated that the absence in Canada of succession duties and estate tax (apart from capital gains tax) had removed a major incentive for testators to create successive interest trusts in the first place.<sup>106</sup>

### a. Effect on trusts of the deemed disposition rule

[86] Though the Manitoba Report only discusses the general topic of capital gains tax, it is likely referring in actuality to the effect of the 21-year deemed disposition rule (DDR) which is applicable under the *Income Tax Act* to trust property.<sup>107</sup> Both capital gains tax and DDR were introduced in 1972. Pursuant to DDR, the majority of trusts are deemed to dispose of and reacquire all trust property at fair market value every 21 years.<sup>108</sup> The purpose of DDR is to avoid an unlimited deferral of capital gains. However, the practical result for most trusts is that, every 21 years, they face a large tax exposure even though they may have little to no liquidity with which to pay it.<sup>109</sup>

[87] DDR applies, not to the trusts themselves, but to “eligible property” held within trusts. Basically, eligible property includes all shares, whether publicly or privately traded, all real property, whether used for personal or business

<sup>105</sup> Manitoba Report at 32-33.

<sup>106</sup> Manitoba Report at 36.

<sup>107</sup> *Income Tax Act*, RSC 1985, c 1, (5th Supp), s 104(4)-104(5.2) [ITA].

<sup>108</sup> David G Thompson, “The 21-Year Rule” (in-house Continuing Legal Education Presentation delivered at Thorsteinssons LLP, 12 October 2010) at 4 [Thompson]; BDO, “Remember the 21 Year Deemed Disposition Rule for Trusts”, *The Tax Factor* 2011-03 (13 September 2011) 1, online: <<https://www.bdo.ca/en-ca/insights/tax/the-tax-factor/tax-factor-2011-03/>>.

<sup>109</sup> William Bernstein, “Planning for Trusts Faced With The 21-Year Deemed Disposition Rule” (Toolbox Seminar delivered at Gardiner Roberts LLP, (2 December 2014) at 5, online: <<http://www.grllp.com/publications/Planning%20For%20Trusts%20Faced%20with%20the%2021-Year%20Deemed%20Disposition%20Rule.pdf>> [Bernstein]. Under section 159(6.1), a trust may also furnish adequate security to the Minister and pay any tax owing over ten annual instalments.

purposes, and most types of personal property held in a trust.<sup>110</sup> Anything not within the *Income Tax Act* list of eligible property constitutes “ineligible property,” the main examples of which are personal property held as inventory within a trust and life insurance owned by a trust.<sup>111</sup>

[88] DDR also does not apply to “exempt property.” Section 108(1) of the *Income Tax Act* defines this as property that is owned by a person who, because of their non-residence in Canada or a provision of another tax treaty, is not obligated to pay income tax in Canada under Part 1 of the *Income Tax Act*.

[89] Certain types of trusts are expressly excluded from the application of DDR, so that it does not apply regardless of whether those trusts contain eligible property. For example, DDR will never apply to RRSPs, RESPs, TFSAs, registered pension plans or unit trusts.<sup>112</sup> The excluded trusts are largely special income plans, employee benefit trusts or pensions.

[90] Interests which have vested indefeasibly are also excluded from DDR because when such a beneficiary dies, it triggers a deemed disposition of their capital property immediately prior to death.<sup>113</sup> Therefore, DDR is not needed in order to capture those accrued capital gains within the trust.

#### **b. Can a trust avoid DDR?**

[91] The question arises as to whether a settlor might be able to convert eligible property into ineligible property before depositing it into a trust so that DDR would not apply. However, other than cash value life insurance or personal property held as inventory, there are not any obvious types of property that would lend itself to such an easy avoidance of DDR.<sup>114</sup> In other words, because of the wide range of property interests that are subject to DDR, “conversion” is not an effective avoidance strategy.

[92] There are two effective ways to avoid the application of DDR. First, prior to the trust’s 21<sup>st</sup> anniversary, the trustee may distribute trust assets to Canadian resident beneficiaries on a tax-deferred basis.<sup>115</sup> This strategy is permissible

<sup>110</sup> Thompson, note 108 at 11.

<sup>111</sup> Thompson, note 108 at 5.

<sup>112</sup> ITA, note 107, s 108(1) (definition of “trust”); Thompson, note 108 at 6; Bernstein, note 109 at 6.

<sup>113</sup> ITA, note 107, s 70(5).

<sup>114</sup> See Caroline Rheaume, *Strategic Use of Trusts in Tax and Estate Planning*, (Toronto: CCH Canada Ltd, 2012) at 142, where the author posits that “A cash value life insurance policy could then be an attractive investment for personal trusts.”

<sup>115</sup> ITA, note 107, s 107(2); Thompson, note 108 at 15-16; Bernstein, note 109 at 9.

because, once the trust assets are rolled over to the beneficiary, their death will trigger a realization of any accrued capital gains. Where available, this distribution strategy is the most common approach.

[93] Second, before the trust's 21<sup>st</sup> anniversary, the trustee may take steps to cause the trust interests of all Canadian resident beneficiaries to vest indefeasibly, thereby excluding the trust from the application of DDR.<sup>116</sup> This may be done by fixing the interests of the beneficiaries under a discretionary trust.<sup>117</sup> As an example:<sup>118</sup>

... a discretionary trust with six Canadian resident beneficiaries might, in advance of its 21-year deemed disposition date, cause each beneficiary's interest in the trust to vest indefeasibly so that the 21-year deemed disposition rule does not apply. The trust might provide that each beneficiary, or his or her estate, gets a 1/6 interest in the trust in 20 years. This could give the trustees control over ongoing management of the trust for the next 20 years....

[94] If the trust deed does not allow the trustee to cause an interest to vest indefeasibly, the trustee may be able to apply for a court variation of the trust under the applicable legislation.<sup>119</sup>

[95] None of these conversion strategies will work where there are non-Canadian-resident beneficiaries,<sup>120</sup> where the trustee is not authorized to distribute or encroach upon capital<sup>121</sup> or where it is an *inter vivos* trust to which the *Income Tax Act's* attribution rules apply.<sup>122</sup>

### c. Can DDR do RAP's job?

[96] If Alberta were to abolish RAP, would DDR constitute an adequate safeguard against perpetuity issues in trusts? In other words, does DDR replicate the effect of RAP and what it is designed to achieve?

<sup>116</sup> ITA, note 107, s 108, definition of trust, para (g); Thompson, note 108 at 27; Bernstein, note 109 at 21.

<sup>117</sup> Nicolas P Smith, "Taxation of Personal Trusts" (Paper delivered at Tax Fundamentals for the Estate Practitioner, Continuing Legal Education Society of British Columbia, Vancouver, February 2011) at 4.1.6, online: <<http://www.cle.bc.ca/PracticePoints/WILL/11-PersonalTrusts.pdf>> [Smith]; Caroline Rheume, *Strategic Use of Trusts in Tax and Estate Planning* (Toronto: CCH Canada Ltd, 2012) at 329-330.

<sup>118</sup> Thompson, note 108 at 27.

<sup>119</sup> Bernstein, note 109 at 23-24.

<sup>120</sup> Bernstein, note 109 at 12; ITA, note 107, s 107(2.1), (5).

<sup>121</sup> *Eaton v Eaton-Kent*, 2013 ONSC 7985.

<sup>122</sup> Smith, note 117 at 4.1.6-4.1.8.

