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THE TRUST PROVISIONS IN
THE PERPETUITIES AND ACCUMULATIONS ACT

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TABLE OF CONTENTS

		Page #
A.	INTRODUCTION	1
B.	OVERCOMING THE LIFE ESTATE RESTRICTIONS	1
C.	*THE PERPETUITIES AND ACCUMULATIONS ACT*	3
D.	THE NEED TO REPEAL	5
	1. *Settled Estates Act, 1856*	5
	2. *The Law of Property Act*	6
E.	MISCELLANEOUS MATTERS	6
	1. Powers of Trustees	6
	2. Land Titles Practice	7
F.	CONCLUSION	8
	EXECUTIVE SUMMARY	9
	SOMMAIRE	13

THE TRUST PROVISIONS IN *THE PERPETUITIES AND ACCUMULATIONS ACT*

A. INTRODUCTION

Generally, real property is held absolutely by its owner; he or she is the only person entitled to sell, lease or mortgage it. However, it is also possible to have less than absolute ownership in real property; land can be held in "successive interests", with one interest taking effect after the other has ended. The most common example of a successive interest is the life estate.[1] The holder of the life estate (known as the life tenant) is entitled to the property and any income generated from it, but only for the duration of his or her life. On the death of the life tenant, the holder of the remainder interest (known as the remainderman) becomes entitled to the property and generally becomes the absolute owner.[2]

A life estate can be created in a number of ways. For example, an individual may transfer land to one person for life and give the remainder to someone else (an *inter vivos* settlement); the same thing can be accomplished in a will. A life estate can also be created through the operation of a statute. For example, *The Homesteads Act*[3] entitles the spouse of a deceased to remain in their homestead for the rest of his or her life; the surviving spouse is given a life estate and the deceased's heirs have the remainder.

In 1983, the enactment of *The Perpetuities and Accumulations Act*[4] brought about important changes in the nature of the life tenant-remainderman relationship. This Report considers the effect of one of those changes on the operation of certain other statutes and considers whether they should now be repealed. Certain other effects on the powers of trustees and on land titles practice are also considered.

B. OVERCOMING THE LIFE ESTATE RESTRICTIONS

The roots of the problems considered in this Report lie in 18th and 19th century England and the popularity during that time of family settlements. These settlements were attempts by large landholders in England to exercise control over their lands long after their deaths; they did

[1]There are other estates which are similar to a life estate. It is possible for an individual to be given the right to occupy and enjoy the property for a set number of years, rather than for the entire term of his or her life. One can also create an "estate pur autre vie", which occurs where an individual, A, is given the right to occupy and enjoy the real property while another person, B, is alive. Upon B's death, A's interest in the property ends.

[2]Although the remainderman does not obtain control or possession of the property until the life tenant's death, he or she does have immediate ownership rights in the property. For example, the remainderman may sell his or her interest in the property while the life tenant is still living (although, of course, the purchaser cannot take possession of the property until after the death of the life tenant).

[3]*The Homesteads Act*, C.C.S.M. c. H80.

[4]*The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c. 43; C.C.S.M. c. P33.

this through the extensive use of successive interests.[5] Land owners used life estates to keep the property in the family for future generations and to prevent the land from being broken up and sold in smaller parcels. Unfortunately, it also brought about unintended consequences, including the gradual physical deterioration of the land and its buildings and economic stagnation for the surrounding area. This, in turn, brought about legislation in England that remains part of the law of Manitoba even today.

At common law, a successive interest holder was free to sell, lease or mortgage his or her interest in the property; however, in doing so, he or she could not do anything which would affect the other party's interest. This meant that any sale, lease or mortgage that a life tenant entered into with respect to the property would end upon the life tenant's death, and any sale, lease or mortgage the remainderman entered into would not take effect until the life tenant's death. Understandably, few people were prepared to buy, lease or grant a mortgage under those circumstances; after all, the purchaser, lessee or mortgagee never knew when the life tenant would die, bringing their interest in the land to an automatic, uncompensated end. As a result, large tracts of land were unavailable for commercial or residential development; the consequence was economic stagnation in the affected areas.[6]

Furthermore, it was not unusual for neither the life tenant nor the remainderman to be willing to make a capital investment in the land during the life tenant's occupation. The life tenant was reluctant to invest because he or she knew that the expenditure would ultimately benefit the remainderman (as the remainderman would own the property upon the life tenant's death). Similarly, the remainderman knew that, although he or she would ultimately benefit from the infusion of money for repairs or improvements to the property, the life tenant would benefit from the capital investment immediately. "In this way the land was starved of money which was needed for its maintenance."[7] Necessary repairs, maintenance and improvements were not made.

