

PERPETUITIES TO PUREFOY: REFORM BY ABOLITION IN MANITOBA

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In 1983 Manitoba adopted two statutes, The Perpetuities and Accumulations Act and An Act to Amend the Trustee Act, the net effect of which was to abolish a wide variety of long-standing principles of property law, including the rule against accumulations, the rules against perpetuities (both old and new), the rule in Saunders v. Vautier and the timely vesting rule. This paper examines the interrelationship of these various principles and the effect of their abolition. It questions, finally, whether such a sweeping reform is desirable.

Le Manitoba adopta en 1983 deux lois portant sur la propriété, soit la Loi sur les dispositions à titre perpétuel et la capitalisation et la Loi modifiant la Loi sur les fiduciaires, afin d'abolir plusieurs principes de vieille date, tels la règle interdisant la capitalisation, les règles (l'ancienne et la moderne) interdisant les dispositions à titre perpétuel, la règle tirée de l'arrêt Saunders v. Vautier, et la règle visant à l'extinction des droits éventuels fondés sur la common law. Dans cet article, l'auteur examine le rapport entre ces diverses règles et l'effet de leur abolition, et termine en s'interrogeant sur le bien-fondé d'une réforme d'une telle envergure.

Introduction

Fundamental reform of the law of property is not an everyday occurrence. It happened in England in 1925. And it appears to have happened in Manitoba in 1983. With one stroke of the pen—or rather two—the Manitoba legislature has abolished the rule against accumulations, the rules against perpetuities (both old and new), the rule in *Saunders v. Vautier*,¹ and the timely vesting rule (by, arguably at least,² abolishing the common law rules governing future interests, and, by implication, the rule in *Purefoy v. Rogers*³ and the Statute of Uses⁴).

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¹ (1841), 4 Beav. 115, 49 E.R. 282 (M.R.); aff'd (1841) Cr. & Ph. 240, 41 E.R. 482 (L.C.). See Part III, *infra*, p. .

² But see *infra*, footnote 111.

³ (1671), 2 Wms. Saund. 380, 85 E.R. 1181 (K.B.).

⁴ (1535), 27 Hen. VIII, c. 10. See (1) the text, *infra*, at footnote 97 ff and (2) footnote 111.

This rather surprising reform package is contained in The Perpetuities and Accumulations Act⁵ and An Act to Amend the Trustee Act,⁶ both of which came into force, with retroactive effect,⁷ on October 1, 1983.⁸ The legislation is itself based on suggestions contained in two reports of the Manitoba Law Reform Commission, the Report on the Rule in *Saunders v. Vautier*, 1975,⁹ and the Report on the Rules Against Accumulations and Perpetuities, 1982,¹⁰ the latter of which was preceded by a position paper prepared for the Commission by Professor D.W.M. Waters.¹¹ In short, the genealogy of the reform is impeccable.

I. The rule against accumulations

The rule against accumulations is aimed at avoiding an excessive tying up of income by means of a direction in a settlement that it be kept and accumulated for a remote beneficiary. The decision in *Thelluson v. Woodford*¹² that the permissible accumulation period at common law is the perpetuity period led immediately to the passage of the Accumulations Act, 1800 (also known as the Thelluson Act)¹³ restricting the permissible periods to four: the lifetime of the grantor or settlor, twenty-one years from the death of the grantor or testator, the minorities of persons living at the testator's death, and the minorities of persons entitled to the accumulated sum on coming of age. Two additional periods applicable to *inter vivos* trusts (being twenty-one years from the date such a trust takes effect and the

⁵ S.M. 1982-83, c. 43 (P 32.5).

⁶ S.M. 1982-83, c. 38.

⁷ For a discussion of the retroactive operation of the reform, see A.J. McClean, *The Rule against Perpetuities, Saunders v. Vautier, and Legal Future Interests Abolished* (1983), 13 Man. L.J. 245, at pp. 270 *et seq.*

⁸ S. 61(2) of The Trustee Act, R.S.M. 1970, c. T-160, as amended by S.M. 1982-83, c. 38, ss. 4 and 5; S.M. 1982-83, c. 43, ss. 5 and 8. Both acts received Royal Assent on August 18, 1983. It is true that s. 61(2), as amended, of The Trustee Act speaks of trusts arising "before, on or after July 1, 1983" but the retention of this, the date originally set for the legislation to become operative, would seem an oversight resulting from a failure to take into account changes made in Committee. It is of no consequence in the light of the general retroactive nature of the legislation.

⁹ Report No. 18 (1975). The recommendations contained in this report drew heavily from a 1972 report of the Alberta Institute of Law Research and Reform on the same subject (Report No. 9, 1972), which was implemented by legislation in 1973: S.A. 1973, c. 13, s. 12 (see now Trustee Act, R.S.A. 1980, c. T-10, s. 42).

¹⁰ Report No. 49 (1982). For a detailed discussion of the report and resulting reforms, see A.J. McClean, *loc. cit.*, footnote 7.

¹¹ The author of *Law of Trusts in Canada* (2nd ed., 1984).

¹² (1799), 4 Ves. 227, 31 E.R. 117 (Ch.); *aff'd* (1805), 11 Ves. 112, 32 E.R. 1030 (H.L.).

¹³ 39 & 40 Geo. III, c. 98 (see now the Law of Property Act, 1925, 15 & 16 Geo. V, c. 20, ss. 164-166). For a discussion of the background of this Act, see R.H. Maudsley, *The Modern Law of Perpetuities* (1979), pp. 196-202.

minorities of persons living at that date) were added in England in 1964,¹⁴ with Ontario¹⁵ and British Columbia¹⁶ following suit shortly thereafter. The effect of these statutory provisions is that a direction to accumulate for a period in excess of the statutory periods but within the perpetuity period is void only to the extent the direction exceeds the statutory period, whereas a direction to accumulate for a period that exceeds the perpetuity period is totally void.

The original Accumulations Act has been held to apply in Manitoba as a result of the reception of English law as of July 15, 1870.¹⁷ Its repeal is provided for in section 2 of The Perpetuities and Accumulations Act.¹⁸

The repeal of the Accumulations Act is not, in itself, exceptional. Several jurisdictions, including Alberta¹⁹ and British Columbia,²⁰ have already done so, as the periods set out in that Act, even as amended, have not proved successful. In these jurisdictions, repeal of the Act has meant merely that the old common law rule limiting accumulations of income to the perpetuity period again applies.²¹ What is exceptional about the Manitoba reform, therefore, is that the abolition of the Accumulations Act is coupled with abolition of the modern rule against perpetuities.

¹⁴ Perpetuities and Accumulations Act, 1964, 12 & 13 Eliz. II, c. 55, s. 13.

¹⁵ The Accumulations Amendment Act, 1966, S.O. 1966, c. 2 (see now Accumulations Act, R.S.O. 1980, c. 5).

¹⁶ Accumulations Act, 1967, S.B.C. 1967, c. 2 (see the text, *infra*, at footnote 20).

