CHARITIES AND THE RULE AGAINST PERPETUITIES

Adam Parachin[1]

Introduction

Charitable status is a legally privileged status. The law in numerous ways, ranging from the trivial[2] to the noteworthy[3], confers legal advantages upon charities. These legal advantages are often misunderstood. This is true in terms of the technical dimensions to the various advantages. It is also true at the more fundamental level of understanding why the law confers advantages on charities and the significance that these advantages pose to the legal meaning of charity generally. These observations are born out in the authorities dealing with the application of the rule against perpetuities to charities, which is the focus of this article.

It is often said that the rule against perpetuities does not apply to charities[4]. As a technical matter, this is wrong, since charities are indeed subject to the rule[5]. A

---

1 Adam Parachin, Assistant Professor, Faculty of Law, University of Western Ontario, London, Ontario, Canada. E-mail: aparachi@uwo.ca. This article was first published in The Philanthropist, Volume 21 No. 3 (2008) (www.thephilanthropist.ca) and is reprinted with the kind consent of the editor and author.

2 For example, subs. 5(1) of the *Athletics Control Act*, R.S.O. 1990, c. A. 34 provides that every person conducting a professional boxing or wrestling contest or exhibition must pay a tax calculated as a percentage (between 1 and 5 per cent) of the gross receipts. However, subs. 5(3) of the statute allows for the tax to be reduced where the entire proceeds will be applied for charitable purposes.

3 Registered charities are generally exempt from federal income tax under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended. The exemption is continued under provincial income tax legislation. See s. 6 of the *Income Tax Act*, R.S.O. 1990, c. I.2 and s. 57, para. 57.11(a) and para. 71(1)1 of the *Corporations Tax Act*, R.S.O. 1990, c. C.40.

4 See, for example, *Goodman v. Mayor of Saltash* (1882) 7 App. Cas. 633 at 642, *Halifax School for the Blind v. Kelley Estate* [1937] S.C.R. 196 at 204, *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] A.C. 531 at 580–81 and *Att.-Gen v. National Provincial Bank* [1924] A.C. 262 at 266.

contingent interest in property held by a charity will, as a general rule, fail if it does not vest within the perpetuity period. There are, however, special exceptions for charities. The result is that, although charities are generally subject to the rule against perpetuities, they enjoy a privileged position in relation to the rule. This article explores these matters with a view to understanding the rule against perpetuities itself, how the rule applies to charities, and the justifications behind the special treatment for charities in relation to the rule.

An essay written over a century ago opened with the observation that the application of the rule against perpetuities to charities "does not in itself seem to be of very great interest."[6] In some respects, this statement appears to remain apt as the privileged position of charities in relation to perpetuity matters has become a time-weathered feature of the legal landscape that largely goes unnoticed. A contributing factor to the relative disinterest in the topic may be the fact that there is eroding support for the rule against perpetuities.[7] As the policy arguments in favour of the rule have weakened, justifying the limited departures from the rule for charities may have taken on a reduced sense of urgency. In the minds of many, the question to be emphasized may well be why anyone should be subject to the rule against perpetuities in the first place and not why there should be leniency for charities.

Why then an article on this topic? The obvious answer is that the rule against perpetuities remains good law in this jurisdiction and understanding the rule and its exceptions continues, for better or for worse, to be necessary for charity lawyers. The less obvious answer is that a study of the application of the rule against perpetuities to charities offers insights not just into the rule itself but also into the legal construction of charity, a matter that is returned to in the conclusion to this article.

---

5 This is not altogether a bad thing for charities. For example, section 15 of Ontario's *Perpetuities Act*, R.S.O. 1990, c. P.9 limits the period of time throughout which a condition subsequent or determinable limitation attaching to a transfer of property is enforceable. Where the provision applies, it limits the enforceability of a condition subsequent or determinable limitation to a maximum of 40 years. Further to this provision, a defeasible or determinable transfer of property to a charity will become an absolute interest for charity if the event of divestment or determining event does not occur within 40 years.

6 R. Lisle, "Remoteness of Charitable Gifts Once More" (1894–1895) 8 Harv. L. Rev. 211.

7 Over fifty years ago, W. Leach, a leading authority on the topic, decried that the rule against perpetuities was "designed to meet problems of past centuries that are almost nonexistent today." See W. Leach, "Perpetuities Legislation" (1954) 67 Harv. L. Rev. 1349 at 1349. More recently, however, the Ontario Law Reform Commission observed in the 1960s that the rule was still justifiable. See Ontario Law Reform Commission, Report No. 1 (Toronto, Ontario Law Reform Commission, 1965) at 4. See also, *infra* note 59.