[97] There are three possible scenarios that provide an answer to this question. First, a trustee may avoid DDR's tax consequences by distributing all of the trust capital to the beneficiaries prior to the trust's 21<sup>st</sup> anniversary. Since the beneficiaries' interests vest when that distribution is made, any perpetuity issues are resolved as of the date of distribution.

[98] Second, the trustee may ensure that all of the beneficiaries' interests vest indefeasibly prior to the trust's 21<sup>st</sup> anniversary. Since the beneficiaries' interests have vested within 21 years of the trust's creation, there are no perpetuity issues.

[99] Third, the trustee may do nothing. In this scenario, the trust would be taxed with capital gains on its 21<sup>st</sup> anniversary. Perpetuity issues will be present because the beneficiaries' interests will not yet have vested. However, provided the trustee continues to pay capital gains tax every 21 years, the trust could (in the absence of RAP) continue indefinitely.

[100] In most circumstances, it would surely be rare to find a trustee or settlor who would delay vesting for so long that DDR was continuously triggered. However, there may be legitimate reasons why a trustee would decide to repeatedly subject a trust to the application of DDR. For example, the tax consequences of the deemed disposition may be insignificant, like where the asset has a high cost base such as public company shares that are regularly traded. In this situation, the trustee may prefer to pay the nominal capital gains tax in order to keep the trust intact.

[101] There may also be non-tax considerations that make the distribution of trust assets unattractive. For example, if the purpose of the trust is to provide for disabled beneficiaries, the trustee or settlor may be content to pay capital gains tax every 21 years until the disabled beneficiary dies.<sup>123</sup> Or, shares in a family business may be held in trust for the business-owner's children. If the purpose of the trust is to provide income from the shares to the beneficiaries without giving them full control over the shares, it may be preferable to leave the shares in trust and pay the capital gains tax every 21 years. In such situations, the inconvenience and expense of paying capital gains tax may be more attractive than the loss of control that accompanies distribution of shares to the beneficiaries.

[102] It should also be noted that DDR would not operate to prevent the perpetual existence of trusts containing ineligible or exempt property, or to

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<sup>123</sup> Smith, note 117 at 4.1.6.

special income, pension or employee benefit trusts excluded by the *Income Tax Act*.

[103] Accordingly, while DDR alone could, in practice, reduce the incentive to create long-lasting trusts of unvested interests, it would still be technically possible to create them. In other words, DDR cannot be characterized as a complete replacement for RAP where trusts are concerned.

[104] Without specifying any analysis, ALRI reached this same conclusion in its 1971 report (which predated DDR and capital gains tax provisions of today):<sup>124</sup>

In our opinion however, although tax laws may have a deterrent effect on efforts to postpone vesting for an undesirably long time, they do not provide a complete substitute for the Rule and should not be relied upon to effect the desired policy in connection with future dispositions of property.

[105] A contrary opinion was recently expressed by the Law Reform Commission of Nova Scotia when it said:<sup>125</sup>

... 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.

The Commission further noted that tax law works to effect “substantial public redistribution of assets held in trusts of sufficient duration.”<sup>126</sup> Any long-term trusts of unvested interests which do exist will likely be taxed over and over again to the benefit of society.

#### d. Consultation

[106] ALRI sought feedback on this issue in the following terms:

### **ISSUE 2**

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One modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our income tax system’s 21-year deemed disposition rule. Is this tax rule a viable and adequate control of the situation?

<sup>124</sup> Alberta Report at 3.

<sup>125</sup> Nova Scotia Report at 32.

<sup>126</sup> Nova Scotia Report at 34.

[107] Electronic survey respondents were evenly split 50% each way on whether this mechanism is a viable and adequate way to address perpetuity issues.

[108] In a written submission, a lawyer who supports abolition also asserted that the DDR is a viable and adequate control of perpetuities issues, even if that is not its official purpose. While other lawyers advised ALRI that they rely on general perpetuities law as a means of dissuading clients from trying to tie up property indefinitely, this lawyer relies instead on the DDR and other tax law. He wrote:

I have been practicing estates and trusts law for 35 years and I can advise that I have rarely been called upon by individuals to create a perpetual trust. And when the issue arises, a discussion about the tax consequences arising from the 21 year deemed disposition rule under the *Income Tax Act*, and the taxation of income retained in a trust at the highest marginal tax rate usually ends the discussion and the dialogue moves to more practical solutions. In my discussions with other trust lawyers across the country through organizations such as the Canadian Bar Association (CBA) and the Society of Trust and Estate Practitioners (STEP), particularly lawyers in Manitoba, perpetual trusts are simply not an issue in practice.

[109] He elaborated on some other tax rules which he advised also serve to work against perpetual trusts, such as:

- Income retained in an *inter vivos* trust is taxed at the highest marginal tax rate.
- Effective January 1, 2016, income retained in a testamentary [trust] is taxed at the highest marginal tax rate.
- The spousal rollover rules require that the property vest indefeasibly in the name of the spouse within 36 months of the date of death. (reference to a spouse in this letter includes reference to a common law partner as defined in the *Income Tax Act*)
- The spousal trust rollover rules require that the property vest indefeasibly in the spousal trust within 36 months of the date of death, followed by a deemed disposition of the assets in the trust on the death of the spouse. (a spousal trust is not subject to the DDR)
- Assets in an alter ego trust are deemed to be disposed of on the death of the settlor. (an alter ego trust is not subject to the DDR)

- Assets in a joint spousal trust are deemed to be disposed of on the death of both spouses. (a joint spousal trust is not subject to the DDR)
- In order to achieve a rollover of farmland, the land must vest indefeasibly in the name of the child or grandchild within 36 months of the date of death.

[110] Having said this, however, the lawyer further advised that he and his firm often draft wills and trusts designed to last longer than 21 years, designing them with flexible powers so that, depending on the nature of the assets, the trustees can manage the trust to avoid severe income tax consequences. Cash assets, in particular, can be managed to spread the capital gains over time so that the tax is minimal on the 21<sup>st</sup> anniversary.

In my experience, testators create trusts for beneficiaries with a loving motivation, not with a desire to control assets in perpetuity. The vast majority of settlors want to protect their heirs' inheritance from a variety of concerns. The trusts created include:

- Spendthrift trusts
- Trusts to protect children with substance abuse problems
- Trusts to protect their child's inheritance from an overbearing, and sometimes abusive spouse, or perhaps it's the spouse who is the spendthrift
- Handicapped trusts
  - Some for severely handicapped beneficiaries
  - Some for children who function very well with small amounts of money, but who would be taken advantage of if they could collapse the trust and receive all of the capital. (ask the Public Trustee's office for a description of their typical client who shows up to their security window for cash on a daily basis)
- Wills which include a simple trust for young children because most parents feel that if a large amount of money was given to their children at age 18, they might not use the money appropriately. Most parents therefore choose a trust to a later age.

[111] Regardless of the nature of a client's motivation, however, it is apparent that, whatever the tax laws may provide, complex estate planning techniques in the hands of skilled lawyers are more than capable of creating multi-generational

trusts of private wealth and the businesses which create it. As the respondent lawyer further elaborated:

High net worth clients (\$10 million and more) have major concerns about how their children's inheritance will be managed. Here we design more complex trusts that ensure that the inheritance is wisely invested and the trustee is given the role of educating the children about how to manage their inheritance. With high net worth clients, the integrity of the family business can be a major factor in estate planning, and the trust is often one of the key estate planning tools. Credit protection and spousal protection become major issues in this process.