¹⁷ The Queen's Bench Act, R.S.M. 1970, c. C280, s. 51(3), as am. by S.M. 1977, c. 57, s. 8; *Fonseca v. Jones* (1911), 21 Man. R. 168, 14 W.L.R. 148 (Man. Q.B.; aff'd C.A.); *Re Aikins Trusts* (1961), 35 W.W.R. 143 (Man. Q.B.); Man. Law Ref. Comm., Report No. 49, *op. cit.*, footnote 10, p. 1, note 1. It would also appear to have been received at the same time in Alberta (*Re Burns Estate* (1960), 32 W.W.R. 689, 25 D.L.R. (2d) 427 (Alta. App. Div.) (Porter J.A. *dubitante*)) and Saskatchewan (*Re Fossum Estate* (1960), 32 W.W.R. 372 (Sask. Q.B.)), as well as the Yukon and North West Territories. It is also arguable that the unamended English Act has been received in Newfoundland (date of reception, 1832) and in British Columbia (1858), which also specifically incorporated it in legislation as of 1897: Accumulations Restraint Act, R.S.B.C. 1897, c. 2 (amended in 1967 and abolished in 1975: see *supra*, footnote 16, and *infra*, footnote 20). Although it was not received in Nova Scotia (1758), New Brunswick (1758), Prince Edward Island (1763) or Ontario (1792), Ontario specifically adopted similar legislation in 1897 (The Act in Restraint on Accumulations, R.S.O. 1897 (App.), c. 332 (amended 1966: see *supra*, footnote 15) and New Brunswick in 1903 (The Property Act, C.S.N.B. 1903, c. 152, ss. 1 and 2: see now Property Act, R.S.N.B. 1973, c. P-19, ss. 1 and 2). Accordingly, Nova Scotia and Prince Edward Island would appear to be the only provinces in which the Accumulations Act never applied in one form or another. It should be pointed out, however, that the permitted accumulation period in the latter province is lives in being plus sixty years: Perpetuities Act, R.S.P.E.I. 1974, c. P-3 (see *infra*, footnote 40).

¹⁸ *Supra*, footnote 5.

¹⁹ Perpetuities Act, S.A. 1972, c. 121, s. 24 (see now R.S.A. 1980, c. P-4, s. 24).

²⁰ Perpetuities Act, S.B.C. 1975, c. 53, s. 24(1) (see now Perpetuity Act, R.S.B.C. 1979, c. 321, s. 24(1)). For other jurisdictions see Maudsley, *op. cit.*, footnote 13, p. 250.

²¹ This is also the case in those jurisdictions, that is, Nova Scotia and Prince Edward Island, which did not adopt the Accumulations Act in the first place: see *supra*, footnote 17.

II. The rules against perpetuities

The common law recognizes two rules against perpetuities. The earlier, known more particularly as the rule in *Whitby v. Mitchell*,²² is the less important. By providing that where, in a common law limitation, an interest in real property is reserved to an unborn person, any subsequent interest to the issue of that unborn person is void, the rule prevents the creation of what would be in effect unbarrable entails.²³ The rule is, as the Manitoba Report says, "a relic of a past age",²⁴ one that has been largely superseded by the modern rule.²⁵ For this reason, it has been abolished in those jurisdictions that have statutorily reformed the modern rule, either in conjunction with the more general reform,²⁶ or earlier.²⁷ Here again, what is remarkable about the Manitoba reform is that abolition of the rule in *Whitby v. Mitchell*, in a jurisdiction which apparently still admits of fee tails,²⁸ has been coupled with abolition of the modern rule against perpetuities.

²² (1889), 42 Ch.D. 494 (Ch.D.); aff'd (1890), 44 Ch.D. (C.A.). Although it takes its name from this case, the rule was in fact developed in the seventeenth century.

²³ By preventing the creation in a settlement of a series of life estates, from father to son, generation after generation.

²⁴ Report No. 49, *op. cit.*, footnote 10, p. 11.

²⁵ In a grant or devise of real property, "to A for life, then to his first-born son for life, then in fee simple to that son's first-born son", the purported fee simple remainder would be caught by both rules. On the other hand, if the instrument required that A's grandson be born within 21 years of A's death, the fee simple remainder, although valid under the modern rule, would still be caught by the rule in *Whitby v. Mitchell*: Alta. Inst. of Law Research & Ref., Report on the Rule against Perpetuities, Report No. 6 (1971); pp. 63-64.

²⁶ Ontario (Perpetuities Act, S.O. 1966, c. 113, s. 17 (now R.S.O. 1980, c. 374, s. 17)); Alberta (Perpetuities Act, *supra*, footnote 19, s. 21); Yukon (Perpetuities Ordinance, O.Y.T. 1968 (2nd), c. 2, s. 18; repealed and replaced by O.Y.T. 1980 (1st), c. 23, s. 22(1) (C.O.Y.T., c. P-3.1)); North West Territories (Perpetuities Ordinance, O.N.W.T. 1968 (2nd), c. 15, s. 18 (now R.O.N.W.T. 1974, c. P-3)).

²⁷ For example, England (Law of Property Act, 1925, *supra*, footnote 13, s. 161); British Columbia (S.B.C. 1957, c. 33, s. 2; see now Perpetuity Act, *supra*, footnote 20, s. 2(2)).

²⁸ Although their continued existence is admittedly problematic in that they are subject to being converted into fee simples by the simple method of registering disentailing assurances: The Law of Property Act, R.S.M. 1970, c. L90, s. 30. The history of fee tails in Manitoba is quite curious. Although they were initially abolished by s. 27 (and s. 138) of The Real Property Act of 1885, S.M. 48 Vict., c. 28, this statute was repealed and replaced by The Real Property Act of 1889, S.M. 52 Vict., c. 16. The latter statute did not contain, arguably through inadvertence, provisions corresponding to ss. 27 and 138 of the 1885 Act, although it was apparently intended as a consolidation of the earlier Act and its various amendments (49 Vict., c. 28; 50 Vict., c. 11; 51 Vict., c. 21 and c. 22). The present s. 30 of The Law of Property Act, providing for disentailment, was first adopted in 1883, prior to the initial abolition of fee tails: S.M. 46 & 47 Vict., c. 27. I am grateful to Dean Anderson for an "informal note" by J.C. Irvine on this subject, "Did Manitoba Abolish, and then Inadvertently Restore, the Fee Tail?" (undated, unpublished).

Fee tails also exist in Prince Edward Island although, as in Manitoba, they are readily converted into fee simples: Real Property Act, R.S.P.E.I. 1974, c. R-4, ss. 17 and 18.

The second, or modern, rule against perpetuities is more accurately but less usually known as the rule against remoteness of vesting. Manitoba's decision to abolish it is unique.

The rule first emerged in the *Duke of Norfolk's Case* in 1682²⁹ in response to a 1620 decision³⁰ that legal executory interests, whether created by *inter vivos* grants to uses or by executory devises, were not subject to the destructibility rules that applied to legal contingent remainders.³¹ It evolved slowly over the next century and a half until 1833, when its formulation was completed in the case of *Cadell v. Palmer*.³² The classic statement of the rule as it finally evolved is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest".³³

Reform of this rule against perpetuities, made popular by the entertaining writings of Professor W. Barton Leach³⁴ in particular, has already occurred in some twenty-seven jurisdictions: in England and New Zealand (1964), in Northern Ireland (1966), in the Australian states of Victoria (1968), Western Australia (1969) and Queensland (1974), in a significant number of American states,³⁵ and in the Canadian provinces of Ontario,³⁶ Alberta³⁷ and British Columbia³⁸ as well as the Yukon³⁹ and North West Territories.⁴⁰

They have been abolished in all other Canadian jurisdictions, expressly so in most and impliedly in Newfoundland by virtue of the fact that real property is treated as chattels real: see *infra*, footnote 45.

²⁹ *Duke of Norfolk v. Howard* (1682), 3 Ch. Cas. 1, 22 E.R. 931 (Lord Nottingham); *aff'd* (1685), 3 Ch. Cas. 53, 22 E.R. 963, 1 Vern 164, 23 E.R. 388 (H.L.).

³⁰ *Pells v. Brown* (1620), Cro. Jac. 590, 79 E.R. 504 (K.B.).

³¹ See the text, *infra*, at footnote 97 ff. And at the same time, equitable future interests, equally indestructible, were coming to be recognized: Man. Law Ref. Comm., Report No. 49, *op. cit.*, footnote 10, p. 25.

