

PERPETUITY ACT

CHAPTER 358

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Definitions

1 In this Act:

“court” means the Supreme Court;

“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 and also includes a possibility of reverter or resulting trust and a right of re-entry on breach of a condition subsequent;

“in being” means living or conceived but unborn;

“perpetuity period” means the period within which at common law as modified by this Act an interest must vest;

“power of appointment” includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration;

“vesting” means vesting in interest.

Section 2

Application of Act

- 2 Except as provided in sections 4, 19 (2) and 25 (3), this Act applies only to instruments taking effect after December 31, 1978, including an instrument made in the exercise of a general or special power of appointment after December 31, 1978, even though the instrument creating the power took effect before January 1, 1979.

Application of remedial provisions

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

Rules not applicable to benefit trusts

- 4 The laws relating to perpetuities and to accumulations do not apply and must be considered never to have applied to the trusts of any of the following:
- (a) a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities or sickness, death or other benefits to persons or to their surviving spouses, dependants or other beneficiaries;
 - (b) a retirement savings plan or home ownership savings plan registered under the *Income Tax Act* (Canada);
 - (c) a property donated to a corporation established under the *First Peoples' Heritage, Language and Culture Act*;
 - (d) any property donated to a university or a foundation established by a university, by the *University Foundations Act* or by the *Trinity Western University Foundation Act*;
 - (e) any property donated to the corporation established under Part 3 of the *Hospital Act*;
 - (f) any property donated to the corporation continued under section 2 of the *Health Research Foundation Act*.

Application to the government

- 5 The rule against perpetuities as modified by this Act binds the government except in respect of dispositions of property made by the government.

Rule against perpetuities

- 6 (1) Except as provided by this Act, the rule of law known as the modern rule against perpetuities continues to have full effect.

- (2) The rule of law, sometimes called the rule in *Whitby v. Mitchell*, prohibiting the disposition, after a life interest to an unborn person, of an interest in property to the unborn child or other issue of an unborn person is abolished.

Eighty year perpetuity period permitted

- 7 (1) Subject to subsection (2), an interest in property which either
- (a) according to the express terms of the disposition creating it, or
 - (b) by necessary implication from the terms of the disposition creating it,
- must vest, if at all, not later than 80 years after the creation of the interest does not violate the rule against perpetuities.
- (2) For the purpose of subsection (1) only, an interest created under the exercise of a special power must be considered to have been created at the date of the creation of the power.

Possibility of vesting beyond period

- 8 No disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period.

Presumption of validity

- 9 (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumed to be valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 11, 12 or 13, becomes void.
- (2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumed to be valid until the time, if any, it becomes established by actual events that the power cannot be exercised within the perpetuity period.
- (3) A disposition conferring a power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumed to be valid and becomes void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period.

Determination of perpetuity period

- 10 (1) If section 9 applies to a disposition and the duration of the perpetuity period is not determined under section 7, 21 or 22, the perpetuity period must be determined as follows:
- (a) if any persons falling within subsection (2) are persons in being and ascertainable at the commencement of the perpetuity period, the duration of the period, to the extent it is determined by a life in being, must be determined

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by reference to their lives and no others but so that the lives of any description of persons falling within subsection (2) (b) or (c) must be disregarded if the number of persons of that description is such as to render it impractical to ascertain the date of death of the survivor;

(b) if there are no lives under paragraph (a), the perpetuity period is 80 years.

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

(a) the person by whom the disposition is made;

(b) a person to whom or in whose favour the disposition was made, that is to say,

(i) in the case of a disposition to a class of persons, a member or potential member of the class,

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, a person as to whom some of the conditions are satisfied and the remainder may in time be satisfied,

(iii) in the case of a special power of appointment exercisable in favour of members of a class, a member or potential member of the class,

(iv) if, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the perpetuity period, a person as to whom all of the conditions are satisfied, or some of the conditions are satisfied and the remainder may in time be satisfied, and

(v) in the case of a power of appointment, the person on whom the power is conferred;

(c) a person having a child or grandchild within paragraph (b) (i) to (iv), or a person any of whose children or grandchildren, if subsequently born, would by his or her descent, fall within paragraphs (b) (i) to (iv);

(d) a person who takes a prior interest in the property disposed of and a person on whose death a gift over takes effect;

(e) if

(i) a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the perpetuity period,

(ii) an interest is created by reference to an event occurring during the lifetime of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or during the lifetime of the survivor of them, or

(iii) an interest is created by reference to the death of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or the death of the survivor of them,

the same spouse whether or not that spouse was in being or ascertainable at the commencement of the period.