When one combines the difficulty of the rule against perpetuities[8] with a topic as unruly as the law of charity, some difficult analysis can be anticipated. For this reason, rather than simply assume a working knowledge of the rule against perpetuities, Part I provides a primer on the historical, technical, and policy dimensions to the rule. Part II deals with how the rule applies to charities with a particular emphasis on contingent gifts over from charity to charity and the unlimited duration of charitable purpose trusts. The article concludes by relating the arguments developed throughout to some broader themes in charity law.

Part I: A Framework for Thinking About the Rule Against Perpetuities

(a) Rule Against Perpetuities as a Fetter on the Freedom of Testation

Generally speaking, property holders are able to dispose of their property on such terms as they desire. A property holder may dispose of property for no consideration (i.e., common law gift) or for such consideration that he or she considers appropriate. In addition, a property holder may attach conditions to a transfer of property. For example, the common law has for many centuries recognized the liberty of a person holding property in land to grant a conditional or qualified form of property in the land. Similarly, the law of trusts allows a settlor to establish a trust with conditions imposed upon the various beneficial interests that exist in the trust property.[9]

8 So deceptively difficult is the rule that a California court held in *Lucas v. Hamm* (1961) 56 C2d 583 that a lawyer was not professionally negligent for failing to anticipate how the rule applied in relation to one of his clients. The court observed at para. 11 that "few, if any areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman." Leach described the rule as a "technicality-ridden nightmare" and a "dangerous instrumentality in the hands of most members of the bar." See Leach, *ibid* at 1349.

9 As to whether a conditional gift of personal property is possible outside of a trust, the matter is more complex. Notwithstanding the popularity of terms such as "conditional gift," "donor directed gift," "donor specified gift," and the like, there is a dearth of authorities in support of such gifts of personal property. This is part owing to the general inapplicability of the doctrine of estates (which is in part what makes a conditional grant of land possible at common law) to personal property and to the hazy state of the law with respect to future interests in personal property. The clearest examples of conditional gifts of personal property may be found in connection with gifts of engagement rings and the *donatio mortis causa* ("gift made in contemplation of death"). It may not be the case, however, that these isolated cases can be relied upon to draw the general conclusion that a gift of personal property is possible at common law.

Nevertheless, there are numerous limitations to dispositive freedom. These limitations exist in both a *qualitative* and a *quantitative* sense. In terms of *qualitative* restrictions, while a transferor of property is at liberty to attach conditions to a transferee's use of land or conditions that restrict a beneficiary's interest in a trust, there are qualitative limits as to the nature of the restrictions that may be imposed. For example, conditions that pose a direct restraint on alienation, interfere with a marital relationship, unduly restrain marriage, or are contrary to public policy have been struck down as being problematic on qualitative grounds.[10] These sorts of conditions may be struck down without regard to their quantitative dimension, since a condition that is problematic on qualitative grounds is generally made no less problematic simply because it is intended to apply for only a short period of time.

Quantitative restrictions on dispositive freedom, the focus of this article, operate differently. While a transferor of property is at liberty to control property into the future by delaying when property will "vest" in a transferee and/or to impose conditions of retention (i.e., conditions that must continue to be satisfied in order for property to continue), the law limits the period of time throughout which such control may persist. In particular, the law does not allow a transferor of property to either unduly delay vesting or to impose conditions of retention that can last in perpetuity. The perpetuity rules prescribe a period of time - the perpetuity period - that limits in a quantitative sense the duration for which property may remain contingent. Once this period of time expires, the law ceases to enforce the contingencies attached to the property by the transferor.

As the preceding reflects, the policy concerns informing the perpetuity rules have little to do with the qualitative nature of conditions attached to a transfer of property. A condition that is utterly innocuous on qualitative grounds may be struck on the basis of perpetuity considerations. The fetter on dispositive freedom posed by the perpetuity rules is thus properly viewed as being quantitative in nature.