None of this should create an issue with RAP at the first generation, because they are lives in being. It is the trusts for succeeding generations that risk offending RAP. Clients have a concern about leaving a 21 year old child millions of dollars and that same concern applies to grandchildren and great-grandchildren. "Shirtsleeves to shirtsleeves in three generations" is a major issue. We are therefore tasked with designing trusts that protect our client's families into multiple generations. The tools we use are not intended to be perpetual trusts; our clients have no desire to control perpetually from the grave. But they do want [to] ensure that their children and their grandchildren have the tools to protect their inheritance from generation to generation. Restricting their planning to a life in being plus 21 years is too restrictive in modern estate planning.

**e. ALRI's position**

[112] All things considered, ALRI would be reluctant to rely solely on the Canadian income tax system as a way to address trust-based perpetuity problems. While the DDR does impact this area greatly, it is not necessarily a complete substitute for RAP. As noted, consultation respondents were evenly split on whether this mechanism is a viable and adequate way to address perpetuity issues. Taken as a whole, such a split does not add up to overwhelming support for this control mechanism and reinforces ALRI's own view on this point. Some Board members were also uneasy because federal tax legislation is not under the control of the Alberta government and could change at any time.

### 3. CONTROL OF PERPETUITIES ISSUES IN TRUSTS BY COURT VARIATION OF TRUSTS LEGISLATION

#### a. Strengths and limitations of court variation of trusts legislation

[113] In addition to modern income tax law, the 20<sup>th</sup> century saw a second critical legal development, one which would have been unthinkable in past eras. Starting about 60 years ago, modern trustee statutes began to codify the common law rule in *Saunders v Vautier* that a trust can be varied or terminated if all the beneficiaries of the trust are of full capacity and in agreement. If the trust is terminated, the beneficiaries would then receive absolute ownership of the trust property. But modern trust variation legislation goes much further and typically empowers a court to give substituted consent on behalf of any beneficiaries who are minors, incapacitated, unborn or even unascertained. This development means that “to a very large extent trusts in favour of persons in succession now remain in effect only with the willingness of the adult and capacitated beneficiaries that they do so”<sup>127</sup> together with discretionary court consent on behalf of those who cannot consent for whatever reason. As a result of the work of the Institute of Law Research and Reform (now ALRI), Alberta has had such modern trust variation legislation since 1973.<sup>128</sup>

[114] The Manitoba Law Reform Commission was the first to suggest that this modern statutory scheme is now the true source of balance between the competing interests of the settlor or testator and their present and future beneficiaries. RAP may have provided this balance in earlier centuries, the Commission said, but is no longer the best way to accomplish it today.<sup>129</sup> The other Canadian law reform bodies which recommend abolition of RAP consistently affirm this analysis as well.

[115] However, this view does have its critics. Even in the Manitoba Report, one commissioner expressed concern about substituting judicial discretion to vary or terminate for the complex, but known, dictates of RAP. According to him, a court acting under the trusts variation statute:<sup>130</sup>

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<sup>127</sup> Manitoba Report at 43.

<sup>128</sup> Institute of Law Research and Reform (Alberta), *The Rule in Saunders v Vautier*, Report 9 (1972), online: <<https://www.alri.ualberta.ca/docs/fr009.pdf>>. The Institute’s recommendations were implemented by *The Attorney General Statutes Amendment Act, 1973*, SA 1973, c 13, s 12 amending the *Trustee Act* (now RSA 2000, c T-8, s 42).

<sup>129</sup> Manitoba Report at 52-53.

<sup>130</sup> Manitoba Report at 64-65.

... would be constrained in the exercise of its discretion only by vague and occasionally hard-to-reconcile statutory directions that it consider both benefit to the beneficiaries and the intentions of the settlor. This risks replacing existing but curable complexity with the continuing uncertainty that flows from a loosely governed discretion exercised on a case-to-case basis.

[116] The Law Commission of England summarily rejected variation of trusts legislation as a sufficient replacement for RAP.<sup>131</sup> However, as noted by the Law Reform Commission of Nova Scotia, it “conspicuously, did not explain why.”<sup>132</sup>

[117] Saskatchewan accepted that variation of trusts legislation could be a viable substitute for RAP and noted an important point that:<sup>133</sup>

Applied to perpetuities problems, variation of trusts legislation would operate in much the same manner as a general *cy-pres* jurisdiction.... At the same time, unlike the *cy-pres* provisions contained in [RAP] 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 the existence of remote interests is a source of real inconvenience for the trust as a whole.

[118] The Uniform Trustee Act includes the latest and most comprehensive version of variation of trusts provisions designed to act, among other things, as a replacement for a repealed RAP.<sup>134</sup> In this model, not only can a court give substituted consent on behalf of beneficiaries who are minors, incapacitated, unborn, missing or unascertained, a court can also give substituted consent to override the objections of a dissenting beneficiary if certain conditions are met.<sup>135</sup> It is the strongest model yet that could be used to overcome a long-term trust of unvested successive interests, if the majority of current beneficiaries and the court (acting as substitute decision-maker) agree to vary, resettle or terminate the trust.

[119] ALRI has recently published a Final Report entitled *A New Trustee Act for Alberta*, which recommends adoption of this uniform model in Alberta, with a

<sup>131</sup> England Report at paras 2.19, 2.25.

<sup>132</sup> Nova Scotia Report at 32.

<sup>133</sup> Saskatchewan Report at 25.

<sup>134</sup> Uniform Law Conference of Canada, Uniform Trustee Act (2012), online: <<http://www.ulcc.ca/en/2012-whitehorse-yk/599-civil-section-documents-2012/1255-uniform-trustee-act>> [Uniform Trustee Act].

<sup>135</sup> Nova Scotia’s legislation was amended in 2011 to have the same feature: *Variation of Trusts Act*, RSNS 1989, c 486, s 3(4).

few differences to strengthen the model even further.<sup>136</sup> For example, court approval will continue to be needed for any variation, resettlement or termination of a trust even if all beneficiaries consent, unless the trust instrument itself authorizes such a change by beneficiary consent alone. The ALRI model also refines the list of factors which a court must consider before granting approval. The concept of settlor's intent and the use of extrinsic evidence to prove it are clarified. The ALRI model provides that a court cannot give substituted consent for a dissenting beneficiary if doing so would reduce or remove any fixed indefeasible interest of, or any interest that has vested absolutely in, that beneficiary.

#### b. Consultation

[120] ALRI sought feedback on this issue:

### **ISSUE 3**

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Another modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our court variation of trusts legislation, as bolstered by the ULCC reforms. Is this variation power a viable and adequate control of the situation for dispositions created by trust?

[121] A clear majority of the electronic survey respondents (71.1%) agreed that variation of trusts legislation is a viable and adequate control of perpetuities issues in this area. Among respondents who disagreed, one lawyer was concerned about increased demands on court time:

As far as mechanisms like variation of trust legislation, are not our Courts already bogged down enough without placing the additional burden on them of having to deal with wealthy family bickering?

[122] Some other respondents were concerned that, because a court application must be made in order to use such legislation, the expense of litigation could raise an access to justice issue. Another lawyer, however, disputed that expensive court applications would often be necessary. First, "a well drafted trust includes a power to vary, which, in accordance with section 42 of the *Trustee Act*, avoids a court application." This remains the case in ALRI's recommendations for a new

<sup>136</sup> Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Final Report 109 (2017), online: <<https://www.alri.ualberta.ca/docs/FR109.pdf>>. See Chapter 14 "Variation and Termination of Trusts" at 151-171 for a full discussion.