³² (1833), 1 Cl. & F. 372, 6 E.R. 956 (H.L.). For a less orthodox account of the origins of the rule against perpetuities, see George L. Haskins, "Inconvenience" and the Rule for Perpetuities (1983), 48 Miss. L. Rev. 451.

³³ J.C. Gray, *Rule against Perpetuities* (4th ed., 1942), s. 201.

³⁴ In addition to his well known book, written with J.H.C. Morris, *The Rule against Perpetuities* (2nd ed., 1962; First Supp., 1964), Professor Leach wrote a total of some seventeen articles on the subject; see in particular *Perpetuities in Perspective: Ending the Rule's Reign of Terror* (1952), 65 Harv. L. Rev. 721.

³⁵ Maudsley, *op. cit.*, footnote 13, lists sixteen such jurisdictions. For their citations, together with those of the Commonwealth jurisdictions, see Maudsley, Appendix D at p. 247.

³⁶ *Perpetuities Act, supra*, footnote 26 (in force as of September 6, 1966).

³⁷ *Perpetuities Act, supra*, footnote 19 (in force as of July 1, 1973).

³⁸ *Perpetuity Act, supra*, footnote 20 (in force as of January 1, 1979).

³⁹ *Perpetuities Ordinance, supra*, footnote 26.

⁴⁰ *Perpetuities Ordinance, supra*, footnote 26 (in force as of July 8, 1968). It should also be noted that in 1931, Prince Edward Island adopted legislation changing the permitted

All these jurisdictions accepted the need for some rule to restrict the futurity of interests—to limit, in other words, the period within which such interests should be permitted to vest. It was rather the arbitrary nature of the common law rule's "initial certainty" requirement (that is, the requirement that one be able to see from the beginning, clearly and certainly, that the interest will vest, if at all, within the perpetuity period) that attracted attention. It seemed unfair that an interest which would probably, even almost certainly, vest within the perpetuity period should nevertheless be struck down because of a remote, and highly unlikely, possibility that it might not.⁴¹ There was, however, little, if any, support for abolition as opposed to reform.

... One thing is clear. Nowhere is there any considerable body of opinion that would wish to repeal the rule entirely, and accordingly, we can see no reason for recommending its abolition. Indeed there seems to be general satisfaction with the rule apart from the manner in which it applies and apart from a few instances in which for obvious reasons it should not apply.⁴²

The thrust of the reform in these jurisdictions, therefore, was not to abolish the rule but rather to reform it, by substituting for the "initial certainty" requirement what came to be known as the "wait and see" rule.⁴³ If there was a possibility that an interest would vest outside the perpetuity period, one would wait and see what actually happened: if the interest did vest within the period, it was valid; only if events showed that it could not in fact vest in time would it be struck down.

In fact, as the above quotation from the Ontario Law Reform Commission Report suggests, the question of the abolition of the rule against perpetuities can be divided into two. Firstly, should the rule apply in what might be termed "peripheral" or non-family situations? Secondly, should it continue to apply to family settlements?

The first group includes such diverse matters as the following: administrative powers of trustees; options to purchase and other contractual rights that might give rise to an interest in land (whether contained in a lease or otherwise); options to renew a lease; future easements and other similar

perpetuity and accumulation periods to lives in being plus sixty years; however, a remainder is not to be deemed a future estate or interest within the meaning of the Act: S.P.E.I. 1931, c. 15 (see now Perpetuities Act, *supra*, footnote 17).

⁴¹ Indeed, because more often than not a perpetuity problem is not noticed until the death of a life tenant, the common law rule requires that an interest that *did* vest in time be nevertheless struck down because of an imagined possibility that had not in fact materialized.

⁴² Ont. Law Ref. Comm., Report No. 1 (1965), p. 5.

⁴³ These jurisdictions coupled the basic reform of "wait and see" with a variety of other provisions to eliminate the usual traps for the unwary. These include age reduction, presumptions as to fertility, the unborn widow as life in being, and class splitting in the case of class gifts. As well, British Columbia, following the example set by the Commonwealth jurisdictions, has provided for a statutory period of eighty years as an alternative to the traditional period: Perpetuity Act, *supra*, footnote 20, s. 3.

interests; rights of re-entry, possibilities of reverter and resulting trusts arising on the determination or defeasance of a fee simple; non-charitable purpose trusts or gifts to non-charitable associations; and employee benefit trusts.⁴⁴ Authors and law reform commissions alike have noted the rather arbitrary and often illogical treatment of these various phenomena at common law, and all reforming jurisdictions in Canada have included specific dispositions regarding them in their legislation.⁴⁵ Two observations can be made about these reforms. Firstly, in spite of the specificity of the various provisions, a general pattern does emerge. All jurisdictions agree that administrative powers of trustees,⁴⁶ employee benefit trusts⁴⁷ and options to purchase contained in a lease⁴⁸ should not be subject to the rule, as the common law requires they be. On the other hand, all jurisdictions agree with the common law that the rule should not apply to options to renew leases.⁴⁹ Finally, while all jurisdictions agree that the rule should apply to possibilities of reverter and resulting trusts as it does to rights of re-entry,⁵⁰ to contractual rights that might give rise to an interest in land (other than an option to purchase in a lease),⁵¹ to future easements and other similar interest,⁵² as well as to the duration of non-charitable purpose trusts,⁵³ all regard a perpetuity period based on lives in being as inappropriate to these situations. Rather, the maximum period should be a fixed period of time.⁵⁴ The second general observation is that these reforms, particularly those in the last group, seem to be directed principally at achieving a consistent treatment of like matters: while the reformers did

⁴⁴ The Manitoba Law Reform Commission would include in this list conditions subsequent upon a leasehold estate (Report No. 49, *op. cit.*, footnote 10, p. 14) and provisos for redemption in a mortgage (*ibid.*, p. 20), both of which are not subject to the common law rule.

⁴⁵ I.e. B.C., Perpetuity Act, *supra*, footnote 20; Alta., Perpetuities Act, *supra*, footnote 19; Ont., Perpetuities Act, *supra*, footnote 26; Yukon, Perpetuities Ordinance, *supra*, footnote 26; N.W.T., Perpetuities Ordinance, *supra*, footnote 26. In footnotes 46-53 the sections referred to are sections of these enactments.

⁴⁶ B.C., s. 16; Alta., s. 15; Ont., s. 12; Yukon, s. 16; N.W.T., s. 13.

⁴⁷ B.C., s. 22; Alta., s. 22; Ont., s. 18; Yukon, s. 19; N.W.T., s. 19. To this list should be added Newfoundland (The Perpetuities and Accumulations Act, R.S.N. 1970, c. 291). It should be noted that, by and large, these dispositions are not new but were first included in the legislation of the various provinces pursuant to a recommendation to this effect by the Conference on Commissioners of Uniformity of Legislation in Canada in 1954: Alta. Inst. of Law Research and Ref., Report No. 6, *op. cit.*, footnote 25, p. 64.

⁴⁸ B.C., s. 17(1); Alta., s. 17(1); Ont., s. 13(1); Yukon, s. 18(1); N.W.T., s. 14(1).

⁴⁹ B.C., s. 17(4); Alta., s. 17(4); Ont., s. 13(4); Yukon, s. 18(4); N.W.T., s. 14(4).

⁵⁰ B.C., s. 20; Alta., s. 19; Ont., s. 15; Yukon, s. 20; N.W.T., s. 16.

⁵¹ The Alberta legislation (ss. 16 and 18), as well as that of B.C. (s. 18) and the Yukon (ss. 17 and 19), appears more comprehensive in this regard than that of Ontario (s. 13(3)) or the N.W.T. (s. 14(3)).

