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Two Alberta Perpetuities Stories

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Matters Commented On: Bill 8, *Justice Statutes Amendment Act* and Gottlob Schmidt's donation to the province of Antelope Provincial Park

This post covers two matters. The first is the amendment to the *Perpetuities Act*, RSA 2000, c. P - 5 enacted as part of Bill 8, the omnibus *Justice Statutes Amendment Act* which received third reading on December 9th and Royal Assent on December 17th. The second relates to a story carried in the Calgary Herald about Gottlob Schmidt's generous donation to the province of a block of land for parkland purposes.

Section 9 of Bill 8, the *Justice Statutes Amendment Act* provides that

> (2) The following is added after section 22 [of the *Perpetuities Act*]:
>
> **Rule against perpetuities not applicable to qualifying environmental trusts**
> 22.1(1) In this section, "qualifying environmental trust" means a qualifying environmental trust as defined in section 1(2)(g.011) of the *Alberta Corporate Tax Act*.
> (2) The rule against perpetuities does not apply to a qualifying environmental trust created after December 31, 2013.

The definition of a qualifying environmental trust (QET) is complex since it involves reference not only to the *Alberta Corporate Tax Act*, RSA 2000, c.A-15 but also to the QET provisions of the federal *Income Tax Act*, RSC 1985 (5th supp.), c 1. The basic idea of a QET is that it is a trust that is established to meet reclamation obligations principally in the natural resources sector. This amendment to Alberta's *Perpetuities Act* became necessary (or at least desirable) as a result of the National Energy Board's consideration of the need to make provision for the reclamation obligations of operators of federally regulated pipelines.

In its report, Reasons for Decision, *Set Aside and Collection Mechanisms: Pipeline Abandonment –Financial Issues*, issued in May 2014, the NEB made decisions about the types of financial mechanisms that it would accept to ensure that regulated companies would have adequate funds in place to pay for pipeline abandonment out into the future. While the Board generally supported the use of QETs as a tax efficient mechanism for achieving this goal, it also noted that any such trusts would need to take account of the applicable perpetuities rules of the relevant jurisdiction. This might, for example, involve commitments to re-settle QETs before the

expiry of any perpetuity period in a "wait-and-see" jurisdiction, or it might involve some jurisdiction shopping to establish the trust in a jurisdiction like Manitoba that has abolished the rule (although the Board noted (at 32) that a settlor's choice of law would not always be determinative). However, the Board also noted (at 33) that "Enbridge argued that there is the potential that Alberta will abolish the rule against perpetuities. The Board expects that Enbridge is working to achieve this goal in view of its submissions."

In sum, the current amendment is a response to the concerns identified. Hansard for December 1, 2014 (at 217) records that the amendment was sought by the Canadian Energy Pipeline Association on behalf of its members. The amendment is designed to provide greater certainty for those seeking to establish QETs in Alberta to provide for pipeline abandonments costs. It will make Alberta a more attractive jurisdiction for this purpose since the inapplicability of the rule means that the settlor will be able to avoid the complexity associated with the need to re-settle funds before the end of the perpetuity period.

The second story which caught my attention was carried in the Calgary Herald on December 6th, referring to a generous donation of land by Gottlob Schmidt of native grasslands for the creation of Antelope Hill Provincial Park. What caught my attention was the statement in the story that "The donation from Schmidt comes with the requirement that the province 'preserve the land in its natural state for future generations to enjoy.'" Now I don't know how Schmidt actually structured this gift but this language does ring some alarm bells because of changes made to the perpetuity rules in Alberta in 1972 (effective 1973).

As everybody knows, perpetuities reform in Alberta introduced the idea of "wait-and-see" to Alberta's perpetuities rules as a result of which most contingent gifts will be saved: *Perpetuities Act*, ss. 2- 4. But the perpetuity reformers of that era (see Institute of Law Research and Reform, Report No. 6, *Report on the Rule Against Perpetuities*, August 1971) also changed the law on the age old distinction between determinable estates and estates subject to a condition subsequent.

In the pre-*Act* days it would have been easy to advise Mr. Schmidt as to how to structure this transaction to make it stick for the benefit of future generations. The advice would have been to structure the gift as the grant of a fee simple determinable, i.e. "for so long as the land is maintained in its natural state". That would have left Mr. Schmidt and his heirs with a possibility of reverter and in the pre-*Act* days that possibility of reverter was not subject to the common law rule: *Village of Caroline v Roper* (1987), 82 AR 72 (QB). But the *Act* changed all of that.

Section 19 made three changes to the common law rules on the distinction between determinable estates and estates subject to a condition subsequent. First, s.19 says that the distinction between the two is abolished for perpetuities purposes. Hence, both the possibility of reverter and the right of re-entry are subject to the rule. Second, the result of making both interests subject to the rule is that if the contingent event has not come about during the perpetuity period, the right of re-entry or the possibility of reverter is henceforward void, i.e. in this example, the province's title becomes an absolute fee simple shorn of the private law obligation to maintain the property in its natural state. The result of these two changes is that Mr. Schmidt can no longer structure the deal to benefit future generations but can only structure it to achieve this result as a matter of *private law* for the perpetuity period. And so third, what is the perpetuity period for this purpose? Well the normal rule under the Act is the (statutory) lives in being plus 21 years for non-commercial transactions (see s. 5) or 80 years for commercial transactions (s.18) – but in the case of s.19 the perpetuity reformers recommended a very short period of 40 years.

The Institute's Report argued as follows (at 56):

> We assume that the distinction between a determinable fee and a right of entry applies in Alberta though we know of no case on the subject; and indeed there may be doubt whether either type of interest is registerable under the Land Titles Act. In any case we think it advisable to deal with them. Morris and Leach (209-218) think that both types of interest should be treated in the same way. The next question is whether they should both be within the Rule or outside it. Both England (s. 12) and Ontario (s. 15) have brought determinable fees within the Rule. On balance we agree with this policy. The determinable fee, like a right of re-entry creates a cloud on the title and it may remain indefinitely in favour of some one who can be identified only with difficulty.

The Institute gave a similar reason (at 57 – 58) for preferring the shorter period of 40 years as the relevant perpetuity period, namely the difficulty of tracing the person entitled to benefit from the condition or limitation.

The short answer to this may of course be that it is not up to the grantee (the Province in our example) to trace anybody. It is up to an interested grantor (or his or her successors) to take the initiative if the "possibility" comes about. If they are not interested then that is likely the end of the story. In any event, 40 years does seem a very short period when considered in the environmental context of protecting land and biodiversity values for future generations.

We have seen some piecemeal reform of the *Perpetuities Act* in the last couple of years to respond to concerns of mineral owners (see the new s.19(5)) and my post on the background to this amendment) and now of pipeline companies (and the landowners who will benefit from perpetual QETs). If we are to engage in a more comprehensive review of the perpetuities legislation then it might be appropriate to revisit the policy behind this particular change that was made in 1972 and ask whether we really want to prevent somebody from trying to ensure that land donated for public purposes will continue to be used for those purposes for more than just a 40 period.