*Trustee Act*.<sup>137</sup> Secondly, “a variation of trust in my experience is usually achieved through negotiation, and the final application to the court is usually on a consent basis.” Moreover, proposed arrangements always direct that the applicants’ solicitor-client costs be paid out of the trust.

[123] This lawyer agreed that a court’s variation power is a viable and adequate control of perpetuities issues for dispositions created by trust. But if there is a concern that perpetual trusts (not generally a problem in Canada) will be established on abolition of perpetuities law, he agreed with the submission made by STEP Edmonton during ALRI’s consultation process on *A New Trustee Act for Alberta* that “perhaps it can be resolved by giving the court additional power to terminate a perpetual trust under our variation of trust legislation.” This suggestion was not expressly adopted in ALRI’s recommendations for a new *Trustee Act*, although a court will be able to terminate any trust (using substituted consent where needed) on application by its consenting beneficiaries.

#### c. ALRI’s position

[124] The majority of ALRI’s Board has confidence in the viability and adequacy of variation of trusts legislation as a sufficient control mechanism of perpetuities issues in trusts. This remedy is based in trust law and aimed at the same kinds of matters often found in perpetuities issues. ALRI’s recommendations for a new *Trustee Act*, when implemented, will only strengthen the effectiveness of trusts variation legislation. As will be discussed in the next chapter, such variation measures do, however, need to be extended to common law and non-trust equitable interests in order to cover all the same ground as perpetuities law.

[125] A minority expressed concern that it would be difficult to draft a variation of trusts provision that would give adequate direction to the court such that the court’s discretion to vary would be compatible with a judicial role (rather than simply a discretionary and subjective preference).

#### 4. HAVE OTHER CANADIAN PROVINCES EXPERIENCED POST-ABOLITION LEGAL PROBLEMS?

[126] Have Manitoba, Saskatchewan and Nova Scotia experienced any post-abolition legal problems? Donovan Waters, the Canadian trusts expert who wrote the Manitoba Report for the Manitoba Law Reform Commission, advises

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<sup>137</sup> Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Final Report 109 (2017) at 158-159, online: <<https://www.alri.ualberta.ca/docs/FR109.pdf>>.

that he is unaware of any occasion since RAP's abolition in Manitoba that anyone would have needed to invoke RAP to deal with a problem. He further advises that he keeps in touch with both Canadian and American jurisdictions which have abolished perpetuities law and has "yet to learn of problems that have arisen that retention of the Rule would have prevented."<sup>138</sup> There does not appear to be any significant Manitoba case law since the 1982 abolition which involves substantive problems stemming from the lack of perpetuities law.<sup>139</sup>

[127] A couple of post-abolition cases have been reported in Saskatchewan. In *Re Swenson Estate*, a will devised farmland in perpetuity via a series of successive life estates in order to achieve the testator's "intention that the land not be sold but remain with my parents' descendants."<sup>140</sup> The court used its variation power under *The Trustee Act, 2009*<sup>141</sup> and the rule in *Shelley's Case* to vary the testamentary trust so that the first life tenant received absolute title.

[128] In *Re Moore Estate*, a sizeable estate was left on perpetual trust with no residuary beneficiaries in order to fund small annual donations to animal protection and student scholarships.<sup>142</sup> The donations would use only a small part of the annual income and so the estate would create large accumulations as well. In an effort to use all the annual surplus income, the executor-trustee applied to court to vary the will to increase the donation amounts. The court noted the repeal in Saskatchewan of RAP and of the similar law against accumulations. The court also noted that, as a testamentary trust, the estate would pay hefty income tax each year, as well as potential capital gains tax every 21 years due to the DDR. Another problem is that the executor-trustee would be obliged to administer the estate for the rest of his life, and his descendants after him. The court referred to its variation powers under *The Trustee Act, 2009* as the means by which these problems could be resolved. It then adjourned the case indefinitely so that up-to-date valuations and information about long-lost

<sup>138</sup> Email from Donovan Waters QC to Peter Lown QC, ALRI Director (24 September 2013).

<sup>139</sup> One case simply noted that, had RAP still been the law in Manitoba, a non-charitable purpose trust at the centre of the case would likely have been void for violating it. The validity of the trust, however, ultimately turned on whether it could be enforced by individual band councils and chiefs, which the court held it could: *Keewatin Tribal Council v Thompson (City)* (1989), 61 Man R (2d) 241(QB).

<sup>140</sup> *Re Swenson Estate*, 2012 SKQB 540 at para 4.

<sup>141</sup> *The Trustee Act, 2009*, SS 2009, c T-23.01, s 51(1).

<sup>142</sup> *Re Moore Estate*, 2013 SKQB 410.

relatives could be sought. This information has now been filed and the estate is awaiting the court's direction.<sup>143</sup>

[129] The important point about these two Saskatchewan cases is not that legal problems arose, but that the court had adequate variation powers to resolve them. On the other hand, it could be argued that the application of RAP (whether reformed or unreformed) would have dealt with such problems swiftly and less expensively.

[130] There is no reported case law in Nova Scotia since the 2011 abolition of its perpetuities law.

## **D. Perpetuities Law: Abolish or Retain?**

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### **1. CONSULTATION**

[131] ALRI sought consultation feedback on this report's central issue by posing the following question:

#### **ISSUE 4**

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Taking all factors into consideration, such as any modern purpose of perpetuities law together with the potential control of perpetuities issues in trusts by income tax law and the power of courts to vary trusts, should perpetuities law be abolished or retained in Alberta?

[132] A clear majority of those who responded to our electronic survey (61.5%) support abolition, while a minority of 38.5% advocate retention. Among those respondents not already accounted for in the survey results who provided feedback by oral comments or written submissions, two support abolition and two support retention.

[133] STEP Edmonton did not, as an organization, provide ALRI with a formal response on this consultation but did provide one concerning our previous Report for Discussion, *A New Trustee Act for Alberta*.<sup>144</sup> In that response, STEP Edmonton stated its support for abolition of perpetuities law.

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<sup>143</sup> Telephone conversations between Scott Moffatt, Counsel, Holliday & Company – Wm H Law PC Inc, and Debra Hathaway, ALRI Counsel (10 February 2016) and (16 January 2017).

<sup>144</sup> Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Report for Discussion 28 (2015), online: <<https://www.alri.ualberta.ca/docs/rfd028.pdf>>.

[134] In the written responses received by ALRI, passionate reasons were advanced on both sides of the issue. For example, one lawyer who supports retention of perpetuities law wrote that:

I believe very strongly that abolishing the rule against perpetuities would not be in the best interests of our society as a whole.

In our current age where we have the extraordinary income and wealth gap, and the fraction of the population controlling an extraordinary amount of wealth and resources, anything that allows dynasty building and the preservation of the wealth to the few cannot be good.

[135] Another lawyer who advocates abolition of perpetuities law criticized the overly complex nature of sections 4 and 5 of the Alberta Act which create the wait and see rule and determine the statutory perpetuity period. They are, he stated, as much a trap for the unwary as the original RAP ever was.

[136] In particular, he argued that the continuing presence of perpetuities law hinders powers of appointment, which are an important modern estate planning tool requiring flexibility. The current method whereby lengthy multi-generational trusts are created to protect and preserve assets is to create a trust and then also give non-fiduciary power(s) of appointment to a donee so the donee can direct the trustees, by deed or will, how to distribute the property among the beneficiaries. As he explained:

However, RAP can become an issue if the donee is given the power to create a new trust, or change the terms of the head trust, or appoint new trustees with further delegated powers of appointment. One of the keys in giving the donee the power to appoint by way of new trusts is that the sub-trust is part and parcel of the head trust. The trust property does not vest in the hands of the donee unless the donee is given a general power of appointment (or unless the trustees distribute property to the child in exercise of their fiduciary power of appointment). This is a critical issue from an estate planning perspective. It allows the donee to direct that the property move from the head trust to a sub trust, and vest many years in the future. And, if allowed by the terms of the power of appointment, the donee might even give her children a similar power of appointment.... This is a critical issue in maintaining creditor protection.