⁵² B.C., s. 19; Alta., s. 18; Ont., s. 14; Yukon, s. 19; N.W.T., s. 15.

⁵³ B.C., s. 21; Alta., s. 20; Ont., s. 16; Yukon, s. 21; N.W.T., s. 17.

⁵⁴ The relevant times vary from twenty-one to forty to eighty years.

address the question of the appropriateness of the traditional perpetuity period to non-family situations, no particular attention seems to have been paid to the question of whether a perpetuity rule, however framed, was needed at all. The authors of the Manitoba Report addressed this question, and found wanting the arguments in favour of retention of any rule in non-family situations.⁵⁵

However, it is not this decision to abolish the application of the rule against perpetuities in non-family situations that distinguishes the Manitoba reform legislation, for, as we have already seen, other jurisdictions have done so to a limited extent. It is rather the decision to abolish it in family situations that singles the Manitoba legislation out for comment.

Section 3 of The Perpetuities and Accumulations Act⁵⁶ provides simply:

The rules of law against perpetuities, sometimes known as the rule in *Whitby and Mitchell* and the modern rule against perpetuities, are no longer the law of Manitoba.⁵⁷

Why did Manitoba, alone of all the Canadian, and indeed Commonwealth, jurisdictions decide upon the abolition of the rule against perpetuities?

The authors of the Manitoba Report identified two central purposes most often put forward to justify the continued existence of the rule against perpetuities: to ensure the alienability of property, and to balance the interests of successive generations.⁵⁸ Neither, however, was thought persuasive. On one hand, it was felt that a rule fulfilling the above purposes ought properly to be drafted in terms of duration of interest rather than remoteness of vesting; history alone explains why the common law rule was framed in terms of the latter. On the other hand, any rule designed to control the duration of interests, even one framed directly in terms of duration, was not thought necessary in present-day Manitoba, and that for four reasons. Firstly, the rule is no longer necessary to ensure against the tying up of specific property since most, if not all, successive interests are now put behind trusts, and trustees given extensive powers of sale. Accord-

⁵⁵ Report No. 49, *op. cit.*, footnote 10, esp. pp. 40-41.

⁵⁶ *Supra*, footnote 5.

⁵⁷ The particularly emphatic phraseology, "are no longer the law of Manitoba", represents a change from the wording suggested by the Commission, "are abolished": Report No. 49, *op. cit.*, footnote 10, p. 82. The modern rule against perpetuities is defined in s. 1 as including "the operation of the rule with regard to remoteness of vesting in perpetual duration [in the Report, "and perpetual duration": *ibid.*] and with regard to testamentary executory interests in personality".

⁵⁸ Report No. 49, *op. cit.*, footnote 10, pp. 23 and 27. Other possible factors suggested in the Report were apprehension that property will be accumulated in the hands of a few, that property subject to limited interests over a good many years will be unproductive, and that people with wealth will make dispositions of their property aimed only and capriciously at depriving future generations of the same amount of control as had the original disposer (fear of the damage to society which the eccentric may cause): *ibid.*, pp. 22-23.

ingly, while the trust fund itself may exist for some time, the assets which compose it are constantly changing: none is taken out of commerce for the duration of the trust. In the vast majority of cases, therefore, the first suggested rationale for the rule, that of ensuring the alienability of property, is no longer very important.⁵⁹ Secondly, for a variety of social and psychological reasons, Canadian testators or settlors do not in fact create "dynastic"⁶⁰ settlements. For example, *inter vivos* settlements are normally prepared with the living in mind, to transfer property from adults in high tax brackets to children or grandchildren in lower ones, or to provide for handicapped persons.⁶¹ And even in the case of testamentary dispositions, the average Canadian testator is usually concerned with providing for the nuclear family (by way of successive interests to the surviving spouse and then to children and grandchildren); with increasing longevity, even the grandchildren are often alive at the time the will is made.⁶² Alternatively, there appears to be a move away from the creation of such successive interests towards outright, immediate dispositions, as a result both of the abolition of succession duties and of the changing role of women.⁶³ Finally, people move or marriages break down, both of which often require a sale and distribution of assets.⁶⁴ A third reason put forward for abolishing the rule is that the taxing policies of the various levels of government are arguably more effective than the rule against perpetuities in preventing an excessive tying up of property.⁶⁵ A fourth reason, and one particularly telling to the authors of the Manitoba Report, is also unique to them. It is that the function of balancing the interests of successive generations is, at least as far as trusts are concerned, more directly performed by the rule in *Saunders v. Vautier* and the variation of trust legislation.⁶⁶ The Commission recommended abolition of the former and revision of the latter.

⁵⁹ *Ibid.*, pp. 26-27. Similar reasoning could be applied to successive legal interests in those jurisdictions having settled estates legislation empowering life tenants, albeit with court authority, to sell settled property. Both British Columbia (Land (Settled Estates) Act, R.S.B.C. 1979, c. 215) and Ontario (Settled Estates Act, R.S.O. 1980, c. 468) have specific legislation in this regard. As well, the more limited powers provided for under the Settled Estates Act, 1856, 19 & 20 Vict., c. 120, would appear to apply to those jurisdictions (Alberta, Saskatchewan, Manitoba, North West Territories and the Yukon) whose date of reception of English law is after 1856.

⁶⁰ Report No. 49, *op. cit.*, footnote 10, p. 51.

⁶¹ *Ibid.*, p. 37.

⁶² *Ibid.*, pp. 29, 35-36.

⁶³ "[T]oday's wives often do not see why they should not have absolute ownership of assets passing under the husband's will, even if their mothers were prepared to tolerate life estates and trustee powers of encroachment": *ibid.*, pp. 36-37.

⁶⁴ *Ibid.*, p. 33.

⁶⁵ *Ibid.*, pp. 1-2, 32-33.

⁶⁶ *Ibid.*, pp. 42 *et seq.* It is somewhat surprising that the Report should (at pp. 42-43) refer to the role played by the rule in *Saunders v. Vautier* in this regard, when it later (at pp. 94-95) recommends the abolition of this rule.

III. The Rule in *Saunders v. Vautier*

The rule in *Saunders v. Vautier*⁶⁷ has been summarized as follows:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.⁶⁸

In other words, in the particular context of future interests, a potential beneficiary of a contingent interest can join together with the other beneficiaries of the settlement and call for an immediate transfer of the legal estate, thereby terminating the trust as of right. For example, in the case of a devise on trust for "the first of my grandchildren to marry" (all of whom are still celibate), all of the grandchildren, together with whomever is entitled to the property until a grandchild qualifies or in the event that none does, can together call for the property (and, say, share it proportionally). All that is necessary is that all possible beneficiaries be alive, adult, mentally competent and in agreement. It does not matter that some of the beneficiaries would not in fact benefit should the trust run its course; nor does it matter that the results are contrary to the settlor's intention.⁶⁹

The application of the rule in *Saunders v. Vautier* has been criticized on three main grounds. The first is that it permits results that are contrary to the clearly expressed intention of the settlor. It is for this reason, for example, that the rule has been rejected in the great majority of American states, where a trust cannot be terminated so long as a "material purpose" of the settlor remains to be carried out.⁷⁰ Secondly, the application of the

⁶⁷ *Supra*, footnote 1.

⁶⁸ Man. Law Ref. Comm., Report No. 18, *op. cit.*, footnote 9, p. 5, citing Underhill's Law Relating to Trusts and Trustees (11th ed., 1959), Article 68. This is the broader statement of the rule, the narrower statement of which is as follows: "Where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee": *ibid.*, citing Theobald on Wills (13th ed., 1971), para. 1554. It should be noted that while the rule, like that of *Whitby v. Mitchell* (*supra*, footnote 22), takes its name from a specific case, it actually developed much earlier: Waters, *op. cit.*, footnote 11, p. 962.