(b) Primer on the Rule Against Perpetuities

Having established that the rule against perpetuities serves the general objective of limiting the duration for which a person may control property into the future, the issue becomes how and why the rule goes about doing this. The rule against perpetuities is properly understood as a rule against remoteness of vesting.[11] That is,

---

10 See, for example, A. Oosterhoff, R. Chambers, M. McInnes and L. Smith, Oosterhoff on Trusts: Text, Commentary and Materials 6th ed. (Scarborough: Carswell, 2004) at 259–266, M. Gillen, L. Smith and D. Waters, *Waters' Law of Trusts in Canada* 3rd ed. (Toronto: Thomson Carswell, 2005) at 307–324 and A. La Forest, *Anger & Honsberger Law of Real Property* 3rd ed. (Aurora: Canada Law Book, 2006) at 8–14 to 8–18.

11 It was at one time debated whether the rule against perpetuities is a rule against remoteness of vesting or a rule against inalienability. The matter has largely been resolved in favour of the view that the rule against perpetuities is a rule against remoteness of vesting. See L. M. Simes, *Public Policy and the Dead Hand* (Ann Arbor: University of Michigan Law School,

the rule against perpetuities simply requires that all contingent interests in property must vest - if at all - within the period of time known as the perpetuity period. If vesting doesn't occur or can't occur within the perpetuity period, then it will not be allowed to occur and the contingent interest will fail. The basic requirement of the rule was famously described by Professor John Chipman Gray as follows:[12]

> "*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*".

The rule against perpetuities initially developed as a common law rule but has since been modified by statute in many jurisdictions. In Ontario, the *Perpetuities* Act[13] altered the rule against perpetuities in several key respects discussed below. It applies to grants taking effect on or after September 6, 1966, and is largely based upon the English *Perpetuities and Accumulations Act, 1964*.[14]

Applying the rule against perpetuities requires a working of knowledge of

(i) vested and contingent interests in property,

(ii) the duration of the perpetuity period,

(iii) the consequences of non-compliance,

(iv) the policy objective of the rule, and

(v) the implications of the rule for the duration and destructibility of trusts.

The discussion below takes up these foundational issues.

1955) at 32–40. It has even been suggested that the rule against perpetuities should have instead been named the rule against remoteness of vesting. See J. Morris and W. Leach, *The Rule Against Perpetuities* 2nd ed. (London: Stevens, 1962) at 1–2.

12 J. Gray, *The Rule Against Perpetuities* 4th ed. (Boston: Little, Brown and Company, 1942) at 191.

13 *Supra* note 4.

14 (U.K.), 1964, c. 55. See La Forest, *supra* note 9 at 10–58. For the background to the *Perpetuities Act*, see the OLRC Report No. 1, *supra* note 6 and also Ontario Law Reform Commission, *Perpetuities Act, 1965—Report No. 1A* (Toronto, Ontario Law Reform Commission, 1966).

(i) Vested versus Contingent Interests in Property

Interests in property are either vested or contingent.[15] To avoid confusion, recall that property is by definition contingent if it is not vested.[16] The distinction between vested and contingent may therefore be understood as a distinction between vested and not vested. Generally speaking, an interest in property will be contingent where there remains an unsatisfied condition precedent to vesting[17], where the person in whom the property will (or may) ultimately vest is unascertained[18] or where the person in whom the property will (or may) ultimately vest is not in existence[19]. All that the rule against perpetuities requires is for property to cease being contingent no later than the end of the perpetuity period. This simply requires that within the perpetuity period the following must occur: all conditions precedent to vesting must be satisfied[20]; all persons to whom property is being transferred must be

---

15 The law of property has a seemingly insatiable appetite for superfluous and confusing terminology. A single phenomenon that arises in different contexts is often described in language tailored to each context even though the phenomenon remains essentially the same in each context. By way of example, in some contexts the term "executory" (rather than "contingent") is used to describe interests in property that are not vested. For the sake of simplicity (and out of protest against needless complication of property law terminology), this paper uniformly uses the term contingent to denote "unvested" interests in property.

16 See, for example, B. Ziff, *Principles of Property Law* 4th ed (Toronto, Carswell, 2006) at 225, M. Mossman and W. Flanagan, *Property Law: Cases and Commentary* 2nd ed. (Toronto: Emond Montgomery Publications Ltd, 2004) at 299, La Forest, *supra* note 9 at 9–3, and Morris and Leach, *supra* note 10 at 38, and R. Maudsley, *The Modern Law of Perpetuities* (London: Butterworths, 1979) at 7–15.