As a result, a variety of means were sought to overcome the adverse effects of the common law. Individuals creating life estates began giving the life tenants powers to deal with the property in the documents establishing them.[8] However, this only worked for newly created successive interests; the documents creating successive interests already in existence did not usually contain any powers for the life tenants and it was not possible to add them afterwards. In such cases, the land could only be dealt with effectively if the life tenant and remainderman made decisions together and agreed upon a particular action. In light of the differing interests of life tenants and remaindermen (and human nature), this was often not possible. Thus, in many cases, the only alternative to the economically ruinous paralysis imposed by the common law was to petition the British Parliament for a Private Act to confer the power needed to take a particular action. However, this option was not available to all life tenants as "such Acts were

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[5]A family settlement was usually created *inter vivos*, with the family head converting his absolute ownership into a life estate for himself and a remainder interest for his heir. However, this only gave the family head control over one generation. On his death, his heir would be free to convert the remainder interest into an absolute interest and to then sell or break up the lands. To prevent this, the family head would persuade his heir, upon coming of age, that he should also create a family settlement; the heir would be persuaded that he should give up his ultimate right to absolute ownership of the land, give himself a life estate instead and give his own heir a remainder interest. Since the heir was not entitled to any income from the property while the family head was still alive and had no other source of income, he could usually be persuaded to do this if offered money or an allowance. "The alternative is gently placed before him: do your duty to the family by surrendering your future estate tail, receiving instead a future life estate and a present handsome allowance, or remain during your father's lifetime without funds.": A. Underhill, "Changes in the Law of Real Property", *A Century of Law Reform* (1901) 283.

[6]*Anger and Honsberger Law of Real Property*, vol. 1 (2nd ed., 1985) 49.

[7]*Id.*, at 49.

[8]Underhill, *supra* n. 5, at 285.

expensive luxuries, only open to the rich, and beyond the means of most country gentlemen of moderate means."[9]

The inability of most successive interest holders to get around the effects of the common law finally led the British Parliament to enact public statutes to deal with the situation. The first of these statutes, the *Settled Estates Act, 1856*,[10] was received into Manitoba law when the province entered Confederation in 1870.[11] The Act gave the Court of Chancery (in Manitoba, the Court of Queen's Bench) the power to authorize a lease, sale or partition of all or part of the lands.[12] More significantly, it also empowered a life tenant[13] to grant leases to the property for a period of not more than 21 years without the approval of the remainderman or the Court, unless such action was expressly forbidden in the document which created the successive interests.[14] This was an important reform because it allowed the life tenant, for the first time, to do something which would bind the remainderman; such a lease would continue in force for its full term, even if the life tenant died during its term.

Legislation was also enacted in Manitoba. *The Law of Property Act* allows "any person interested in land in Manitoba", including successive interest holders, to seek approval from the Court of Queen's Bench for a partition or sale.[15] Thus, a successive interest holder can, with the Court's approval, affect the interests of another successive interest holder by seeking to sell or partition the property.

C. *THE PERPETUITIES AND ACCUMULATIONS ACT*

In 1983, *The Perpetuities and Accumulations Act* was enacted as a result of recommendations from the Manitoba Law Reform Commission. The chief aim of the Commission was to abolish the modern rule against perpetuities,[16] an arcane and, despite its name, anachronistic legal principle which had bedeviled generations with its complexity. Without going into its details, it suffices for our purposes to note that one of the purposes of the rule was to "strike a fair balance between the desires of present absolute owners to regulate beyond their own mortality the enjoyment of their property in the years to come, and the wishes of those living tomorrow to have the same, or at least effective, control over the enjoyment of property which they have inherited."[17] In other words, the modern rule against perpetuities

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[9]Underhill, *supra* n. 5, at 285.

[10]*Settled Estates Act, 1856* (U.K.), 19 & 20 Vict., c. 120.

[11]The reception of the *Settled Estates Act, 1856* into Manitoba law has not been confirmed by a Manitoba court; however, it seems clear that the Act forms part of Manitoba law. There are two reasons for this conclusion. First, the Saskatchewan Court of Queen's Bench, applying the same test that is used in this Province, determined that the Act was received in Saskatchewan in 1870: *Re Moffat Estate* (1955), 16 W.W.R. 314. Second, prior to its revision in 1988-89, *The Court of Queen's Bench Act* stated that the Court of Queen's Bench had the same powers as the Court of Chancery had with respect to leases and sales of settled estates as of July 15, 1870; at that date, the *Settled Estates Act, 1856* provided the Court of Chancery with all of these powers. The Act no longer makes specific reference to leases and sales of settled estates; however, it still refers to the Court having all the powers which the Court of Chancery had on July 15, 1870: *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 32.

[12]*Settled Estates Act, 1856* (U.K.), 19 & 20 Vict., c.120, ss. 2 and 11.

[13]The Act applied to both an equitable and legal life tenant. An equitable life tenant has a life interest in property which is held under a trust.

[14]*Settled Estates Act, 1856* (U.K), 19 & 20 Vict., c. 120, s. 32.

[15]*The Law of Property Act*, C.C.S.M. c. L90, s. 20(1); *Chupryk* v. *Haykowski* (1980), 3 Man. R. (2d) 216 (C.A.).

[16]The modern rule against perpetuities has been described in the following way: "No interest which does not vest when the instrument of creation takes effect, is valid unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.": Manitoba Law Reform Commission, *The Rules Against Accumulations and Perpetuities* (Report #49, 1982) 9.