⁶⁹ This example is intended to emphasize the application of the rule where there are successive contingent interests. The rule also applies where one or more beneficiaries have immediate vested interests, even though, say, enjoyment is intended to be postponed to a certain age or event (see the narrower statement, *supra*, footnote 68), or the beneficiary is to be paid on instalments. For a full discussion of the various situations in which the rule operates, see Waters, *op. cit.*, footnote 11, pp. 964 *et seq.* and Alta. Inst. of Law Research & Ref., Report No. 9, *op. cit.*, footnote 9, pp. 8-15.

⁷⁰ For a discussion of trust termination in the United States, see Waters, *op. cit.*, footnote 11, pp. 976 *et seq.* The persuasiveness of this argument really depends on the answer one gives to the question "Who's property is it?" If one feels that it is still the settlor's property, this argument carries weight. It is less forceful if one regards the property as now belonging to the beneficiary.

rule can often be avoided by careful draftsmanship. For obvious reasons, the rule is most likely to be invoked where the beneficiary or beneficiaries have vested interests and wish to override directions as to the enjoyment of that interest, and less likely to be invoked where the interests are contingent because, in this event, all possible beneficiaries must support the application: the more people involved, the less likely it will be that all will be competent adults and of like mind. Accordingly, if a settlor wishes, for example, to prevent a beneficiary from getting control of assets until a mature age, he can postpone vesting of the interest until that age rather than merely postponing its enjoyment.⁷¹ Thirdly, and most tellingly, it is suggested that the application of the rule, although couched in terms of a right inherent in the beneficiaries, is in fact dependent on judicial sanction. If a court dislikes the consequences of *Saunders v. Vautier* in a particular case, it can avoid them by construing the disposition so as to leave it outside the scope of the rule.⁷² Looked at in this way, then, *Saunders v. Vautier* constitutes disguised judicial discretion.

For these reasons, the Manitoba Law Reform Commission decided to follow the example set by the Alberta Institute for Law Research and Reform^{72a} and to recommend the abolition of the rule in *Saunders v. Vautier*, making all trust terminations subject to judicial consent under the variation of trusts legislation. Section 61(2) of The Trustee Act, as amended,⁷³ now provides:

Subject to any trust terms reserving a power to any person to revoke, or in any way vary the trust, a trust arising before, on or after July 1, 1983, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiry of the period of its natural duration as determined by the terms of the trust except with the approval of the court.

Variation of trust legislation was first adopted in England in 1958⁷⁴ to meet a concern that trusts, once established, were not sufficiently flexible

⁷¹ By settling the property on trustees in trust for B "should he attain" the designated age, rather than "to be paid when he attains" it. For a fuller discussion of the ease in avoiding the rule, see Man. Law Ref. Comm., Report No. 18, *op. cit.*, footnote 9, pp. 23-24.

⁷² The Manitoba Law Reform Commission, at pp. 15-21 of its Report No. 18, examined a number of decisions to illustrate "... how ephemeral and artificial the rule can be in actual practice. When the courts are seized of an attempted trust variation, the equities of the particular case are far more likely to determine whether the so called "Rule" is applied than any rigid following of inexorable legal logic": *ibid.*, p. 15. See also Alta. Inst. of Law Research & Ref., Report No. 9, *op. cit.*, footnote 9, pp. 6 and 7.

^{72a} The Ontario Law Reform Commission has recently recommended to like effect in regard to express personal (or family) trusts: see Report on the Law of Trusts (1984), pp. 389 *et seq.*

⁷³ *Supra*, footnote 8. Subsection (3) goes on to specify that "[w]ithout limiting the generality of subsection (2)", this requirement of court approval applies, *inter alia*, to "(b) any variation or termination of the trust. . . (ii) by consent of all persons who are beneficially interested. . .".

⁷⁴ Variation of Trusts Act, 1958, 6 & 7 Eliz. II, c. 53.

in a rapidly changing society.⁷⁵ For one thing, the court's inherent jurisdiction to vary a trust had proved not as extensive as had previously been argued.⁷⁶ For another, the rule in *Saunders v. Vautier* was not available if, as was often the case, any of the beneficiaries were underage or were unborn.⁷⁷ England's Variation of Trust Act, 1958,⁷⁸ authorized the court to approve an arrangement varying or revoking a trust on behalf of, generally speaking, persons incapable of consenting on their own behalf.⁷⁹ It did not abolish the rule in *Saunders v. Vautier*: rather, it sought to build upon it.

Legislation modelled on the 1958 Act was subsequently adopted in Manitoba⁸⁰ as well as in all other Canadian common law provinces except Newfoundland.⁸¹ Because this legislation presupposes the continued existence of the rule in *Saunders v. Vautier*, it is perhaps useful to examine more closely their interrelationship, with a view to deciding whether Manitoba's recent changes have simplified the situation.

In one regard, as has been seen, the general run of variation of trust legislation merely supplements the rule in *Saunders v. Vautier*: the court consents on behalf of persons incapable of consenting for themselves, with competent adults consenting on their own behalf. In other regards, however, the Canadian statutes, at least, represent an uneasy peace between a beneficiary's rights as represented by the rule in *Saunders v. Vautier* and judicial discretion. This can be illustrated in two ways. Firstly, although the court does not have jurisdiction to override the *consent* of competent adult beneficiaries, whether vested or contingent, if all agree to terminate

⁷⁵ See the discussion in Waters, *op. cit.*, footnote 11, pp 1056 *et seq.*

⁷⁶ An important decision in this regard was *Chapman v. Chapman*, [1954] A.C. 429 (H.L.), holding that the compromise jurisdiction is limited to cases in which there is a genuine dispute. See Waters, *op. cit.*, footnote 11, pp. 1061 *et seq.*

⁷⁷ Or otherwise unavailable, as where an adult beneficiary was missing or his whereabouts unknown. As well, there is some question whether the rule can be used to vary rather than to terminate trusts. The wording of the general run of variation of trust legislation would imply that this is possible (in that courts are empowered to approve arrangements "varying or revoking" trusts on behalf of incapable persons, and with capable persons presumably consenting on their own behalf in the context of *Saunders v. Vautier*). In any event, beneficiaries can terminate a trust and resettle the property: see Man. Law Ref. Comm., Report No. 18, *op. cit.*, footnote 9, p. 6.

⁷⁸ *Supra*, footnote 74.

⁷⁹ The English Act, *ibid.*, s. 1, authorizes the court to consent on behalf of four groups of persons: persons who "by reason of infancy or other incapacity [are] incapable of assenting" and persons "unborn" (paragraphs (a) and (c)), as well as certain contingent beneficiaries and beneficiaries under protective trusts (paragraphs (b) and (d)). Canadian legislation is in identical terms as to the first two groups. The last group (d), inappropriate in the Canadian context, was varied accordingly. Differences in drafting of paragraph (b) are discussed *infra*, the text at footnote 82.

⁸⁰ The Trustee Act, *supra*, footnote 8, s. 61 (enacted 1964 (1st Sess.), c. 56).