17 An example is a life estate followed by a remainder to the life tenant's eldest child if he graduates law school. The remainder is contingent until the condition precedent of graduating law school is met.

18 An example is a life estate followed by a remainder to the eldest child of the life tenant who survives the life tenant. The identity of the eldest child to survive the life tenant will be unascertained until the death of the life tenant. The interest will thus remain contingent until that time.

19 An example is a life estate followed by a remainder to the first child of the life tenant. The remainder is contingent until the first child of the life tenant is born, i.e., comes into existence.

20 In Ontario, subs. 8(1) of the *Perpetuities Act*, *supra* note 4 modified this requirement where the condition precedent is the attainment of an age greater than 21. If this condition precedent will not be satisfied within the perpetuity period but would have been satisfied within the perpetuity period had the specified age been 21, then the specified age is deemed to be reduced as minimally as is necessary to allow for vesting to occur within the perpetuity period.

ascertained[21], and all persons to whom property is being transferred must be in existence[22].

Keep in mind the distinction between "vesting in interest" and "vesting in possession." Vesting in possession occurs where a person is entitled to immediate possession. This can occur no sooner than vesting in interest occurs. That said, vesting in interest and vesting in possession are not synonymous, since it is possible to be vested in interest but not yet vested in possession[23]. The distinction is important to keep in mind because the rule against perpetuities only requires vesting in interest to occur within the perpetuity period. Vesting in possession may be deferred until a date outside of the perpetuity period without attracting the rule.

As an example, consider a trust in which there are successive life estates followed by a remainder that is contingent due, say, to some unsatisfied condition precedent. In this example, the remainder can't vest in possession until the completion of all prior life estates. It matters not that this may occur outside of the perpetuity period. What the rule against perpetuities instead requires is that the contingent remainder in this example must vest in interest, i.e., the condition precedent must be satisfied, within the perpetuity period. Another way to say this is that, although the actual distribution of the trust property to the remainderperson [read: vesting in possession] may be deferred until after the perpetuity period has expired, certainty as to whether trust property will eventually be distributed to the remainderperson [read: vesting in interest] must exist within the perpetuity period.

(ii) The Perpetuity Period

Quantifying the perpetuity period in Ontario is complicated by the fact that Ontario

---

21 In Ontario, subs. 8(2), (3), and (4) of the *Perpetuities Act* modified this requirement where property is transferred to a group of persons described as a class. The common law rule was "all or nothing" in the sense that the disposition failed for remoteness unless every member of the class was ascertained and in existence within the perpetuity period. (For a criticism of this rule, see 17 of the OLRC Report No. 1, *supra* note 6.) The modified rule under the *Perpetuities Act* is that class members who will not be born or ascertained within the perpetuity period are excluded from the class so that the class members who are born and ascertained within the perpetuity period may vest.

22 The common law was willing to entertain some preposterous possibilities as to the circumstances in which persons could come into existence. As demonstrated by the cases dealing with the so-called "fertile octogenarian" and the "precocious toddler." the common law assumed that people were capable of reproducing from the moment of birth until the moment of death. Section 7 of the *Perpetuities Act*, *supra* note 4 has overridden the common law with more sensible presumptions as to possible parenthood.

23 Consider a common law land grant where there is a life estate to A followed by a remainder in fee simple to B. Assuming that both of A and B are living and ascertained, they are both vested in interest. However, only A is vested in possession, since B will not be entitled to possession of the land until the death of A.

law does not define the perpetuity period with reference to a specific number of years[24] and by the fact that in Ontario there is no single perpetuity period that applies to all contingent interests in property. In most cases, the perpetuity period will be the period beginning on the date of the disposition and ending on the 21st anniversary of the date of death of "some person" or of the date of death of the last to die of "some group of persons."[25] The phrase "life or lives in being" is the term of art to describe the person (or persons) whose life (or collective lives) is (or are) used to measure the perpetuity period. To say that a contingent interest in property must vest within the perpetuity period is therefore to say that the contingent interest must vest in interest (although not necessarily vest in possession) not later than the 21st anniversary of the date of death of the life or lives in being. Identifying the life or lives in being is therefore foundational to applying the rule against perpetuities. If there are no lives in being, then the perpetuity period is simply 21 years.