[17]*Id.*, at 23.

sought to put a limit on the number of years into the future the present owner of property could stipulate how it would be owned and managed.[18] The Commission concluded that the same objective could be achieved without the outmoded rule by simply making such property subject to the variation of trust provisions of *The Trustee Act*. These provisions allow the beneficiaries of a trust to apply to court for a variation or termination of the trust's provisions;[19] allowing life tenants and remaindermen to use these provisions would ensure that the person establishing the successive interests could not indefinitely control how the property was owned. However, in order to achieve this, it was necessary to convert the relationship of life tenant and remainderman to a trust relationship, so as to bring it within the ambit of *The Trustee Act*. Section 4(1) of *The Perpetuities and Accumulations Act* accomplishes this.[20]

Thus, *The Perpetuities and Accumulations Act* effected a major change in the legal principles governing the way in which successive interests are held and the roles played by the successive interest holders. The Act deems a trust to have been created over all successive interests, including those of life tenant and remainderman. The property now becomes trust property and is held by trustees for the benefit of the successive interest holders, all of whom are the beneficiaries of the trust. The trustees are those adult beneficiaries of the successive interest trust, to a maximum of four[21], who wish to so act.[22] Where there are no qualified trustees, an application can be made to court for the appointment of a trustee.[23]

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[18]If the property could not be vested in a person within the time period stipulated by the rule, the gift was invalid.

[19]*The Trustee Act*, C.C.S.M. c. T160, s. 59. The capable adult beneficiaries must consent to such an action. The court may consent to the proposal on behalf of any beneficiaries who are unable to consent personally: *The Trustee Act*, C.C.S.M. c. T160, s. 59(5).

[20]It might also be argued that this was necessary to ensure that all types of future interests were affected by the abolition of the rule against perpetuities. There are a number of different types of future interests which can be created in a will or through an *inter vivos* grant and the modern rule against perpetuties certainly applied to most of them (including equitable contingent remainders, swinging and shifting uses and executory devises or trusts): *Halsbury's Laws of England*, vol. 35, (4th ed. reissue) 633, 636-637, *Challis's Law of Real Property: Chiefly in Relation to Conveyancing* (3d ed., 1911) 183, H.G. Rivington, *Law of Property in Land* (2d ed., 1937) 176. However, it is arguable that the rule did not apply to one type of future interest: legal contingent remainders.

A legal contingent remainder is a remainder interest which takes effect only when a stipulated condition has been met or a stipulated event has occurred (such as the donee reaching a certain age or entering a certain profession). The application of the modern rule against perpetuities to such an interest has not been decided by a Manitoba court or by the Supreme Court of Canada. In England, the applicability of the modern rule against perpetuities to legal contingent remainders has not been an issue since 1925 when legislation was enacted which changed all legal future interests into equitable interests: *Law of Property Act 1925* (U.K.), 15 & 16 Geo. 5, c. 20. However, according to one source, prior to that time "[t]he applicability of the rule against perpetuities to legal contingent remainders . . . was the subject of much controversy" in England: *Halsbury's Laws of England*, vol. 35 (4th ed. reissue) 634. The Court of Chancery indicated that the rule against perpetuities applied to legal contingent remainders (*In re Ashforth*, [1905] 1 Ch. 535; *In re Frost* (1889) 43 Ch. D. 246); however, noted authors have cast doubt on this conclusion: *Challis's Law of Real Property: Chiefly in Relation to Conveyancing*, *supra* at vii-viii, 197-200, 205-217; Fearne, *Contingent Remainders* 441 as cited in *Challis's Law of Real Property: Chiefly in Relation to Conveyancing*, *supra*, at 214. Another author, after stating that the rule against perpetuities has been judicially determined to apply to legal contingent remainders, limits this by saying that the rule would only apply "where there was not a single contingent remainder, but one contingent remainder following after another . . . .": Rivington, *supra*, at 177. In Nova Scotia and Ontario, the rule against perpetuities does apply to legal contingent remainders: *Hewson* v. *Black* (1917), 36 D.L.R. 185 (N.S.S.C.); *Thomas* v. *Shannon* (1898), 30 O.R. 49 (Div. Ct.).

The Perpetuities and Accumulations Act addresses this ambiguity. The imposition of a trust over legal contingent remainders changes them to equitable contingent remainders, to which the modern rule against perpetuities clearly applied: *The Perpetuities and Accumulations Act*, C.C.S.M. c. P33, s. 4(1).

[21]If there are more than four beneficiaries who are willing to act, then the first four named will be the trustees or, if beneficiaries are named in a class, seniority of age will be used to determine which of them will be trustees: *The Perpetuities and Accumulations Act*, C.C.S.M. c. P33, s. 4(4).

[22]The combined effect of *The Perpetuities and Accumulations Act*, C.C.S.M. c. P33, s. 4(2)(b) and *The Trustee Act*, C.C.S.M. c. T160, s. 9(1)(a), is that the following persons cannot act as trustee: "a trustee who is convicted of a crime, or is a lunatic or a defective, or is a bankrupt, or has made an authorized assignment, or is a corporation that is in liquidation or has been dissolved".