Reduction of age

- 11** (1) If a disposition creates an interest in property by reference to the attainment by any person of a specified age exceeding 21 years, and actual events existing at the time the interest was created or at any subsequent time establish
- (a) that the interest, but for this section, would be void as incapable of vesting within the perpetuity period, but
 - (b) that it would not be void if the specified age had been 21 years,
- the disposition must be construed as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would have prevented the interest from being void.
- (2) One age reduction to embrace all potential beneficiaries must be made for the purposes of subsection (1).
- (3) If in the case of any disposition different ages exceeding 21 years are specified in relation to different persons,
- (a) the reference in subsection (1) (b) to the specified age must be construed as a reference to all the specified ages, and
 - (b) the subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

Exclusion of class members to avoid remoteness

- 12** (1) If the inclusion of any persons, being members or potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents section 11 from operating to save a disposition from being void for remoteness, those persons must be excluded from the class for the purposes of the disposition, and that section has effect accordingly.
- (2) If, in the case of a disposition to which subsection (1) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, but for this subsection, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons must be excluded from the class for all the purposes of the disposition, and section 11 has effect accordingly.

General cy pres provision

- 13** (1) If it has become apparent that, apart from the provisions of this section, a disposition would be void solely on the ground that it infringes the rule against perpetuities, and if the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence, on application to the court by an interested person, the disposition may be varied so as to give effect as far as possible to the general intention within the limits of the rule against perpetuities.

Section 14

- (2) Subsection (1) does not apply if the disposition of the property has been the subject of a valid compromise.

Presumptions and evidence as to future parenthood

- 14** (1) If, in a proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then, it must be presumed that
- (a) a male is able to have a child at the age of 14 years or over, but not under that age, and
 - (b) a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years.
- (2) Despite subsection (1), in the case of a living person, evidence may be given to show that the person will not be able to have a child at the time in question.
- (3) Subject to subsection (4), if any question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then the person must be so treated for the purpose of any question that may arise respecting the rule against perpetuities in relation to the same disposition, even if the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.
- (4) If a question is decided in relation to a disposition by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order as it sees fit to protect the right that the child would have had in the subject of the disposition as if that question had not been decided and as if the child would, apart from the decision, have been entitled to a right in the subject of the disposition not in itself invalid by the application of the rule against perpetuities as modified by this Act.
- (5) For the purposes of this section, the possibility that a person may at any time have a child by adoption or legitimation must not be considered in deciding a question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child by that means, then subsection (4) applies to that child.
- (6) A trustee or personal representative is not personally liable if
- (a) relying on a decision of a court having jurisdiction in relation to a disposition that a person is or will be unable to have a child at a particular time, and
 - (b) before the trustee or personal representative has notice that that person subsequently has a child at that time,
- the trustee or personal representative transfers, delivers or pays over property under the control of the trustee or personal representative.
- (7) Subsection (6) does not extend to indemnify a trustee or personal representative in respect of any act done in accordance with the opinion, advice or direction of

a court if the trustee or personal representative has been guilty of fraud or willful concealment or misrepresentation in obtaining that opinion, advice or direction.

Application to court to determine validity

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

Interim income

- 16** (1) Until an interest presumed to be valid becomes void under section 9, the income arising from that interest and not otherwise disposed of must be treated as income arising from a valid contingent interest.
- (2) An uncertainty as to whether or not the disposition will ultimately prove to be void for remoteness must be disregarded.

Saving provision and acceleration of expectant interests

- 17** (1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated only because it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not the disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent on, the invalid disposition.
- (2) If a prior interest is invalid under the rule against perpetuities, a subsequent interest that, if it stood alone, would be valid is not prevented from being accelerated only because of the invalidity of the prior interest.

Powers of appointment

- 18** (1) For the purpose of the rule against perpetuities, a power of appointment must be treated as a special power, unless
- (a) in the instrument creating the power it is expressed to be exercisable by one person only, and
 - (b) it could, at all times during its currency when that person is of full age and capacity, be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.
- (2) A power that satisfies the conditions of subsection (1) (a) and (b) must, for the purpose of the rule against perpetuities, be treated as a general power.
- (3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power must be treated as a general power if it would have been so treated if exercisable by deed.

Section 19

Administrative powers of trustees

- 19 (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to dispose of property, or to do any other act in the administration, as opposed to the distribution, of property including, if authorized, payments to trustees or other persons of reasonable remuneration for their services.
- (2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after January 1, 1979, even though the power is conferred by an instrument that took effect before that time.

Options to acquire reversionary interests

- 20 (1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, whether the lease or renewal is of real or personal property,
- (a) if the option is exercisable only by the lessee or his successors in title, and
 - (b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease or renewal.
- (2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and “lessee” must be construed accordingly.
- (3) Subsection (1) applies to a right of first refusal or pre-emption as it applies to an option.
- (4) The rule against perpetuities does not apply to an option to renew a lease of property.

Commercial transactions

- 21 (1) In the case of an option or other contractual right under which an interest in property may be acquired for valuable consideration, the perpetuity period is 80 years from the date of the creation of the option or contractual right, and if under an option or contractual right an interest in property could arise more than 80 years after the creation of the option or contractual right, the option or contractual right is void after the expiration of 80 years from the date of its creation,
- (a) as between the original parties, and
 - (b) so far as the benefit or burden is transmissible, as between the original parties and all parties claiming through them.
- (2) No remedy lies for the purpose of giving effect to the option or contractual right or for making restitution because of the option or contractual right being void.
- (3) Without limiting subsections (1) and (2), those subsections apply to all contracts relating to a future sale or lease, to grants of options in gross, rights of pre-emption or first refusal and to future profits à prendre, easements and restrictive covenants.