A settlor/grantor is at liberty to explicitly identify the life or lives in being. Since identifying the life or lives in being where none are explicitly specified can be unduly tedious, professionally drafted trust instruments/grants frequently address the matter explicitly. It is, for example, common for wills to explicitly define the perpetuity period as the period ending on the 21st anniversary of the date of death of the last to die of the testator, the testator's spouse and all issue of the testator living on the date of the settlement. This provides a methodology to easily identify the period in which vesting in interest must occur. Depending upon the age of the lives in being on the date of the settlement, it is possible for the perpetuity period to last for over a century[26].

Although the general rule is that anyone can be identified as a life in being, there are *some* restrictions on who may be named as a life in being by a settlor/grantor. A life in being must be a person alive on the date of the grant. This includes persons conceived but not yet born, i.e., *en ventra sa mère*.[27] Although one may not have expected the matter to have been litigated, courts have resolved that a life in being must be a human life, which rules out corporations and non-human living things,

---

24 Certain jurisdictions allow the perpetuity period to be set at a fixed number of years. See, for example, subs. 7(1) of the *Perpetuity Act*, R.S.B. 1996, c. 358 and subs. 1(1) of the *Perpetuities and Accumulations Act, 1964*, (U.K.), 1964, c. 55.

25 As is discussed below, there is a different perpetuity period within which rights of reentry, possibilities of reverter and possibilities of resulting trust must vest. See the discussion below re s. 15 of the *Perpetuities Act, supra* note 4.

26 Consider what will happen where an infant is designated as a life in being. If that infant lives to age 90, then the perpetuity period will be approximately 111 years (i.e., 90 + 21).

27 See Morris and W. Leach, *supra* note 10 at 65, P. Todd and S. Wilson, *Textbook on Trusts* 6th ed. (Oxford: Oxford University Press, 2003) at 96 and 169 and Maudsley, *supra* note 15 at p. 92.

e.g., animals and plant life[28]. In addition, there is case law to support the proposition that the lives in being must not be so broad as to be administratively unworkable. For example, in *Re Moore*,[29] the court held that it was not open to the testator to designate all persons alive at the date of his death to be the lives in being for his will. Courts have upheld "royal lives" clauses, but have warned against their continued use[30].

Subsection 6(1) of Ontario's *Perpetuities Act*[31] contains language that could be interpreted to mean that only those persons whose lives are in some way relevant to restricting the period within which the conditions to vesting in interest may occur may be included as the explicit lives in being. This interpretation poses a significant restriction on the ability of a grantor/settlor to designate his or her own lives in being. This provision of the *Perpetuities Act* could, though, also be read as merely providing a rule for identifying lives in being where none are explicitly identified in the grant/settlement, in which case it does not restrict who may be explicitly identified as a life in being, but instead merely informs the application of the rule against perpetuities where no life or lives in being have been made explicit.[32]

A separate perpetuity period applies where the contingent form of property is a right of re-entry, possibility of reverter or equivalent interest in personalty. Here, the perpetuity period has a statutorily imposed ceiling of 40 years under s. 15 of the *Perpetuities Act*. Rights of re-entry and possibilities of reverter are explained in the immediately following section.

(iii) Consequences of Non-Compliance

If property does not vest within the perpetuity period, then it will not be allowed to ever vest. That is to say, an interest that fails to comply with the rule against perpetuities is void. Statutory reforms have changed what constitutes non-compliance with the rule against perpetuities. At common law, a contingent interest in property was void *ab initio* if there was any chance - *no matter how unlikely* - that it *might* vest remotely. Subsection 4(1) of the *Perpetuities Act* now provides that a contingent interest in property is valid until it is actually known that it either has not

---

28 In *Re Kelly* [1932] I.R. 255, the court rejected the testator's dogs as possible lives in being. See Morris and Leach, *supra* note 10 at 63; La Forest, *supra* note 9 at 10–11; and Maudsley, *supra* note 15 at 91.

29 [1901] 1 Ch. 936. See Morris and Leach, *supra* note 56 at 61.

30 See Morris and Leach, *supra* note 56 at 61, La Forest, *supra* note 8 at 10–10 and Maudsley, *supra* note 56 at 88. The matter turns in part on which sovereign is used to define the class.

31 *Supra* note 4.