[23]*The Perpetuities and Accumulations Act*, C.C.S.M. c. P33, s. 4(5).

Changing the relationship of the successive interest holders from one based on land law to one based on trust law means that life tenants and remaindermen no longer have legal ownership of the property. Instead, the trustees are its legal owners[24] and they hold it in trust for the beneficiaries, namely, the life tenants and remaindermen. The trustees, as legal owners, have the right to deal with the property in accordance with the provisions of *The Trustee Act*.

This raises the central question of this Report. On the one hand, life tenants have been granted certain transactional powers under the *Settled Estates Act, 1856* and *The Law of Property Act*. On the other hand, the enactment of *The Perpetuities and Accumulations Act* has made life tenants into beneficiaries of a trust and it is a central tenet of trust law that beneficiaries have no transactional powers over the trust property; these are reserved to the trustees.[25] Do the *Settled Estates Act, 1856* and *The Law of Property Act* fit in the trust scheme established under *The Perpetuities and Accumulations Act* or is there a need to repeal or amend them? Is there a need to adjust the powers of trustees appointed under *The Perpetuities and Accumulations Act*?

D. THE NEED TO REPEAL

1. *Settled Estates Act, 1856*

If it is to serve the public well, the law must be clear, unambiguous and free of anomalous results. In our view, the continued co-existence of the *Settled Estates Act, 1856* and the *The Perpetuities and Accumulations Act* fails this test. On the one hand, the *Settled Estates Act, 1856* empowers life tenants to grant leases to the property for up to 21 years; the approval of a court or of the remainderman is not required. It also allows life tenants to apply to court for a sale, partition or lease of the property. At the same time, *The Perpetuities and Accumulations Act* states that life tenants are to be regarded as beneficiaries of a trust and the law of trusts clearly provides that beneficiaries have no power to lease the property (or to manage it in any other way).[26]

At best, the combined effect of these two statutes is that both life tenants and trustees have the concurrent power to grant leases of the affected property. This, however, creates the possibility that the property could be independently leased to two different tenants. So, for example, anyone who enters into a lease arrangement with a life tenant runs a substantial risk that the trustee has already entered into a lease arrangement with someone else or will do so in the future. Each would, in theory, have a valid lease. At worst, the two statutes are completely contradictory: one statute confers powers on life tenants to deal with the property, while the other creates a situation in which life tenants cannot deal with the property.

If the two statutes are indeed contradictory, then it might be argued that the combined enactment of *The Perpetuities and Accumulations Act* and *The Trustee Act* has impliedly repealed the *Settled Estates Act, 1856* in Manitoba. A statute is impliedly repealed by a later

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[24]The trust property vests in the trustees: *The Perpetuities and Accumulations Act*, C.C.S.M. c. P33, s. 4(3).

[25]The trustee is the legal owner of the trust property and only he or she can take legal actions with respect to the property. However, the beneficiaries are not completely powerless. A beneficiary can compel a trustee to carry out his or her powers and duties in a proper manner by obtaining a court order forcing a trustee to stop an action which would be in breach of the trust or carry out an action required by the trust which he or she is refusing to perform: D.M.W. Waters, *Law of Trusts in Canada* (2nd ed., 1984) 984-985.

[26]A life tenant may be one of the trustees but, in that case, he or she would have to share the office with other beneficiaries (among whom would probably be remaindermen) and so would still not have the capacity for unilateral action. Even where a life tenant is the only trustee under the trust created by *The Perpetuities and Accumulations Act* (which could arise if none of the other beneficiaries has consented to act or is an adult), he or she would have a fiduciary obligation to act in the best interests of all of the beneficiaries (including remaindermen). This obligation arises out of a trustee's duty to act impartially between the beneficiaries. A trustee cannot act in any way which gives one beneficiary an advantage and causes another beneficiary to be harmed, unless so ordered by the trust document: Waters, *supra* n. 26, at 787.

statute where the "two Acts are inconsistent or repugnant".[27] If one believes that two individuals cannot be given the same absolute power over the same property, then this test has arguably been met and the *Settled Estates Act, 1856* has been impliedly repealed. However, as we have noted, one can also view this as a simple sharing of a power and not necessarily inconsistent (however dangerous the results may be to third parties).

In our view, doubt on this issue creates uncertainty for life tenants, remaindermen and all persons who may enter into commercial transactions with them and should be resolved. A trust beneficiary, in this case, a life tenant, should not have any independent power over the property. The interests of all parties in a successive interests relationship are best protected by giving effect to the trust created by *The Perpetuities and Accumulations Act* and allowing them to make use of the variation of trust provisions in *The Trustee Act*. The possibility of the continued application of the *Settled Estates Act, 1856* is an impediment to this and should be ended expressly.

RECOMMENDATION

The Settled Estates Act, 1856 should be repealed.