- (4) This section does not apply to a provision in
- (a) a will, or
 - (b) a trust.

Easements, profits à prendre

- 22 (1) In the case of the grant of an easement, profit à prendre or other similar interest, not referred to in section 21 (1) to (3), to which the rule against perpetuities may be applicable,
- (a) the perpetuity period is 80 years from the date of the creation of the easement, profit à prendre or other similar interest,
 - (b) the validity or invalidity of the easement, profit à prendre or other similar interest, so far as remoteness is concerned, must be determined by actual events within the 80 year period, and
 - (c) the easement, profit à prendre or other similar interest is only void for remoteness if and to the extent that it fails to acquire the characteristics of a present exercisable right in the servient land within the 80 year period.
- (2) This section does not apply to a provision in
- (a) a will, or
 - (b) a trust.

Possibilities of reverter and conditions subsequent

- 23 (1) In the case of
- (a) a possibility of reverter on the determination of a determinable fee simple, or
 - (b) a possibility of a resulting trust on the determination of any determinable interest in property,
- the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property.
- (2) For subsection (1), if the event that determines the determinable interest does not occur within the perpetuity period, the provision must be treated as void for remoteness and the determinable interest becomes an absolute interest.
- (3) Subsections (1) and (2) do not apply if the event which determines the prior interest, or on which the prior interest could be determined, is the cessation of a charitable purpose, but in that case if the cessation of the charitable purpose takes place after the expiration of the perpetuity period the property must be treated as if it were the subject of a charitable trust to which section 13 applies.

Section 24

- (4) This section does not apply to a gift over from one charity to another.
- (5) The rule against perpetuities does not apply to a gift over from one charity to another.

Specific noncharitable trusts

- 24**
- (1) A trust for a specific noncharitable purpose that creates no enforceable equitable interest in a specific person must be construed as a power to appoint the income or the capital, as the case may be.
 - (2) Unless a trust described in subsection (1) is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the original trustee's successor within a period of 21 years, even if the disposition creating the trust showed an intention, either expressly or by implication, that the trust should or might continue for a period longer than that period.
 - (3) Despite subsection (2), if the trust is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by doing so the result would be closer to the intention of the creator of the trust than the period of validity provided by this section.
 - (4) To the extent that the income or capital of a trust for a specific noncharitable purpose is not fully expended within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person who would have been entitled to the property comprised in the trust, if the trust had determined at the expiration of the 21 year period, is entitled to that unexpended income or capital.
 - (5) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person without the furnishing of valuable consideration.

Accumulations of income

- 25**
- (1) If property is settled or disposed of in such manner that all or part of the income of it 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.
 - (2) Nothing in this section affects
 - (a) the rights 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 to direct payments from accumulations under any statute.
 - (3) Subject to subsections (4) and (5), this section applies to instruments taking effect before or after January 1, 1979.

- (4) Nothing in this section renders invalid any accumulation validly empowered by a disposition taking effect before January 1, 1979.
- (5) Nothing in this section operates to divest or otherwise affect any interest which had become vested as a result of the expiration before January 1, 1979 of a period of accumulation previously permitted or in force.

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PERPETUITY — HISTORICAL TABLE

Legislative History

PERPETUITY ACT

RSBC 1996, chapter 358

Section	History
1	RS1979-321-1.
2	RS1979-321-25.
3	RS1979-321-12.
4	RS1979-321-22; 1987-50-15; 1989-49-2; 1989-82-16; 1990-7-14; 1990-16-22.
5	RS1979-321-23.
6	RS1979-321-2.
7	RS1979-321-3.
8	RS1979-321-4.
9	RS1979-321-5.
10	RS1979-321-6.
11	RS1979-321-7.
12	RS1979-321-8.
13	RS1979-321-9.
14	RS1979-321-10.
15	RS1979-321-11.
16	RS1979-321-13.
17	RS1979-321-14.
18	RS1979-321-15.
19	RS1979-321-16.
20	RS1979-321-17.
21	RS1979-321-18.
22	RS1979-321-19.
23	RS1979-321-20.
24	RS1979-321-21.
25	RS1979-321-24.

EXPLANATORY NOTE

Amendments Not in Force: If there are any legislative changes to the Act that are not in force as of December 31, 1996, these are identified in *italics* at the beginning of the historical table. The "Section" column identifies the affected provisions of the Act. The "Citation" column identifies the amending legislation by its citation in the 1996 Statute Revision Supplement.

Legislative History: The second part of the table provides a legislative history of each section of the Act between the 1979 Statute Revision and the 1996 Statute Revision. The "Section" column identifies all sections of the Act in force on December 31, 1996. The "History" column for each section begins with the citation of the section immediately before the 1996 Statute Revision. This is followed by a list of citations for the legislation that enacted or amended the section between the 1979 Statute Revision and the 1996 Statute Revision (if a section was repealed and replaced during that period, these last citations begin at the most recent replacement).

Legislative citations have the format of "year-chapter-section".