Critics might suggest that this process should be controlled by RAP. But in fact a power of appointment is actually giving the donee the power to decide who gets the trust property; it actually gives the donee power to control the disposition of the trust property. The settlor/testator wants the child to decide who is to receive her share

of the trust/estate. Income tax laws will usually require an earlier vesting in order to avoid the 21 year deemed disposition rule. But flexibility needs to be maintained, to allow different sub trusts to be appointed. For example, perhaps the child has a handicapped child from her first marriage. The child will want to maintain a portion of his trust for the benefit of the handicapped child with a sub trust, and on the death of the child, to other children and/or grandchildren, with trusts that might offend RAP. It is critical to the child in this example that the assets not form part of her estate and thus be available to a claim under *Wills and Succession Act* by the child's second spouse.

[137] Because the time for vesting starts to run from the head trust, this lawyer's opinion is that this aspect of estate planning would be simpler if perpetuities law did not exist.

## 2. ALRI'S POSITION

[138] Following much discussion and debate, the ALRI Board makes a majority recommendation that perpetuities law be abolished in Alberta. ALRI agrees with all the reasons for doing so which have been canvassed in this report already, but highlights the following as the most compelling factors in reaching our decision.

[139] Firstly, Manitoba, Saskatchewan and Nova Scotia have all abolished perpetuities law without any apparent major problems resulting from their decision. ALRI agrees with the careful analysis, consideration and conclusions expressed by those jurisdictions. We also endorse the recommendation of the ULCC that it is time to abolish perpetuities law across Canada.

[140] Secondly, the Alberta Act reformed the worst excesses of the common law RAP, but it nevertheless remains a complex piece of legislation to understand and apply. Further reforms to this legislation are possible, but the more fundamental question is whether a strategy predicated on RAP remains the best approach to this area. We do not think it is.

[141] Thirdly, whatever the modern social and legal purpose of perpetuities law may be, ALRI is persuaded that other modern legal mechanisms now exist which adequately address it. In particular, ALRI believes that any issues in the area of trusts can be handled by our jurisdiction's court variation of trusts legislation, particularly as enhanced by the Uniform Trustee Act reforms endorsed by ALRI.

[142] Fourthly, our consultation feedback on this central issue indicates majority support for abolition. While we recognize that our survey did not conform to a scientific methodology, the results do at least anecdotally suggest that many

lawyers are now comfortable with the idea of doing away with specialized perpetuities law.

[143] A minority of Board members do not agree with the majority recommendation for abolition and would instead retain the Alberta Act, reforming it in a similar manner as England. They would simplify calculation of the perpetuity period by eliminating the role of real or statutory lives in being and substituting a statutory, fixed perpetuity period of between 80 and 120 years. The wait and see rule and other saving provisions would be retained. The minority was itself split over whether RAP should continue to apply to commercial interests.

### **RECOMMENDATION 1**

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Perpetuities law should be abolished in Alberta.

## CHAPTER 4

# Addressing Non-Trust Equitable and Common Law Interests

## A. Introduction

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[144] Over the centuries, case law extended RAP to areas well beyond the family trust and estates context. The unreformed RAP also applies to future or contingent common law or equitable property interests in non-trust contexts. For example, it applies to future or conditional easements, options to purchase, rights of first refusal, rights of re-entry following a condition subsequent, and successive remainder interests.

[145] In jurisdictions like Alberta which have statutorily reformed RAP, modifications are typically made to how RAP applies to non-trust equitable and common law interests. Sometimes, the Alberta Act exempts certain interests from RAP, such as an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, a right of first refusal or pre-emption as it applies to such an option, and an option to renew a lease.<sup>145</sup> The Act also exempts a gift over from one charity to another.<sup>146</sup>

[146] In other cases, the Alberta Act sets a fixed perpetuity period. Regarding commercial options generally, for example, the Act legislates a perpetuity period of 80 years and, without limiting this generality, notes that it will apply to all contracts concerning a future sale or lease, options in gross, rights of pre-emption or first refusal, and to future *profits a prendre*, easements and restrictive covenants.<sup>147</sup> When it comes to determinable interests in real or personal property and the possibility of reverter or resulting trust, the Act shortens the perpetuity period to 40 years. The Act further clarifies that (except for mineral leases) if the determinable event fails to happen within the perpetuity period, the determinable interest becomes absolute.<sup>148</sup>

[147] These non-trust equitable and common law interests raise special issues for consideration if perpetuities law is abolished. As noted in Chapter 3,

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<sup>145</sup> Alberta Act, s 17.

<sup>146</sup> Alberta Act, s 19(4).

<sup>147</sup> Alberta Act, s 18.

<sup>148</sup> Alberta Act, s 19(1)-(2), (5).

recommending abolition of perpetuities law is predicated on court variation of trusts legislation being a sufficient tool in the absence of perpetuities law to handle any problematic issues arising out of trusts and estates in the future. Yet this legislation cannot be a complete answer in the area of perpetuities because it does not apply to the non-trust equitable and common law dispositions now subject to perpetuities law.<sup>149</sup>

[148] As noted by the Law Reform Commission of Nova Scotia, the repeal of perpetuities law is advisable in this particular area only “[i]f a suitable means can be found to deal with cases of undue inconvenience or actual hardship arising from a long-term unvested property interest....”<sup>150</sup>

[149] How did the Canadian jurisdictions which have abolished RAP – Manitoba, Saskatchewan and Nova Scotia – deal with this issue? What solutions did they propose?

## **B. Overview of Potential Solutions**

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### **1. MAKE VARIATION OF TRUSTS LEGISLATION APPLICABLE**

[150] According to the Manitoba Law Reform Commission, if a court’s ability to consent to the variation or termination of trusts under variation of trusts legislation is truly to perform the same balancing role as RAP, it must apply to everything to which RAP currently applies. The Commission outlined two alternate solutions to achieve this:<sup>151</sup>

- (1) Statutorily provide that the variation of trusts legislation is applicable to all successions of limited interests whether they are equitable or common law in nature; or
- (2) Abolish common law or legal successive interests by deeming them to be held on trust for the owners of the estate, i.e., convert all successive estates to equitable interests taking effect behind a trust and then the variation of trusts legislation will automatically govern them.

<sup>149</sup> Nor would modern taxation law be any check on such issues either, since the DDR provisions apply only to trusts.

<sup>150</sup> Nova Scotia Report at 28.

<sup>151</sup> Manitoba Report at 58.

[151] The Manitoba Commission recommended the second solution as the most conceptually consistent. Its final recommendation elaborates on the effect of this solution:<sup>152</sup>

10. That common law successive estates be deemed to be held on trust for the owners of those estates. The trustees would be the adult and capacitated estate beneficiaries, and they would hold the legal or other title to the underlying property in trust for all vested and contingent beneficiaries, whether born, capacitated, ascertained, or otherwise.