2. *The Law of Property Act*

The Law of Property Act can be used by a successive interest holder to apply to court for a partition or sale of the property. However, in our view, this complements, rather than contradicts, *The Perpetuities and Accumulations Act*. Unlike the *Settled Estates Act, 1856*, *The Law of Property Act* does not allow the beneficiaries of a successive interest trust to take any unilateral action. Rather, it gives them an opportunity to have a court rule on the appropriate administration of the trust property, just as trustees who wished to partition or sell the property would also have to apply to court for such an order. In either case, the court would have to decide, based on the evidence before it, what would be best for the trust and all of its beneficiaries. We therefore see no reason to amend *The Law of Property Act* as it applies to successive interests in land.

E. MISCELLANEOUS MATTERS

1. Powers of Trustees

In the course of reviewing the implications of the trust provisions in *The Perpetuities and Accumulations Act*, we also considered the issue of the powers of the trustees of the deemed trusts which it establishes.

Trustees derive their powers to deal with the assets of the trust from two sources: the document which creates the trust and *The Trustee Act*. In the case of the successive interest trusts created by *The Perpetuities and Accumulations Act*, there is of course no trust document; the trust is created by the statute and it does not confer any powers on the trustees. The result is that the trustees can only take those actions which are authorized by *The Trustee Act*.

The Trustee Act empowers trustees to sell, lease, grant options, repair and make improvements to the property held in trust.[28] However, a trustee can only sell or grant options to the property and enter into leases with respect to the property for periods longer than three years

[27] E.A. Driedger, *Construction of Statutes* (2nd ed., 1983) 226.

[28] *The Trustee Act*, C.C.S.M. c. T160, ss. 25-28.

if a power of sale is vested in the trustee in the trust document.[29] Since *The Perpetuities and Accumulations Act* does not confer a power of sale on the trustees of the trust created under that Act (or any other power), they must obtain the approval of the Court of Queen's Bench[30] or the unanimous consent of all the beneficiaries[31] in order to take any of these actions.

Should *The Perpetuities and Accumulations Act* be amended to grant successive interest trustees a power of sale, with the corresponding expansion of powers under *The Trustee Act*? In our view, the answer to this question lies in maintaining a balance between the trustees and the beneficiaries. While the trustees must be allowed to act with respect to the property, the beneficiaries must be protected from trustees taking actions which they believe are contrary to their interests. After discussing various options, we have concluded that the current law best achieves this balance. By allowing trustees to grant leases for up to three years and sell, mortgage and take other actions only with the approval of the court or all the beneficiaries, no major actions can be taken without the knowledge of the beneficiaries and they are afforded a full opportunity to comment on any proposed action. Although a court may well approve a proposed action despite the opposition of a particular beneficiary, any opposing successive interest holder is assured that his or her views will be given serious consideration.[32]

2. Land Titles Practice

One notable result of the imposition of the trust by *The Perpetuities and Accumulations Act* is the way in which legal title to property subject to a successive interest can be held.

Under *The Real Property Act*, title to land must always be in the name of its legal owner; beneficial owners cannot be listed on the title.[33] Thus, prior to the enactment of *The Perpetuities and Accumulations Act*, title to property subject to successive interests was held in the names of all of the successive interest holders, in those capacities (since each held a legal interest). For example, the title would name the life tenant, indicating that he or she owned only an estate for life in that property, and would name the remainderman, indicating that he or she owned the remainder interest.

However, the life tenant and remainderman now have only an equitable interest in the land; they no longer have a legal interest. The legal owner is the trustee. It therefore appears to us that, since successive interest holders are now beneficiaries of a trust, title to land subject to successive interests should be held not in the names of the "life tenant" and "remainderman", but in the names of the trustees. Our understanding is that this is not the practice now being followed by some members of the Manitoba Bar and we draw their attention to this concern.

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[29]*The Trustee Act*, C.C.S.M. c. T160, ss. 25(1), 27(2) and 28(1); Waters, *supra* n. 26, at 886. If the trust document does not contain a power of sale, a trustee can still grant leases, other than mining leases, of any land for a term which does not exceed three years: *The Trustee Act*, s. 27(2).

[30]The trustees can apply to court pursuant to section 58(1) of *The Trustee Act*.

[31]Waters, *supra* n. 26, at 889. This is a common law provision, not statutory.

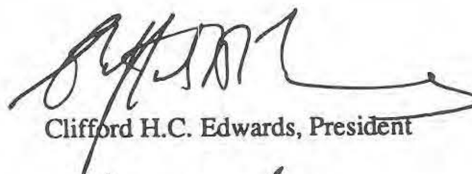
[32]"It would be a rare case where a life tenant would be compelled to suffer partition or sale against his wishes.": *Chupryk* v. *Haykowski*, *supra* n. 16, at 234-235. While the Court was discussing allowing a remainderman to obtain an order of partition or sale under *The Law of Property Act*, it is very likely that it would espouse the same position with respect to an application by the trustees under *The Trustee Act*.

[33]Under *The Real Property Act*, C.C.S.M. c. R30, the district registrar of the land titles office is not to make any entry in the register containing notice of trusts, unless the trust is with respect to a church, cemetery or the estate of a bankrupt (s. 81(1)). If any document filed with the office states that the owner is a trustee, the district registrar has the discretion to refuse the documents (s. 81(2)). However, beneficial owners can register a caveat on the title, giving notice of the existence of the trust: (s. 145).