32 In any event, could it not be argued that an explicitly identified life in being is "relevant" to vesting if only because the grantor/settlor has made him or her relevant?

vested within the perpetuity period or that it is simply incapable of so doing. In other words, we now wait and see whether compliance will occur for so long as compliance is at least possible.[33]

The consequences of non-compliance will vary with the circumstances. If the impugned interest was created as part of a stand-alone disposition with no prior or subsequent interests created[34], then one of a few possibilities will materialize. If the disposition was a specific bequest or devise, then the property will be distributed as part of the residue[35]. If the disposition was residual in nature, then the property will be distributed on intestacy. If the disposition was *inter vivos*, then the property will result back to the transferor[36].

But this result may not always follow. The offending contingent interest may not be part of a stand-alone disposition. History has proven that lawyers and their clients have vast imaginations as to how to structure property transfers. The invalid contingent interest may be preceded by or followed by another interest that itself complies with the rule against perpetuities[37]. Of what consequence to the prior or subsequent interest is the invalidity of the offending contingent interest? There is no simple answer to this question. This is in part owing to the fact that the prior or subsequent interests may take many forms.

Where the invalid interest follows a prior vested interest, the general rule is that the prior vested interest becomes what it would have been had the invalid subsequent interest been omitted from the disposition[38]. A vested life interest followed by a remote contingent remainder thus remains a vested life interest and the remainder is in effect ignored[39]. Another analysis applies where a vested interest is defeasible due

---

33 There were a limited number of circumstances in which the common law allowed for a "wait and see" approach. See Maudsley, *supra* note 15 at 66, and La Forest, *supra* note 9 at 10–29.

34 Assume, for example, a simple disposition in favour of A that is subject to a condition precedent of A graduating law school.

35 See, for example, La Forest, *supra* note 9 at 10–26, and Morris and Leach, *supra* note 10 at 164.

36 *Ibid*.

37 As an example of the former, consider a vested life estate followed by a contingent remainder. As an example of the latter, consider a contingent life estate followed by a vested remainder.

38 Gray, *supra* note 11at 260, and Morris and Leach, *supra* note 10 at 168.

39 However, in *Caldwell v. Willis* 57 Miss. 555, a U.S. court held that a vested life estate followed by a remote contingent remainder resulted in the life estate mutating into an absolute interest in the entirety of the property. The case has been criticized (justifiably so). See Gray, *supra* note 11 at 262.

to a contingent gift over[40]. Courts held that if the contingent gift over is remote (meaning that it will not vest within the perpetuity period), then it is to be struck from the instrument. The defeasible vested interest is thereby transformed into an *indefeasible* vested interest[41].

Another analysis applies where the transferor has given a vested defeasible interest or a vested determinable interest with no gift over[42]. This is another instance of a prior vested interest followed by a subsequent interest, since in such instances the transferor holds a subsequent interest (either a right of re-entry or a possibility of reverter). Where the transferor has created a defeasible interest, the transferor holds a form of property called a right of re-entry. Where the transferor has made a determinable limitation, the transferor holds a form of property called a possibility or reverter. At common law, the right of re-entry was considered contingent until the condition subsequent was breached whereas a possibility of reverter was considered vested. This meant that it was possible at common law for the right of re-entry (but not the possibility of reverter) to vest remotely. If the right of re-entry did not vest within the perpetuity period, then the condition subsequent was ignored and the defeasible interest became absolute[43]. In Ontario, s. 15 of the *Perpetuities Act* extends this treatment to possibilities of reverter by deeming possibilities of reverter to be contingent until the determining event occurs. Consequently, the current rule in Ontario is that a defeasible or determinable interest in property becomes absolute if the condition subsequent is not breached or the determining event does not occur within the perpetuity period (which is restricted by s. 15 in Ontario to 40 years for these types of interests).

The preceding considers what happens where a vested prior estate is followed by a subsequent contingent estate and the subsequent contingent estate fails to vest within the perpetuity period. What happens in the reverse circumstances where a contingent

40 As an example, consider a trust under which there is a vested income interest in favour of A that will be divested in favour of B in the event that A remarries.

41 See, for example, La Forest, *supra* note 9 at 10–26; Waters, *supra* note 9 at 649; Maudsley, *supra* note 15 at 190; and Morris and Leach, *supra* note 10 at 168. For an alternative analysis, see Gray, *supra* note 11 at 273.