[152] The Manitoba legislature implemented this recommendation.<sup>153</sup>

[153] This solution does not address equitable interests which exist outside a trust, such as an option to purchase. Such non-trust equitable interests are not of course subject to variation of trusts legislation, nor would they be converted to trust interests by this solution's deeming provision since it applies only to common law or legal successive interests. Under this solution, therefore, non-trust equitable interests could exist in perpetuity, with no way to terminate or modify them in the future if they cause problems.

[154] The Law Reform Commission of Saskatchewan rejected Manitoba's choice of the second solution. Instead, it advocated use of the first solution of statutorily providing that variation of trusts legislation would be applicable to all successions of limited interests whether equitable or common law in nature. The Commission preferred this solution essentially because of the nature of the Torrens System:<sup>154</sup>

The so-called "legal doctrine of estates" that gives effect to future interests not created by trust is largely an historical anachronism. It does not fit well with the general concepts underlying the Land Titles system. It was probably for that reason that the Manitoba Law Reform Commission recommended abolition of the doctrine by converting legal future interests into trust interests. However, because legal future interests are virtually non-existent in practice in Saskatchewan, such interests may be encompassed by variation of trusts legislation in a simpler manner. Provision can be made for the unlikely possibility that a legal future interest will be created by will, contract, or other grant by extending the scope of variation of trusts legislation to permit variation of legal future interests. This result can be achieved

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<sup>152</sup> Manitoba Report at 59.

<sup>153</sup> *The Perpetuities and Accumulations Act*, CCSM, c P33, s 4.

<sup>154</sup> Saskatchewan Report at 26.

by including legal future interests within the definition of “trust” for purposes of the legislation.

[155] However, when it comes to contingent future options to purchase, the Saskatchewan Commission did not recommend extending the variation of trusts legislation to deal with those particular interests because:<sup>155</sup>

... introduction of a discretionary element into the law relating to options would be commercially undesirable. It has been suggested ... that options exercisable at some remote time in the future do not create unusual or insurmountable difficulties in any event. For that reason, it is unnecessary in the Commission’s opinion for the law to incorporate any mechanism to control options.

[156] So, as in Manitoba, these interests should simply be allowed to endure in perpetuity, the Saskatchewan Commission said. But, in the alternative, if some control were thought to be needed, the Commission recommended enacting a simple default statutory limit on the duration of options, if the parties had not otherwise provided such a limit in their option agreement. Of course, having a special duration limit for these interests is, in reality, reintroduction of a special perpetuity rule for this class of interests, but the Commission did not dwell on this inconsistency with its main recommendation. The Commission was adamant that no form of RAP, in particular, should be retained as a way of handling such interests because that approach contradicts RAP’s general repeal.<sup>156</sup>

[157] The Saskatchewan legislature, however, chose to adopt that rejected means of addressing those interests. The variation of trusts legislation did not redefine “trust” to include legal future interests and did not set a statutory limit on duration for options. Instead, it made consideration of the repealed law of RAP a prerequisite to a court exercising a discretionary power to vary or terminate one of those problematic interests:<sup>157</sup>

**Authority of court to approve variations – re dispositions formerly subject to the rule against perpetuities**

**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 the 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.

<sup>155</sup> Saskatchewan Report at 27.

<sup>156</sup> Saskatchewan Report at 27.

<sup>157</sup> *The Trustee Act, 2009*, SS 2009, c T-23.01, s 51(1).

[158] The Law Reform Commission of Nova Scotia criticized the Saskatchewan legislation's broad wording in two regards. First, the provision grounds the court's jurisdiction in a hypothetical application of repealed law.<sup>158</sup> Second, it "leaves open the potential application of the court's virtually unlimited variation jurisdiction to interests created in the course of commercial bargaining."<sup>159</sup> The Commission considered that such judicial interference in parties' freedom to contract is inappropriate.

[159] A third criticism, of course, is that Saskatchewan lawyers will still need to learn and understand the legal intricacies of the common law RAP despite its general abolition.

## 2. ENACT SEPARATE VARIATION LEGISLATION

[160] The Law Reform Commission of Nova Scotia did not choose any of those solutions to handle problems stemming from the absence of RAP in regard to long-term contingent non-trust property interests. It proposed a different solution, namely, enactment of a separate variation statute to address such interests.

[161] The Nova Scotia Commission recommended the creation of court jurisdiction to "order a variation (including advanced or postponed vesting, or termination) of any unvested property interest, other than one subject to the *Variation of Trusts Act*."<sup>160</sup> Its proposed model was accepted by the Nova Scotia government and implemented in the *Real Property Act*.<sup>161</sup> The court's new variation and termination powers apply to "every contingent interest in real property" arising before or after the effective date of the statutory provisions, except for those "held on a trust under any will, settlement or other disposition" or those prescribed by regulation as being excluded.<sup>162</sup> There are currently no regulations.

[162] Under section 31 of the Act, the court's power arises when the following test is met:

**31(4)** Upon hearing the application and being satisfied that the reasonable use of the real property will be impeded, without practical

<sup>158</sup> Nova Scotia Report at 45.

<sup>159</sup> Nova Scotia Report at 42.

<sup>160</sup> Nova Scotia Report at 45.

<sup>161</sup> *Real Property Act*, RSNS 1989, c 385, ss 29-32.

<sup>162</sup> *Real Property Act*, RSNS 1989, c 385, s 30.

benefit to others, if the interest is not varied or terminated, the court may make an order varying, including advancing or postponing the vesting of, or terminating the interest in the real property.

(5) In making a determination pursuant to subsection (4), the court shall have regard to

- (a) the length of time that the interest has remained or could be expected to remain contingent;
- (b) the intention, if ascertainable, of the grantor of the interest and, where the grantee was a *bona fide* purchaser for value, the grantee; and
- (c) the position of any person appearing before the court on the application.

[163] The court may also order compensation “for any loss, injury, interference or damage suffered by any person arising from the variation or termination of the interest.”<sup>163</sup> The Law Reform Commission of Nova Scotia expects such orders to be rare, “[g]iven the requirement that the order must not deprive any person of practical benefit of the interest.”<sup>164</sup>

[164] These new court variation and termination powers are wide enough to apply to equitable interests which exist outside a trust, such as options to purchase. As noted above, the Nova Scotia Commission criticized Saskatchewan for allowing a court’s virtually unlimited variation jurisdiction to be applied to interests created in the course of commercial bargaining. Yet Nova Scotia’s legislation has the same potential. Presumably such interests could be excluded by regulation under the Act although, as noted, no regulations have yet been enacted.

### 3. CONSULTATION ISSUES

[165] ALRI sought feedback on how best to proceed in this area. ALRI’s first consultation question outlined various ways of dealing with common law or legal property interests. (Please note that the following issues are numbered as they were in the Report for Discussion).

<sup>163</sup> *Real Property Act*, RSNS 1989, c 385, s 31(6).

<sup>164</sup> Nova Scotia Report at 47.

## ISSUE 8

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Given that current court variation of trusts legislation does not apply to **common law or legal** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?

- (a) Statutorily provide that variation of trusts legislation applies to them.
- (b) Statutorily abolish common law or legal property interests and convert them to equitable interests taking effect behind a trust so that variation of trusts legislation will apply to them.
- (c) Enact a separate variation statute for them.
- (d) Enact a statutory duration limit for them.
- (e) Do not make them subject to any variation statute or duration limit.
- (f) Other (please specify).

[166] Half of the electronic survey respondents favoured statutorily providing that variation of trusts legislation apply to such interests. The other half was more or less evenly distributed among the other four described choices.

[167] ALRI's second consultation issue outlined the slightly different ways of dealing with non-trust equitable property interests.