F. CONCLUSION

In the end, this Report has made only one recommendation for legislative reform: that the *Settled Estates Act, 1856* be repealed. However, we believe that this is an important change because it removes an anomaly from the law which endangers the proper administration of land which is subject to a life estate; not only does this include land transferred on that basis by sale or will, it also covers land subject to a life estate under *The Homesteads Act*. Repeal of the *Settled Estates Act, 1856* will protect third parties wishing to negotiate the purchase or lease of property subject to a life tenancy.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, signed this 21st day of September 1995.[34]



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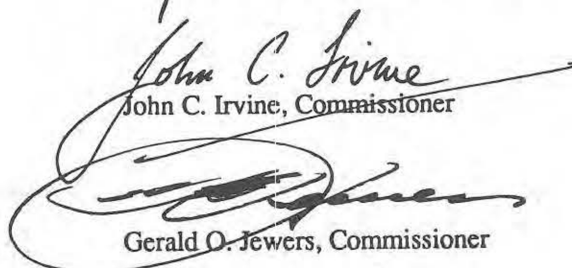

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EXECUTIVE SUMMARY OF

REPORT ON THE TRUST PROVISIONS IN
THE PERPETUITIES AND ACCUMULATIONS ACT

EXECUTIVE SUMMARY

INTRODUCTION

Generally, real property is held absolutely by its owner. However, it is also possible to have less than absolute ownership; land can be held in "successive interests", with one interest taking effect after the other has ended. For example, the holder of a life estate (the life tenant) is entitled to the property only for the duration of his or her life. On the death of the life tenant, the holder of the remainder interest (the remainderman) becomes entitled to the property and generally becomes the absolute owner.

A life estate can be created in a number of ways. An individual may transfer land to one person for life and give the remainder to someone else; the same thing can be accomplished in a will. A life estate can also be created by statute. For example, *The Homesteads Act* entitles the spouse of a deceased to remain in their homestead for the rest of his or her life; the surviving spouse is given a life estate and the deceased's heirs have the remainder.

THE PROBLEM

At common law, a successive interest holder was free to sell, lease or mortgage his or her interest in the property. However, any sale, lease or mortgage that a life tenant entered into would end upon the life tenant's death and any sale, lease or mortgage the remainderman entered into would not take effect until the life tenant's death. Understandably, few people were prepared to buy, lease or grant a mortgage under those circumstances; after all, they never knew when the life tenant would die, bringing their interest in the land to an automatic, uncompensated end.

This eventually caused the British Parliament to enact the *Settled Estates Act, 1856*; this Act was received into Manitoba law when the province entered Confederation in 1870. The Act gave the Court of Chancery (in Manitoba, the Court of Queen's Bench) the power to authorize a lease, sale or partition of all or part of lands held in a life estate. More significantly, it also empowered a life tenant to grant leases to the property for up to 21 years (even if he or she died during the lease) without the approval of the remainderman or the Court.

In 1983, *The Perpetuities and Accumulations Act* was enacted in Manitoba. Among other things, the Act effected a major change in the legal principles governing the way in which successive interests are held. It deems a trust to have been created over all successive interests, including those of life tenants and remaindermen. The property is now considered to be held in a trust for the benefit of the successive interest holders, all of whom are considered to be the beneficiaries of the trust. The trustees are those adult beneficiaries of the successive interest trust, to a maximum of four, who wish to so act. Where there are no qualified trustees, an application can be made to court for the appointment of a trustee.

Changing the relationship of the successive interest holders from one based on land law to one based on trust law means that life tenants and remaindermen no longer have legal ownership of the property. Instead, the trustees are its legal owners and they hold it in trust for the beneficiaries, namely, the life tenants and remaindermen.

At best, the *Settled Estates Act, 1856* and *The Perpetuities and Accumulations Act* confer the same power to lease land held in a life estate to different people; the former confers it on the life tenant and the latter confers it on the trustees. This means that, for example, anyone who enters into a lease arrangement with a life tenant runs a substantial risk that the trustee has

already entered into a lease with someone else or will do so in the future; each lease would arguably be valid. At worst, the two statutes are completely contradictory. One statute seems to confer powers on life tenants to deal with the property, while the other creates a situation in which life tenants cannot deal with the property. In order to protect life tenants and remaindermen, as well as all persons who may enter into commercial transactions with them, the *Settled Estates Act, 1856* should be repealed.

MISCELLANEOUS ISSUES

The Report also considers three miscellaneous issues: the status of *The Law of Property Act*, the powers of trustees and the appropriate way of holding title in a life estate situation.

The Law of Property Act also contains provisions which appear to give powers to life tenants; it allows "any person interested in land in Manitoba", including successive interest holders, to seek approval from the Court of Queen's Bench for a partition or sale. However, the Commission concludes that this complements, rather than contradicts, *The Perpetuities and Accumulations Act*. Unlike the *Settled Estates Act, 1856*, *The Law of Property Act* does not allow the beneficiaries of a successive interest trust to take any unilateral action but, rather, it gives them an opportunity to have a court rule on the appropriate administration of the trust property. There is no need to change this provision.