42 A defeasible interest is one subject to a condition subsequent whereas a determinable interest is one subject to a determinable limitation. The difference between a condition subsequent and a determinable limitation is extremely subtle. Conditions subsequent are generally associated with the following “magic words”: on condition that, but if, provided that, but when, if it should occur that, and if it should happen that. Determinable limitations are generally associated with the following “magic words”: while, during, so long as, and until. The difference between conditions subsequent and determinable limitations is so subtle that one judge candidly remarked that it is “little short of disgraceful to our jurisprudence” that the distinction is drawn by the law. See *Re King’s Trusts* (1892), 29 L.R. Ir. 401 at 410, per Porter M.R.

43 See, for example, La Forest, *supra* note 9 at 10–35 to 10–36.

prior estate that fails to vest within the perpetuity period is followed by a subsequent estate? Courts have held that if the prior estate and the subsequent estate are subject to the same contingency, then they both fail for remoteness[44]. It is possible, however, that only the prior estate is contingent and the subsequent estate is vested. It seems counterintuitive that the failure of the prior contingent estate to vest within the perpetuity period could render a vested subsequent estate void for remoteness. However, this is what courts concluded where the subsequent estate was "dependent or expectant" on the prior estate[45]. The problem was that the phrase "dependent or expectant" was never adequately defined[46]. Accordingly, the common law was changed by s. 10 of the *Perpetuities Act* of Ontario, which provides that an interest in property that itself complies with the rule against perpetuities won't be invalidated simply because it is preceded by a prior interest that fails to comply with the rule and nor will the invalidity of the prior interest preclude the subsequent interest from accelerating.

(iv) Policy Objective of the Rule Against Perpetuities

It is important to distinguish between the policy objective of the rule against perpetuities, on the one hand, and the legal mechanic through which the rule seeks to attain this objective on the other hand. Failure to properly draw this distinction has unnecessarily confused analysis of what the rule is versus what the objective of the rule is. The objective of the rule against perpetuities is to limit the extent to which remote contingent interests are allowed to frustrate alienation by a presently vested property holder[47]. The legal mechanic through which this objective is attained is the rule against remoteness of vesting. That is, the rule against perpetuities is distinct from the rule against direct restraints on alienation. Its focus is to limit not restraints on alienation *per se* but rather to keep in check one cause of restrained alienation,

---

44 See Morris and Leach, *supra* note 10 at 173–175. The kind of disposition in question involves a subsequent interest that is contingent upon the failure of the prior contingent interest. The thought process at play here is that the subsequent interest can't vest within the perpetuity period if it is contingent upon a prior interest failing to vest within the perpetuity period.

45 See Morris and Leach, *supra* note 10 at 175–181.

46 See OLRC, *supra* note 6 at 19–20.

47 See, however, Morris and Leach, *supra* note 10 at 2 for the suggestion that the rule against perpetuities is "*not* a rule against suspension of the power of alienation of property through the creation of interests in unborn or unascertained persons." This statement needs to be read carefully. Although it seems to suggest that the rule against perpetuities is unconcerned with suspended alienation, what is probably meant is that the rule against perpetuities is not restricted to circumstances where property will remain contingent (and thus inalienable) until some person is born or ascertained. In other words, the rule can apply even where the persons holding contingent interests are alive.

namely, remote contingent interests[48]. Given that the rule is solely focused on when vesting occurs, much confusion could have been avoided if the moniker "rule against remoteness of vesting" had been preferred over the esoteric name by which the rule has come to be known by[49].

To appreciate the link between the objective of the rule against perpetuities and the legal mechanic by which this objective is attained it is necessary to appreciate how contingent interests fetter the alienability of property. Contingent interests do not explicitly restrain alienation, but this can be their practical consequence[50]. This is most easily seen in relation to property in land, the kind of property over which the common law judges who developed the rule against perpetuities were most concerned.

Consider a devise of a fee simple estate to A that is subject to a contingent gift over of the estate in favour of B. The contingent interest held by B poses a practical restraint on alienation for A. In particular, B's contingent interest results in there being a diminished market for the form of property held by A, since all that a potential purchaser can acquire from A is an estate in land that may at some point terminate in favour of B. Potential purchasers will either walk upon discovering B's contingent interest or refuse to pay more than a deeply discounted price. Negotiating a price that is satisfactory to both A and the purchaser could be difficult, especially if the likelihood of the contingency that will terminate A's estate and cause B to vest