⁸¹ For the Canadian legislation see Waters, *op. cit.*, footnote 11, pp. 1067 *et seq.*

the trust and all together represent the entire beneficial interest,⁸² it does have jurisdiction to override the *refusal* of any or all of the *contingent* beneficiaries. This is so because the Canadian versions authorize the court to consent on behalf of those persons, including competent adults, whose interests are contingent at the time of application.⁸³ Secondly, the court is given jurisdiction to override the *consent* of competent adults (even ones with vested interests) when the matter is otherwise brought before it (on application, say, on behalf of an infant beneficiary). This jurisdiction would seem to flow from its authority to approve an arrangement only "if it thinks fit".⁸⁴

With the abolition of the rule in *Saunders v. Vautier* in Manitoba and, earlier, Alberta,⁸⁵ one would have hoped that this uneasy interrelationship between a beneficiary's rights and judicial discretion would no longer exist. Unfortunately, this does not appear to be the case. In fact, the amended legislation in both jurisdictions, while purportedly abolishing the rule in *Saunders v. Vautier*, arguably ensure it "another lease on life"⁸⁶ by requiring the prior consent of *sui juris* beneficiaries to any arrangement. The Manitoba Trustee Act⁸⁷ now provides:

Before a proposed arrangement is approved by the court, it must have the consent in writing of all persons who are beneficially interested under the trust and who are capable of assenting thereto.

⁸² In which case they can together terminate the trust as of right by virtue of the rule in *Saunders v. Vautier* alone, without the need for any court intervention. See Part III, *infra*, p. .

⁸³ Paragraph (b) of the typical statute (in Manitoba, The Trustee Act, *supra*, footnote 8, s. 61(1)(g)). The court is authorized to consent on behalf of "any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of person". The English Act, *supra*, footnote 74, has avoided this consensual override by providing specifically in paragraph (b) that the court cannot consent on behalf of "any person who would be of that description, or a member of that class, . . . if the said date had fallen or the said event had happened at the date of the application to the court". For a fuller discussion, see Waters, *op. cit.*, footnote 11, pp. 1070-1071.

⁸⁴ Found in the opening words of s. 1(1) in the usual legislation. This would appear to be different from its obligation to approve only those arrangements which appear to be for the benefit of "the person on whose behalf it is consenting", which is found in a separate subsection (ss. 2(2)); see Waters, *op. cit.*, footnote 11, pp. 1078-1083; Man. Law Ref. Comm., Report No. 49, *op. cit.*, footnote 10, pp. 43-44. For a discussion of these sections and the intention of the settlor or testator, see *infra*, the text at footnote 91 ff.

⁸⁵ See the Trustee Act, *supra*, footnote 9, s. 42, and the text, *supra*, at footnote 73.

⁸⁶ Man. Law Ref. Comm., Report No. 18, *op. cit.*, footnote 9, p. 25.

⁸⁷ *Supra*, footnote 8, s. 61(6) as amended. S. 42(6) of the Alberta legislation, *supra*, footnote 9, s. 42 is to like effect. This requirement was included in the Alberta legislation with very little discussion (Alta. Inst. of Law Research & Ref., Report No. 9, *op. cit.*, footnote 9, p. 19) and was accepted by the Man. Law Ref. Comm. in its 1975 report with only slightly more (Report No. 18, *op. cit.*, footnote 9, pp. 25-26). Interestingly, while its 1982 report (Report No. 49, *op. cit.*, footnote 10) was silent as to this requirement (although such consent was arguably implicit), it reappeared explicitly in the legislation.

And the dividing line between consent and discretion does not seem to have been more clearly drawn than before. As in the past, the court can still override a competent adult's *refusal* to consent where the interest of that adult is contingent only. This conclusion is supported by two separate provisions. Firstly, the section requires such consent only of persons "who are beneficially interested under the trust", which suggests that their interests must be vested; secondly, the court is authorized to consent on behalf of contingent beneficiaries in exactly the same terms as under the previous legislation.⁸⁸ As well, the court cannot now (as it also could not in the past) override the *refusal* of a *sui juris* vested beneficiary. However, the court can now always override a competent adult's *consent* to variation, whereas previously it could do so only if court approval happened otherwise to be required.⁸⁹

Both the Manitoba and Alberta reforms appear to have met two of the three criticisms addressed to the rule in *Saunders v. Vautier*: that the rule can be avoided by careful draftsmanship and that its application is in fact dependent on judicial sanction. However, neither reform has met the first main criticism, that it permits results clearly contrary to the settlor's intention.⁹⁰ Although the Manitoba Law Reform Commission considered this objection in both its 1975 and 1982 Reports and decided that the court should be required to consider the intentions of the settlor or testator when exercising its discretion under the Act,⁹¹ no specific provision in this regard found its way into the amending statute, with the result that the intention of the settlor or testator is to be considered, if at all, under the general

⁸⁸ See *supra*, footnote 83. See now subsection (5)(b). However, it seems that this particular problem would have been resolved had the legislature adopted the 1982 proposed legislation, which would have given the court a more limited jurisdiction to consent on behalf of "a person who is totally unascertained, which includes a person described as any future spouse, and the statutory next of kin of a living person, as if that living person were dead": s 61(6)(e).

⁸⁹ See the discussion *supra*, the text following footnote 83. The authority for this consensual override is more explicit than previously, in that subsection (7) directs that a court shall not approve an arrangement "unless it is satisfied . . . that in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of a justifiable character".

⁹⁰ See the discussion *supra*, the text following footnote 68.

⁹¹ The 1975 Report was more tentative in this regard than the 1982 Report. Whereas the former merely said that there would be "no harm" in including a direction that the judge consider the intentions of the settlor or testator (Report No. 18, *op. cit.*, footnote 9, p. 26), the latter emphasized that the section should "expressly require" such consideration (Report No. 49, *op. cit.*, footnote 10, p. 56). Section 61(10) of the 1982 proposed legislation reads as follows:

For the purpose of subsection 61(9) [court satisfaction that overall the arrangement is justifiable] the court is to consider the intentions of the settlor or testator in creating the trust, and the circumstances that prevail at the time of the consideration by the court of the proposed arrangement.

requirement that the court shall not approve an arrangement unless it is satisfied that it appears "otherwise to be of a justifiable character".⁹²

IV. *The timely vesting rule*

We have seen that the principal recommendation of the Manitoba Law Reform Commission was to substitute judicial discretion under the variation of trust legislation for the rule against perpetuities.⁹³ To this end, the 1983 reform package gives Manitoba courts enlarged (albeit not complete) control over the duration of trusts. However, in Manitoba, as in the rest of Canada, successive interests did not have to appear behind a trust; they could still be created at common law. While, traditionally, the variation of trust legislation (and, indeed, the rule in *Saunders v. Vautier*) is available only for interests behind a trust, the rule against perpetuities applies equally to legal interests. Therefore, in order that the substitution of judicial discretion under the variation of trust legislation for the rule against perpetuities be complete, the former had to apply to the same extent as the latter. This could be achieved in one of two ways: either judicial discretion could be extended to apply to all successive interests, legal as well as equitable; or successive legal interests could be abolished and converted into equitable interests.⁹⁴ The Commission opted for the latter alternative,⁹⁵ and section 4(1) of The Perpetuities and Accumulations Act⁹⁶ provides:

Successive legal interests take effect in equity as interests behind a trust.

⁹² Trustee Act, *supra*, footnote 8, s. 61(7)(b). That is, "otherwise", or in addition to, being satisfied that the arrangement is for the benefit of each person on whose behalf the court is consenting: s. 61(7)(a). S. 61(8) lists certain matters the court should look to in assessing the beneficial character of the arrangement. S. 16(7)(b) would appear to fill the same role as "if it thinks fit" in the general run of legislation. See *supra*, the text at footnote 84. See as well *infra*, footnote 123.

⁹³ See the discussion *supra*, in the text following footnote 66.

⁹⁴ Man. Law Ref. Comm., Report No. 49, *op. cit.*, footnote 10, p. 58.