Trustees derive their powers to deal with the assets of the trust from two sources: the document which creates the trust and *The Trustee Act*. In the case of the successive interest trusts created by *The Perpetuities and Accumulations Act*, there is of course no trust document; the trust is created by the statute. *The Trustee Act* empowers trustees to sell or grant options to the property and enter into leases with respect to the property for periods longer than three years only if a power of sale was vested in the trustee in the trust document. Since *The Perpetuities and Accumulations Act* does not confer a power of sale (or any other power), the trustees must obtain the approval of the Court of Queen's Bench or the unanimous consent of all the beneficiaries in order to take any of these actions. The Report concludes that this maintains an appropriate balance between trustees and beneficiaries; no major actions can be taken without the knowledge of the beneficiaries and they are afforded a full opportunity to comment on any proposed action.

Finally, the Report notes that, under *The Real Property Act*, title to land must always be in the name of its legal owner; beneficial owners cannot be listed on the title. Thus, prior to the enactment of *The Perpetuities and Accumulations Act*, title to property subject to successive interests was held in the names of all of the successive interest holders, in those capacities (since each held a legal interest). However, the life tenant and remainderman now have only an equitable interest in the land; they no longer have a legal interest. The legal owner is the trustee. Since successive interest holders are now beneficiaries of a trust, title to land subject to successive interests should be held not in the names of the "life tenant" and "remainderman", but in the names of the trustees. The Commission's understanding is that this is not the practice now being followed by some members of the Manitoba Bar and the Report draws attention to this concern.

SOMMAIRE DU RAPPORT SUR

LES DISPOSITIONS FIDUCIAIRES CONTENUES DANS LA
LOI SUR LES DISPOSITIONS À TITRE PERPÉTUEL ET LA CAPITALISATION

SOMMAIRE

INTRODUCTION

De façon générale, les biens réels sont détenus absolument par leur propriétaire. Toutefois, il est également possible d'avoir un droit de propriété qui n'est pas absolu; en effet, un bien-fonds peut être détenu en "intérêts successifs", l'un des intérêts prenant effet lorsque l'autre s'éteint. Par exemple, le titulaire d'un domaine viager (le tenant viager) a droit au bien seulement de son vivant. À son décès, le titulaire de l'intérêt résiduel (le résiduaire) a droit au bien et devient, en général, le propriétaire absolu.

Il existe un certain nombre de façons de créer un domaine viager. Un particulier peut transférer un bien-fonds à une autre personne pour la vie et donner le résidu à quelqu'un d'autre. La même chose peut être accomplie par testament. Par ailleurs, un domaine viager peut également être créé par loi. Ainsi, la *Loi sur la propriété familiale* donne au conjoint d'un défunt le droit de demeurer dans la propriété familiale pour le reste de sa vie; le conjoint survivant se voit attribuer un domaine viager et les héritiers du défunt ont le résidu.

LE PROBLÈME

En common law, le titulaire d'un intérêt successif avait la liberté de vendre, de louer ou d'hypothéquer son intérêt dans le bien. Toutefois, toute vente, location ou hypothèque qu'un tenant viager avait conclu prenait fin à son décès et toute vente, location ou hypothèque que le résiduaire avait conclu ne pouvait prendre effet avant le décès du tenant viager. On peut comprendre que peu de gens aient été disposés à acheter, louer ou accorder une hypothèque dans de telles circonstances; après tout, ils ne savaient jamais quand le décès du tenant viager allait survenir et entraîner l'extinction automatique et sans compensation de leur intérêt dans le bien-fonds.

Cette situation a, en fin de compte, poussé le Parlement britannique à édicter la *Settled Estates Act, 1856*; cette loi a été adoptée au Manitoba lorsque la province a été admise au sein de la Confédération en 1870. La loi donnait à la Cour de chancellerie (au Manitoba, la Cour du Banc de la Reine) le pouvoir d'autoriser la location, la vente ou le partage de l'ensemble ou d'une partie des biens-fonds détenus dans un domaine viager. Fait encore plus révélateur, elle donnait également le pouvoir à un tenant viager d'accorder des baux d'une durée maximale de 21 ans à l'égard des biens (même s'il décédait pendant la durée du bail) sans l'autorisation du résiduaire ou du tribunal.

En 1983, la *Loi sur les dispositions à titre perpétuel et la capitalisation* a été édictée au Manitoba. Entre autres choses, la loi a apporté une modification importante aux principes juridiques régissant le mode de détention des intérêts successifs. Elle suppose qu'une fiducie a été créée à l'égard de tous les intérêts successifs, y compris ceux des tenants viagers et des résiduaires. Les biens sont maintenant réputés détenus en fiducie au profit des titulaires d'intérêts successifs, lesquels sont tous réputés bénéficiaires de la fiducie. Les fiduciaires sont les bénéficiaires majeurs de la fiducie, au nombre de quatre au plus, qui sont disposés à agir. En l'absence de fiduciaire remplissant les conditions requises, une demande peut être présentée au tribunal en vue de la nomination d'un fiduciaire.

