

1980

## c 374 Perpetuities Act

Ontario

© Queen's Printer for Ontario, 1980

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/rso>

---

### Bibliographic Citation

*Perpetuities Act*, RSO 1980, c 374

### Repository Citation

Ontario (1980) "c 374 Perpetuities Act," *Ontario: Revised Statutes*: Vol. 1980: Iss. 6, Article 14.

Available at: <http://digitalcommons.osgoode.yorku.ca/rso/vol1980/iss6/14>

## CHAPTER 374

### Perpetuities Act

**1. In this Act,**

Interpre-  
tation

- (a) "court" means the Supreme Court;
- (b) "in being" means living or *en ventre sa mere*;
- (c) "limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred. R.S.O. 1970, c. 343, s. 1.

**2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.** R.S.O. 1970, c. 343, s. 2.

Rule  
against  
perpetuities  
to continue;  
saving

**3. No limitation creating a contingent interest in real or personal property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.** R.S.O. 1970, c. 343, s. 3.

Possibility  
of vesting  
beyond  
period

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

Pre-  
sumption of  
validity and  
"Wait and  
See"

- (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or
- (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

**(2) A limitation conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.**

General  
power of  
appoint-  
ment

Special power of appointment, etc.

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period. R.S.O. 1970, c. 343, s. 4.

Applications to determine validity

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

Interim income

(2) Pending the treatment or declaration of a presumptively valid interest within the meaning of subsection 4 (1) as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded. R.S.O. 1970, c. 343, s. 5.

Measurement of perpetuity period

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

Idem

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

Idem

(3) Where there is no life satisfying the conditions of subsection (1), the perpetuity period is twenty-one years. R.S.O. 1970, c. 343, s. 6.

Pre-sumptions and evidence as to future parenthood

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

(a) it shall be presumed,

- (i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and
  - (ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but,
- (b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

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

(3) Where a question is decided by treating a person as <sup>Idem</sup> unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act. R.S.O. 1970, c. 343, s. 7 (1-3).

(4) The possibility that a person may at any time have a <sup>Idem</sup> child by adoption or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children. R.S.O. 1970, c. 343, s. 7 (4); 1977, c. 41, s. 20.

**8.—(1)** Where a limitation creates an interest in real or personal property by reference to the attainment by any <sup>Reduction of age</sup> person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

- (a) that the interest, would, but for this section, be void as incapable of vesting within the perpetuity period; but

(b) that it would not be void if the specified age had been twenty-one years,

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

Exclusion  
of class  
members  
to avoid  
remoteness

(2) Where 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, prevents subsection (1) from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

Idem

(3) Where a limitation creates an interest in favour of a class to which subsection (2) does not apply and actual events at the time of the creation of the interest or at any subsequent time establish 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 limitation to the class to be void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

Interpre-  
tation

(4) For the purposes of this section, a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and a person shall be treated as a potential member if in his case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied. R.S.O. 1970, c. 343, s. 8.

Spouses

9.—(1) Where any disposition is made in favour of any spouse of a person in being at the commencement of the perpetuity period, or where a limitation creates an interest in real or personal property by reference to the time of the death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, for the purpose of validating any such disposition or limitation, that but for this section would be void as offending the rule against perpetuities as modified by this Act, the spouse of such person shall be deemed to be a life in being at the commencement of the perpetuity period even though such spouse was not born until after that time. R.S.O. 1970, c. 343, s. 9.

“spouse”  
defined

(2) For the purposes of subsection (1), “spouse” includes either of a man and a woman who, not being married to

each other, had been cohabiting immediately before the death of one of them,

- (a) continuously for a period of not less than five years; or
- (b) in a relationship of some permanence where there is a child born of whom they are the natural parents. 1977, c. 40, s. 90 (1).

**10.**—(1) A limitation that, if it stood alone, would be valid <sup>Saving</sup> under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation.

(2) Where a limitation is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest. <sup>Acceleration of expectant interests</sup> R.S.O. 1970, c. 343, s. 10.

**11.**—(1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power <sup>Powers of appointment</sup> unless,

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

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

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed. <sup>Idem</sup> R.S.O. 1970, c. 343, s. 11.

Administra-  
tive powers  
of trustees

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

Application  
of subs. (1)

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before that time. R.S.O. 1970, c. 343, s. 12.

Options  
to acquire  
reversionary  
interests

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

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

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

Application  
of subs. (1)

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

Other  
options

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

Options  
to renew  
leases

(4) The rule against perpetuities does not apply, nor do the provisions of subsection (3) apply, to options to renew a lease. R.S.O. 1970, c. 343, s. 13.

Easements,  
profits  
à prendre,  
etc.

**14.** In the case of an easement, *profit à prendre* or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period is forty years from the time of the creation of such easement, *profit à prendre* or other similar interest, and the validity or invalidity of such easement, *profit à prendre* or other similar interest, so far as remoteness is concerned, shall be determined by actual events

within such forty-year period, and the easement, *profit à prendre* or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period. R.S.O. 1970, c. 343, s. 14.

**15.—(1)** In the case of,

Deter-  
minable  
interests

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

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

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

(3) Even though some life or lives in being may be relevant in determining the perpetuity period under subsection (2), the perpetuity period for the purposes of this section shall not exceed a period of forty years from the time when the interests were created and shall be the lesser of a period of forty years and a period composed of the relevant life or lives in being and twenty-one years. R.S.O. 1970, c. 343, s. 15. <sup>Idem</sup>

**16.—(1)** A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the <sup>Specific non-  
charitable  
trusts</sup>



capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of twenty-one years, notwithstanding that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

*Idem*

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital. R.S.O. 1970, c. 343, s. 16.

Rule in  
*Whitby*  
vs.  
*Mitchell*  
abolished

**17.**—(1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to any unborn issue of an unborn person is abolished, but without affecting any other rule relating to perpetuities. R.S.O. 1970, c. 343, s. 17; 1977, c. 40, s. 90 (2).

“issue”  
defined

R.S.O. 1980,  
c. 66

(2) For the purposes of subsection (1), “issue” means issue of a person, whether born within or outside marriage, subject to sections 86 and 87 of the *Child Welfare Act*. 1977, c. 40, s. 90 (3).

Rules as to  
perpetuities  
not appli-  
cable to  
employee-  
benefit  
trusts

**18.** The rules of law and statutory enactments relating to perpetuities do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits, to employees or to their widows, dependants or other beneficiaries. R.S.O. 1970, c. 343, s. 18.

Application  
of Act

**19.** Except as provided in subsection 12 (2) and in section 18, this Act applies only to instruments that take effect on or after the 6th day of September, 1966, and such instruments include an instrument made in the exercise of a general or special power of appointment on or after that date even though the instrument creating the power took effect before that date. R.S.O. 1970, c. 343, s. 19.