⁹⁵ Interestingly enough, in so opting, the Manitoba Law Reform Commission made the opposite choice to that of a similar body in Newfoundland. In 1970, the Newfoundland Family Law Study expressed concern that the effect of The Chattels Real Act, R.S.N. 1970, c. 36, which provides that all real property "shall, in all Courts of Justice in this province, be held to be 'chattels real'", was to prohibit the creation *inter vivos* of future interests without using the device of a trust (Newfoundland Family Law Study, Family Law in Newfoundland, 1973, p. 278). As a result, The Chattels Real Act was amended in 1972 to add the following provision: "A valid life estate and any future interest that can be created by will in any chattel real may after the coming into force of this section also be created by deed without the interposition of a trustee": S.N. 1972, No. 13, s. 2. Note that from 1885 to 1886, Manitoba also provided that real property be held as chattels real: The Real Property Act of 1885, *supra*, footnote 28, s. 21; rep. 49 Vict., c. 28, s. 5.

⁹⁶ *Supra*, footnote 5. The remainder of s. 4 provides for the designation of trustees (who are to be, basically, either capable beneficiaries or court nominees). "Successive legal interests" are defined in s. 1 as including (i) the first or particular interest, (ii) any following interest, whether the following interest is future, vested, or contingent or is an

In so doing, however, the legislation abolished another, implicit, rule against perpetuities, the "timely vesting rule".⁹⁷ As every law student knows, legal remainders are governed by four "rules". Two of these, still applied today although offshoots of the feudal notion that there must never be an abeyance in seisin, are important for present purposes: firstly, a remainder is void unless, when it is created, it is supported by a particular estate of freehold created by the same instrument; and, secondly, a remainder is void if it does not in fact vest during the continuance of the particular estate or at the moment of its determination.⁹⁸ Because it is usually the case that the supporting particular estate is a life estate,⁹⁹ the effect of these two rules together is, more often than not, that a legal remainder is destroyed if it does not in fact vest during the lifetime of someone in existence at the time the instrument takes effect. In other words, the legal remainder rules institute a perpetuity period limited to "lives in being" and a rule against perpetuities which could be framed as follows: "A legal remainder is void from the outset if it must vest, if at all, after the death of some life in being at the creation of the instrument; if it might vest within this period, one waits and sees whether it does or not; if it does not, it is destroyed".¹⁰⁰

However, the reach of this timely vesting rule, and consequently the effect of its abolition, is less extensive than might first appear. Firstly, the rule does not apply to all legal future interests but only to legal remainders, that is to say, to those legal future interests that could not properly be classified as legal executory interests in that either they were not created in a deed to uses or a devise¹⁰¹ or, if they were so created, were nevertheless subject to the legal remainder rules by virtue of the operation of the rule in

executory interest, or a determinable or defeasible interest, or any interest over thereupon, and (iii) a general or special power of appointment. *Quaere* whether, in view of the specificity of this definition, all possible interests have been caught. Does (ii), for example, include a possibility of reverter on a determinable fee simple or a right of re-entry on a defeasible interest?

⁹⁷ Basil D. Stapleton, *Purefoy v. Rogers* and the Rule against Perpetuities (1980), 29 U.N.B.L.J. 263, at p. 264.

⁹⁸ R. Megarry and H.W.R. Wade, *The Law of Real Property* (4th ed., 1975), pp. 183-187. The other two rules are that a remainder after a fee simple is void and that a remainder is void if it is designed to take effect in possession by defeating the particular estate.

⁹⁹ Although it might possibly be a fee tail, which, as we have seen (*supra*, the text at footnote 28), can apparently still be created in Manitoba. In this event, the common law "rules" would not play a perpetuity role, but the remainder would be destroyed if the entail is barred.

¹⁰⁰ This formulation is not entirely accurate in that a contingent remainder might validly be limited to follow two successive life estates, the second of which is to a person unborn at the time the instrument takes effect.

¹⁰¹ Thereby taking advantage of the Statute of Uses, *supra*, footnote 4. This statute would appear to be in force in all common law provinces by virtue of the doctrine of reception (see *supra*, footnote 17). It has also been specifically enacted in Ontario: An Act concerning Uses, R.S.O. 1897, c. 331, as reproduced in R.S.O. 1980, Vol. 9, App. A.

Purefoy v. Rogers.¹⁰² Secondly, the courts have on occasion refused to apply rigorously the timely vesting rule even to legal remainders properly so called. For example, the courts recognized an exception in favour of children born posthumously who were *en ventre sa mère* at the termination of the particular estate, thereby countenancing a gap in seisin albeit of limited duration.¹⁰³ Similarly, on at least two occasions the courts refused to apply the timely vesting rule to contingent remainders that were equitable at the time the instrument creating them took effect even though they were converted to legal remainders before they vested. Developed initially in the case of mortgaged property,¹⁰⁴ this exception was extended in *In re Robson*¹⁰⁵ to contingent remainders created by way of testamentary disposition. This result obtained because the relevant legislation¹⁰⁶ provided that the real property of a deceased vested in his personal representatives who held it "as trustees for the persons by law beneficially entitled thereto",¹⁰⁷ so that any contingent remainders thereby created were necessarily equitable and not legal; as such, they "retain[ed] their initial immunity from destruction though clothed from the date of such assent [by the personal representative to any devise] with the legal estate".¹⁰⁸ This reasoning, if correct,¹⁰⁹ is arguably of general application in Canada

For the suggestion, based on *Re Smith and Dale* (1919), 55 D.L.R. 274 (Ont. H.C.), that the scope of the legal remainder rules is arguably more restricted than this, in that they apply only to common law conveyances effected by feoffment with livery of seisin, see D. Mendes da Costa and R.J. Balfour, *Property Law: Cases, Texts and Materials* (1982), pp. 748-749. See *contra*, E.D. Armour, Annotation: Grant of Freehold Estates *in Futuro* (1920), 55 D.L.R. 276.

¹⁰² "Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise but a contingent remainder only": *supra*, footnote 3, at pp. 388 (Wms Saund.), 1192 (E.R.), per Hale C.J. This is the name most often applied to the rule although, according to Megarry and Wade, *op. cit.*, footnote 98, at p. 190, n. 37, *Purefoy v. Rogers* "extended to wills the doctrine established for grants *inter vivos* in *Chudleigh's Case* (1595) 1 Co. Rep. 113b at 137b, 138a".

Looked at in this light, the rule in *Purefoy v. Rogers* can be seen as a subsidiary rule only, the effect of which is to reinforce the perpetuity role played by the legal remainder rules. In other words, it makes it impossible to escape the effect of the second legal remainder rule, as set out above, merely by framing the settlement as a legal executory interest. See generally Stapleton, *loc. cit.*, footnote 97.

¹⁰³ *Reeve v. Long* (1694), 1 Salk. 227, 91 E.R. 202 (K.B.), which rule was extended to deeds as well as wills by the Statute of Posthumous Children (1698), 10 Will. III, c. 22; Megarry & Wade, *op. cit.*, footnote 98, p. 187, n. 20.

¹⁰⁴ *In re Freme*, [1891] 3 Ch. 167 (Ch.D.).

¹⁰⁵ [1916] 1 Ch. 116 (Ch.D.).

¹⁰⁶ Land Transfer Act, 1897, 60 & 61 Vict., c. 65 (U.K.).

¹⁰⁷ *Ibid.*, s. 2(1).

¹⁰⁸ [1916] 1 Ch. 116, at p. 124, per Ashbury J.