Le fait que les rapports des titulaires d'intérêts successifs soient maintenant fondés sur le droit des fiducies plutôt que sur le droit foncier signifie que les tenants viagers et les résiduaires

n'ont plus la propriété des biens en common law. En effet, ce sont les fiduciaires qui en sont les propriétaires en common law et qui les détiennent en fiducie pour les bénéficiaires, à savoir les tenants viagers et les résiduaires.

Au mieux, la *Settled Estates Act, 1856* et la *Loi sur les dispositions à titre perpétuel et la capitalisation* confèrent le même pouvoir de location des biens-fonds détenus dans un domaine viager à des personnes différentes, la première attribuant ce pouvoir au tenant viager et la dernière le donnant aux fiduciaires. Cette situation signifie, par exemple, que toute personne qui conclut un bail avec un tenant viager risque fort que le fiduciaire ait déjà conclu un bail avec quelqu'un d'autre ou qu'il le fasse dans l'avenir; on pourrait prétendre que chacun des baux est valide. Au pis aller, les deux lois sont complètement contradictoires. Une des lois semble conférer aux tenants viagers des pouvoirs leur permettant d'accomplir des actes à l'égard des biens, alors que l'autre les empêche de le faire. La *Settled Estates Act, 1856* devrait être abrogée afin que soient protégés les tenants viagers et les résiduaires de même que tous ceux qui peuvent conclure des opérations commerciales avec eux.

QUESTIONS DIVERSES

Le rapport fait état de trois autres questions: les pouvoirs accordés par la *Loi sur les droits patrimoniaux*, les pouvoirs des fiduciaires et le mode approprié de détention d'un titre dans le cas où un domaine viager serait accordé.

La *Loi sur les droits patrimoniaux* contient également des dispositions qui semblent conférer des pouvoirs aux tenants viagers; elle permet à toute personne ayant un intérêt dans un bien-fonds situé au Manitoba, y compris les titulaires d'intérêts successifs, de demander à la Cour du Banc de la Reine d'approuver un partage ou une vente. Toutefois, la Commission est d'avis que ces dispositions complètent la *Loi sur les dispositions à titre perpétuel et la capitalisation*, plutôt que de la contredire. Contrairement à la *Settled Estates Act, 1856*, la *Loi sur les droits patrimoniaux* ne permet pas aux bénéficiaires d'une fiducie créée à l'égard d'intérêts successifs de prendre des mesures unilatérales. Elle leur donne plutôt la possibilité de demander à un tribunal de statuer sur la gestion des biens en fiducie. Il n'est donc pas nécessaire de modifier cette disposition.

Le pouvoir des fiduciaires d'accomplir des actes à l'égard de l'actif de la fiducie provient de deux sources: l'acte qui crée la fiducie et la *Loi sur les fiduciaires*. Dans le cas des fiducies concernant des intérêts successifs créées en vertu de la *Loi sur les dispositions à titre perpétuel et la capitalisation*, il n'y a évidemment aucun acte de fiducie car la fiducie est créée par la loi. La *Loi sur les fiduciaires* donne aux fiduciaires le pouvoir de vendre ou d'accorder des options relatives aux biens et de louer ceux-ci pendant des périodes supérieures à trois ans seulement si l'acte de fiducie investit le fiduciaire d'un pouvoir de vendre. Puisque *la Loi sur les dispositions à titre perpétuel et la capitalisation* ne confère aucun pouvoir de vendre (ni aucun autre pouvoir), les fiduciaires doivent obtenir l'autorisation de la Cour du Banc de la Reine ou le consentement unanime de l'ensemble des bénéficiaires afin de prendre l'une quelconque de ces mesures. La Commission conclut dans son rapport que cette situation permet de maintenir un juste milieu entre les intérêts des fiduciaires et ceux des bénéficiaires. Il n'est permis d'accomplir des actes important que si les bénéficiaires en ont connaissance et que si ceux-ci ont la possibilité de commenter les mesures envisagées.

Pour terminer, la Commission note dans son rapport que le titre de propriété d'un bien-fonds doit toujours être établi au nom de son propriétaire en common law en vertu de la *Loi sur les biens réels*; le nom des propriétaires bénéficiaires ne peut y figurer. Ainsi, avant l'édiction de la *Loi sur les dispositions à titre perpétuel et la capitalisation*, le titre de propriété d'un bien visé par des intérêts successifs était détenu au nom de tous les titulaires d'intérêts successifs, agissant

en cette qualité (puisque chacun d'eux était titulaire d'un intérêt en common law). Toutefois, le tenant viager et le résiduaire ne possèdent, à l'heure actuelle, qu'un intérêt en equity dans le bien-fonds; ils n'ont plus d'intérêt en common law. Le propriétaire en common law est le fiduciaire. Étant donné que les titulaires d'intérêts successifs sont maintenant les bénéficiaires d'une fiducie, le titre de propriété du bien-fonds visé par les intérêts successifs devrait être détenu non pas au nom du tenant viager et du résiduaire mais plutôt au nom des fiduciaires. La Commission croit comprendre que certains membres du Barreau du Manitoba ne suivent pas cette pratique et fait état de ce problème dans son rapport.