## ISSUE 9

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Given that current court variation of trusts legislation does not apply to **non-trust equitable** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?

- (a) Statutorily provide that variation of trusts legislation applies to them.
- (b) Enact a separate variation statute for them.
- (c) Enact a statutory duration limit for them.
- (d) Do not make them subject to any variation statute or duration limit.
- (e) Other (please specify).

[168] Here, majority support of 60% favoured statutorily providing that variation of trusts legislation apply to such interests. Again, the remaining

support was more or less evenly distributed among the other three described choices.

#### 4. ALRI'S POSITION

[169] ALRI disagrees with using the solution chosen by Manitoba, namely, the deemed conversion of all common law or legal successive interests to equitable interests taking effect behind a trust in order to make the variation of trusts legislation apply to them. This deemed conversion could have much broader implications for such interests beyond a narrow concern for perpetuity issues. Moreover, this solution does nothing to address non-trust equitable interests which would not be subject to deemed conversion and therefore not subject to the variation legislation.

[170] Nor does ALRI agree with using the solution recommended by the Law Reform Commission of Saskatchewan, namely, statutorily providing that the variation of trusts legislation applies to all successions of limited interests whether they are equitable or common law in nature. This solution is admittedly attractive because it appears to be straightforward with a minimum of complexity, which may be why it was also the popular choice in our electronic survey. However, on reflection, ALRI has concerns about certain drawbacks of this approach.

[171] First of all, such a blanket extension of the variation of trusts legislation would also extend its ambit to contingent future options to purchase. This would negatively affect confidence in commercial transactions involving such options to purchase by introducing uncertainty into them, since court discretion could alter the terms of the option. The Law Reform Commission of Saskatchewan recognized this problem too and recommended exclusion of options or, if not, the setting of a special duration limit for them.

[172] Secondly, if someone did need to vary a future contingent common law or non-trust equitable interest, would it be obvious to them that they should use for that purpose a statute concerning variation of trusts? ALRI does not believe that it is obvious where the remedy would be found but is, rather, actually counter-intuitive.

[173] Therefore, ALRI prefers to adopt the Nova Scotia approach of enacting separate legislation for the variation of these interests. It is the more transparent solution. However, as already noted earlier in this chapter, it too would apply to

commercial interests, including options, unless they were excluded by regulation.

[174] ALRI agrees with the view expressed in England and New Zealand that the extension of perpetuities law to commercial transactions is an unwarranted breach of commercial parties' freedom to contract. Abolishing perpetuities law, as ALRI recommends, takes care of that issue. But, in actuality, it makes a circuitous reappearance if variation legislation applies too broadly to commercial interests as well as to private interests.

[175] Therefore, while ALRI recommends that Alberta enact variation legislation based on Nova Scotia's *Real Property Act*<sup>165</sup> to address future contingent common law and non-trust equitable interests, ALRI also recommends that the new statute not apply to any such interest arising out of a "commercial disposition." The Act (or a regulation under the Act, if that aspect of the Nova Scotia legislation is also used in Alberta) should define "commercial disposition" using the definition currently found in section 18 of the Alberta Act, namely, as being "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time."

## **RECOMMENDATION 2**

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In order to provide for court variation of future contingent common law and non-trust equitable interests, a statute based on Nova Scotia's *Real Property Act* should be enacted in Alberta.

## **RECOMMENDATION 3**

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The new variation statute should not apply to any interest arising out of a commercial disposition, defined as "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time."

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<sup>165</sup> *Real Property Act*, RSNS 1989, c 385.



## CHAPTER 5

# The Mechanics of Abolition

## A. Introduction

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[176] This chapter explores the legislative steps required to implement this Report. First, how will abolition occur? Secondly, what transitional provisions should be put in place? Thirdly, what consequential amendments will be needed to other statutes?

## B. Abolition Process

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[177] The Alberta Act continues the common law RAP, which is then extensively modified by that statute.<sup>166</sup> Since the Alberta Act does not itself create or codify RAP, ending this law in Alberta would actually involve a two-step process:

- (1) statutorily abolish RAP as it exists at common law and then,
- (2) repeal the Alberta Act which would be spent or meaningless at that point.

[178] The Uniform Trustee Act model assumes simultaneous enactment of that Act with the abolition of perpetuities law. It contemplates that the two-step abolition and repeal provision, transitional provisions and consequential amendments related to ending perpetuities would be placed within the new *Trustee Act*. However, ALRI disagrees with this approach.

[179] Perpetuities law currently applies well beyond the realm of trust law. It would be counter-intuitive for anyone involved in non-trust perpetuities issues to look for abolition and transitional provisions in a trust statute. For that reason, ALRI recommends that a separate statute be enacted to accomplish the process of abolition and repeal of perpetuities law. That separate Act will also be the one to enact transitional provisions and consequential amendments flowing from the abolition.

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<sup>166</sup> Alberta Act, s 2.

## C. Transitional Provisions

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### 1. THE EXPERIENCE OF OTHER JURISDICTIONS AND MODELS

[180] When perpetuities law is abolished, abolition is generally retrospective, with certain exceptions. In jurisdictions like Manitoba, Saskatchewan and Nova Scotia where the unreformed common law RAP existed, it seemed relatively straightforward to give the total abolition of perpetuities law a retrospective application, sweeping away the old law almost in its entirety, disregarding whether a contingent interest was created in the past, the present or the future. Exceptions to retrospective application were commonly made only where:

- (1) an interest had previously been held by a court to be void for violating RAP, or
- (2) the vesting period had already terminated and there had been active reliance on that termination (for example, by transferring property).

[181] In other words, situations that were legally completed could not be reopened but, apart from that, existing interests would no longer be subject to any challenge based on RAP.<sup>167</sup> As the Manitoba Law Reform Commission said regarding its proposed Act implementing abolition:<sup>168</sup>

... given the clear policy of the Act, it is preferable to have a clean break with the old law, rather than allow the old law to linger on into an indefinite future, subject only to the limitation of actions, and with respect only to some instruments, namely those taking effect before the Act comes into force. Given the policy of the Act, we can see no compelling justification for leaving “skeletons in the cupboard”, wills and deeds in strong rooms and desks that in years to come are recognized as having provisions which are in violation of the perpetuity or accumulation rules, with all that may flow therefrom.

[182] The Uniform Trustee Act provides two models for transitional provisions flowing from abolition of perpetuities law. Sections 87-90 address the transitional needs of jurisdictions which still have in force the unreformed common law RAP. The ULCC transitional provisions are similar to the ones found in the Manitoba, Saskatchewan and Nova Scotia legislation.

<sup>167</sup> See, for example: Manitoba Report at 84-88; *The Perpetuities and Accumulations Act*, CCSM, c P33, s 5; Saskatchewan Report at 27-28; *The Trustee Act 2009*, SS 2009 c T-23.01, s 60; Nova Scotia Report at 49-51; *Perpetuities Act*, SNS 2011 c 42, s 4. Slight differences in the exceptions to retrospectivity exist among these jurisdictions, but nothing that contradicts their basic common approach.

<sup>168</sup> Manitoba Report at 87.

[183] Sections 91-92 of the ULCC model address the transitional needs of jurisdictions which (like Alberta) have previously reformed the common law RAP by enacting a wait and see perpetuities statute. Section 91(3) and (4) similarly provides for retrospective application of the abolition of perpetuities law with the same basic exceptions as discussed above. (Other transitional provisions found in this part of the ULCC model will be discussed below).

## 2. CONSULTATION

[184] ALRI sought feedback on transitional issues using a general question in the Report for Discussion.