¹⁰⁹ In *Commissioner of Stamp Duties (Queensland) v. Livingston*, [1965] A.C. 694, [1964] 3 All E.R. 692, the Privy Council emphasized that during the period of administration "whatever property came to the executor *virtute officii* came to him in full ownership,

because all common law provinces have a similar statutory provision.¹¹⁰ This would mean that the abolition of the timely vesting rule is of very limited effect indeed. *In Re Robson* excludes from the rule's application legal contingent remainders created by will; the Manitoba reform would merely extend this exclusion to *inter vivos* transfers.

Conclusion

One cannot quarrel with the simplification of the rules governing legal future interests.¹¹¹ The continued existence of archaic and excessively complicated rules, based on policy considerations that disappeared with the disappearance of the feudal system itself, understood today by only a few and used by less, is not a credit to any legal system. And while one could suggest other techniques of reform that the transformation of all legal interests into equitable,¹¹² this latter solution does have the additional merit, as the authors of the Report themselves point out,¹¹³ of preventing the occurrence of difficult problems that arise between holders of succes-

without distinction between legal and equitable interests. . . . What equity did not do was to recognize or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration"; (pp. 707 (A.C.), 696 (All E.R.)). However, Queensland does not appear to have had a provision similar to s. 2(1) of the Land Transfer Act, 1897: see, e.g., Succession Act, 1981, s. 45 (referring to the Intestacy Act, 1877, s. 14).

¹¹⁰ With the possible exception of Nova Scotia. See: Estates Administration Act, R.S.B.C. 1979, c. 114, s. 90; Devolution of Real Property Act, R.S.A. 1980, c. D-34, s. 3; The Devolution of Real Property Act, R.S.S. 1978, c. D-27, s. 5; The Devolution of Estates Act, R.S.M. 1970, c. D70, s. 18; Estates Administration Act, R.S.O. 1980, c. 143, s. 2; Devolution of Estates Act, R.S.N.B. 1973, c. D-9, s. 3; Probate Act, R.S.P.E.I. 1974, c. P-19, s. 108; The Chattels Real Act, *supra*, footnote 95, s. 2; Devolution of Real Property Ordinance, R.O.Y.T. 1971, c. D-4, s. 4; Devolution of Real Property Ordinance, R.O.N.W.T. 1974, c. D-5, s. 4.

¹¹¹ Professor McClean, however, makes the interesting suggestion that the legislation might not have effected such a simplification. He argues that The Perpetuities and Accumulation Act, *supra*, footnote 5, could be interpreted as requiring that successive legal interests be valid before they take effect in equity, and that their validity can be determined only by resorting to the existing rules governing legal interests (including the rule in *Purefoy v. Rogers* and the Statutes of Uses). In this event, the only common law rule affected by the reform would be the timely vesting rule (that is, the rule that contingent remainders must vest during the currency of the particular estate or *eo instanti* its determination), as it is the only such rule that applies to legal remainders that were initially valid. See *loc. cit.*, footnote 7, at p. 268.

¹¹² There is no reason in principle why one could not admit of the continued existence of legal future interests, but ones stripped of the feudal vestiges of the four common law rules, the Statute of Uses and the Rule in *Purefoy v. Rogers*. Both legal and equitable interests would exist and both would be subject to the more flexible rules currently reserved for equitable interests. In this event, the variation of trust legislation could be amended to encompass legal interests as well as those behind a trust.

¹¹³ Report No. 49, *op. cit.*, footnote 10, p. 58. As well, this solution has already been tested in the 1925 English reforms.

sive legal interest where there is no trustee responsible for the administration of the property.

The reform proposal as a whole is, in the words of the dissenting report, "imaginative, not to say audacious";¹¹⁴ nevertheless, this writer confesses to a sense of unease about it.¹¹⁵ For one thing, Manitoba now has a property régime different from that of any other Canadian province. If uniformity of law is a legitimate goal *per se*, one must question whether Manitoba's uniqueness is appropriate.¹¹⁶ As well, it seems regrettable that the rule in *Saunders v. Vautier* is no longer available at all, that in all cases, even the most simple, termination as of right has been replaced by judicial discretion. Finally, the reasons given for the abolition of the rule against perpetuities¹¹⁷ are not totally convincing. Firstly, while it is true that specific property in a settlement is usually alienable under the extensive powers of sale normally given to trustees, this need not be the case. Trusts for sale or powers of sale are not automatically incorporated into a trust document, even by statute; rather, they must be expressly included by the settlor.¹¹⁸ Where, for example, successive legal interests are converted into equitable interests under The Perpetuities and Accumulations Act,¹¹⁹ the specific property will not be subject to a power of sale. As well, even where a power of sale is given and the property composing the fund alienable, the beneficiaries are nevertheless still subject to the financial tutelage of the trustees for as long as the trust lasts. The abolition of the rule in *Saunders v. Vautier* reinforces this last objection. Secondly, it may be that social and psychological factors currently mitigate against the creation of dynastic settlements in Canada.¹²⁰ Again, this need not always be the case. Current public concern, for example, to preserve historic, recreational and agricultural property for future generations of Canadians might be reflected in a private concern to preserve such property in the same family. Thirdly, although existing tax policies do discourage excessive tying up of property, it would seem unreasonable to expect this result as a matter of course, especially when tax laws are already under attack as being required

¹¹⁴ Report No. 49, *op. cit.*, footnote 10, p. 62. The author of the Memorandum of Dissent was Professor (now Dean) D. Trevor Anderson of the Faculty of Law, University of Manitoba.

¹¹⁵ Like the author of the Memorandum of Dissent, I hope I am not "standing against the light": *ibid.*

¹¹⁶ As well, Manitoba is foregoing the possibility of benefitting from some fifteen years of experience with reforming legislation in other jurisdictions: *ibid.*, p. 64.

¹¹⁷ See the text, *supra*, at footnote 58 ff.

¹¹⁸ Waters, *op. cit.*, footnote 11, p. 882. The usual Trustee Act does, however, elaborate upon the content of such a power or trust if granted. See, for example, The Trustee Act, *supra*, footnote 8, ss. 27 and 28.

¹¹⁹ *Supra*, the text at footnote 96.

¹²⁰ The Report's evidence as to this is "in large measure impressionistic": McClean, *loc. cit.*, footnote 7, at p. 249.

to do too much.¹²¹ Their role in this regard is largely fortuitous. History bears witness to this: the rule against perpetuities originally developed when the tax laws of the time (that is, the need for someone always to have seisin) no longer controlled the futurity of interests. Fourthly, and most fundamentally, in abolishing the rule against perpetuities, Manitoba has removed the linchpin of future interests. While the role played by the rule in placing temporal restrictions on the creation of future interests and in controlling the duration of accumulations is well recognized, the rule against perpetuities also fulfills another important function, that of channelling the operation of the variation of trust legislation.¹²² By setting outside limits on vesting, the rule restricts the time within which all beneficiaries will be born. The variation of trust legislation is therefore easier to apply, in that the courts can more readily assess the impact of the proposed arrangement upon beneficiaries.¹²³

In short, the arguments for abolishing the rule against perpetuities and the rule in *Saunders v. Vautier*, rules that are quietly and effectively performing their tasks,¹²⁴ and substituting therefor a combination of social factors, taxing statutes and judicial discretion, are not persuasive, at least to this writer.

¹²¹ The Alberta Institute for Law Research and Reform was of the opinion that "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": Report No. 6, *op. cit.*, footnote 25, p. 3.

¹²² And the rule in *Saunders v. Vautier* in jurisdictions where it has not been abolished.

¹²³ The suggestion that the courts should be required to consider the intention of the settlor or testator (the text, *supra*, at footnote 90 ff.) might tend to reinforce the perpetual duration of settlements, if such was clearly the settlor or testator's intention.

¹²⁴ Report No. 49, *op. cit.*, footnote 10, p. 47, describing one of the arguments against the abolition of the rule against perpetuities.