### **ISSUE 11**

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How should transitional issues be handled?

[185] ALRI's electronic survey posed a more detailed inquiry to which supporters of abolition were specifically routed. They were asked whether they supported retrospective application of abolition and, if so, with any exceptions? The two exceptions discussed above were summarized and input was requested.

[186] Among abolition supporters, 65% agreed with retrospective application. A total of 41.7% concurred that an exception should be made where an interest had previously been held by a court to be void for violating RAP. The second exception, applicable when the vesting period had already terminated and there had been active reliance on that termination, garnered 91.7% support. One respondent suggested there should be full retroactivity, without any exceptions.

## 3. ALRI'S POSITION

[187] Full retroactivity is not advisable because it would reopen vested interests and upend settled legal rights. Any interest which has vested before the effective date of abolition should never be able to be challenged or reopened on the basis of abolition of perpetuities law.

[188] ALRI does agree that, as in other jurisdictions, abolition of perpetuities law should be applied retrospectively to contingent interests existing at the effective date of abolition, regardless of when those interests were created. ALRI also agrees, however, that retrospectivity should be subject to some exceptions, so that contingent interests which were terminated otherwise than through

vesting before the effective date of abolition should not be revived. Specifically, it is ALRI's intent that retrospectivity should not apply in two situations.

[189] First, if a contingent interest was void *ab initio* for violating the unreformed common law RAP which governed in Alberta before 1973, that interest remains void. Nor should this result rely on a court order having been made to declare the interest void. It is theoretically possible that some litigation may be generated seeking to revive a terminated interest from that era which was not previously declared void by a court, but such cases are not likely to be common.

[190] Second, if a perpetuity period governing a contingent interest has expired before the effective date of abolition, then that interest has been terminated and is not revived. This exception applies whether the perpetuity period was governed by the statutory lives provisions of the Alberta Act or any of that Act's fixed perpetuity provisions.

[191] While other abolition jurisdictions have required active reliance on an expired perpetuity period as a prerequisite to application of this exception, ALRI disagrees with including such a requirement. If a perpetuity period has expired, the contingent interest which it governs is terminated and is no longer in effect at the date abolition comes into force. Therefore, it should not be retrospectively revived, regardless of reliance.

[192] If a perpetuity period relating to a contingent interest has yet to expire as of the effective date of abolition – whether under the statutory lives provisions of the Alberta Act or any of that Act's fixed perpetuity provisions – the interest will be subject to the retrospective application of the abolition of perpetuities law. Therefore, it will no longer be subject to any perpetuities law.

#### **RECOMMENDATION 4**

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The abolition of the rule against perpetuities and the repeal of Alberta's *Perpetuities Act* should be applied retrospectively to contingent interests regardless of when those interests were created, subject to two exceptions.

## RECOMMENDATION 5

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The retrospective abolition and repeal of perpetuities law in Alberta should not apply in two situations:

- (1) where a contingent interest was already void at common law for violating the rule against perpetuities before the effective date of abolition,
- (2) where the perpetuity period governing a contingent interest has already expired before the effective date of abolition.

### 4. OTHER TRANSITIONAL ISSUES

#### a. The Rule in *Whitby v Mitchell*

[193] Section 91(2) of the Uniform Trustee Act model abolishes the common law rule of *Whitby v Mitchell*, which prohibited the disposition, following a life interest to an unborn person, of a property interest to an unborn child or other issue of an unborn person. Alberta already abolished this old rule in the Alberta Act, so it does not need to be abolished a second time here.<sup>169</sup> Repealing the Alberta Act will not revive any law which that statute repealed.<sup>170</sup>

#### b. Accumulations

[194] As noted in Chapter 2, Alberta has already made inapplicable the old, received English statute forbidding accumulations of income beyond a very short period and now relies on the reformed RAP to control accumulations instead. The Alberta Act section which made the old English statute inapplicable was accompanied by some transitional provisions to govern the new accumulations situation and its reliance on the reformed RAP, as follows:

##### **Accumulations of income**

**24(1)** The *Accumulations Act, 1800*, 39 & 40 Geo. III c98 (U.K.), does not apply in Alberta.

**(2)** When property is settled or disposed of in such manner that the income of the property 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.

<sup>169</sup> Alberta Act, s 21.

<sup>170</sup> *Interpretation Act*, RSA 2000, c I-8, s 35(1)(a).

(3) Nothing in this section affects the rights of any person to terminate an accumulation that is for the person's 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 July 1, 1973 except when the period of accumulation permitted by the *Accumulations Act, 1800* has expired before July 1, 1973 and as a result a beneficiary has acquired a vested right to receive income from property.

[195] In jurisdictions like Manitoba and Saskatchewan which simultaneously abolished RAP and discontinued the old English accumulations statute, there are no special transitional provisions relating to accumulations. The general transitional provisions apply.

[196] Once perpetuities law is abolished in Alberta, then reliance for controlling accumulations will similarly have to be placed on the taxation system and variation of trusts legislation. It would seem to follow in this situation as well that no special transitional provisions should be needed for accumulations. The general transitional provisions would apply.

[197] However, the ULCC model does suggest that a special transitional provision is needed. Section 92 of the model statute is clearly based on the current Alberta provision:

**Accumulations of income**

**92(1)** In this section, “**disposition**” includes the conferring of a power of appointment and any provision by which an interest in property or a right, power or authority over property is disposed of, created or conferred.

(2) If property is settled or disposed of in such a manner that all or part of the income earned from the property may or must be accumulated, 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

(a) the right of any person or persons to terminate an accumulation that is for the benefit of the person or persons, or

(b) any jurisdiction or power of the court under an Act to direct payments from accumulations.

(4) Subject to subsections (5) and (6), this section applies to instruments taking effect before, on or after *[date specific to each jurisdiction]*.

(5) Nothing in this section renders invalid any accumulation validly empowered by a disposition taking effect before *[date specific to each jurisdiction]*.

(6) Nothing in this section divests or otherwise affects any interest that had become vested as a result of the expiration before *[date specific to each jurisdiction]* of a period of accumulation previously permitted or in force.

[198] But does this provision make any sense if there is no underlying perpetuities law to control accumulations? That is what the current Alberta provision is predicated on. But that underlying legal reality will be absent once perpetuities law is abolished. It seems to ALRI that this particular transitional provision need not be continued after the abolition of perpetuities law and should not be included in the abolition statute.

## D. Consequential Amendments

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[199] If Alberta enacts a new *Trustee Act* before abolishing perpetuities law, the *Trustee Act* will subsequently require no consequential amendments to continue functioning in a perpetuities-free landscape.

[200] A few minor consequential amendments will be required to a couple of Alberta statutes and a regulation to remove references to perpetuities law or the Alberta Act.<sup>171</sup> Change will not be required to two other statutes referencing a situation “in perpetuity.”<sup>172</sup> They will remain unaffected by the abolition of perpetuities law.

<sup>171</sup> Specifically, repeal of the *Age of Majority Act*, RSA 2000, c A-6, s 10 and amendment of the *Public Lands Act*, RSA 2000, c P-40, s 21(3). The *Designation and Transfer of Responsibility Regulation*, Alta Reg 80/2012, s 13(1)(ppp) will also need repeal.

<sup>172</sup> *Cemeteries Act*, RSA 2000, c C-3, s 1(n) [gravesite care “in perpetuity”] and *Irrigation Districts Act*, RSA 2000, c I-11, s 184(2) [creation of a statutory easement “in perpetuity”].

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