---

48 See Simes, *supra* note 10 at 32–40; L.M. Simes, *Law of Future Interests* (St. Paul, West Publishing Company, 1966) at 253; Morris and Leach, *supra* note 10 at 2; and E. Fraser, "The Rationale of the Rule Against Perpetuities" (1922) Vol. 6 Minnesota Law Rev. No. 7 560. At 570, Fraser notes that "the rule against perpetuities took *the form* of a rule against remoteness of vesting, but its object was to prevent an unreasonable postponement of the power of alienation." In distinguishing the rule against perpetuities from rules against restraints on alienation, Fraser notes at 569 that the "rule against perpetuities was a special rule developed to take care of suspensions [of alienation] caused by future interests and has no application to other restraints, express or implied, on present interests." Simes observes at, *supra* note 10 at 40 that Fraser's conclusion "has been almost universally accepted ever since it was announced." Nevertheless, the language used by commentators to describe the rule against perpetuities often invites confusion on this point. For example, in Waters, *supra* note 9, the authors note at 645 that the "rule against perpetuities is strictly concerned with remoteness of vesting." This is consistent with Simes and Fraser. At 646–647, however, it is noted that "it is better to think of perpetuity as involving two elements: a rule against remoteness of vesting and a rule against inalienability." Note the different focus of the two statements. The first refers to the "rule against perpetuities" and the latter refers simply to "perpetuity." Unless read carefully, the second statement could cause confusion as to whether the rule against perpetuities is inclusive of the rule against restraints on alienation rather than a separate rule the purpose of which is to promote the free alienation of property. The distinction is subtle but meaningful.

49 Morris and Leach, *supra* note 10 make a similar point at 326.

50 In relation to the marketability of property in which successive contingent interests exist, one commentator has noted as follows: "Purchasers cannot be found for such defective titles." See E. Fraser, *supra* note 47 at 574.

is not amenable to actuarial quantification[51]. A and B could in theory jointly convey the entire estate, but this is practically unlikely given that A and B may be anticipated to disagree on how the total proceeds of sale should be divided between them. Proceeding from the assumption that alienation is practically unlikely (albeit theoretically possible) where there are contingent interests, the rule against perpetuities requires all contingent interests to vest within the perpetuity period[52]. This is the law's way of disallowing contingent interests from fettering alienability for any longer than the perpetuity period.

By way of critique, there may have been a case to be made for the rule against perpetuities when it was first developed by common law courts, but the argument in support of the rule has since diminished. Three developments have contributed to the rule becoming increasingly difficult to justify. The first development is the change in the locus of wealth. At the time that the rule against perpetuities was initially developed, land was the most important source of wealth. The problem is that land was (and is) in fixed supply. A single conveyance of land under which contingent interests were permitted to last in perpetuity may not have posed an economic threat. But what would happen if the practice became commonplace? More land couldn't be created if the current supply was effectively removed from productive circulation through perpetual contingent interests. Economic destabilization could result without a legal rule restricting the duration for which contingent interests could encumber the alienability of land. While this remains a concern, one critical difference is that the fraction of wealth reflected in land holdings has since diminished. Today, wealth is to a much greater extent reflected in holdings other than land, e.g., securities, licenses, patents, and the like, in relation to which the same fixed supply concerns do not apply. In the contemporary era, each

51 The range of contingencies on which A's estate could terminate in favour of B is vast. If the contingency is that A's estate will terminate in favour of B if all of A's children living on the date of the grant live to age 30, then an actuary could determine the likelihood of this condition being met. Other contingencies, e.g., all of A's children living on the date of the grant graduating law school, could prove far more difficult to factor into a pricing arrangement.

52 It was at one time thought that the rule against perpetuities was satisfied so long as there was a theoretical possibility of an absolute interest being alienated by the joint action of all persons who collectively represent the entirety of the interests (vested and contingent). Under this view, vesting was less important than was being to identify the entire group of persons who were currently vested and who held contingent interests that may or may not vest in the future. This effectively restricted the rule against perpetuities to circumstances in which contingent interests were held by unborn persons, since only here would it be impossible to assemble all persons representing the entirety of the interests and thus the sale. This line of thought was, however, short lived. As per E. Fraser, *supra* note 47 at 572 and 573, respectively: "*It is now firmly established that the common law rule is not satisfied by a power of alienation by joint action of the parties with successive interests in the property*".
* * *
The rule against perpetuities is a practical rule. It does not look so much at the theoretical possibility of a joint conveyance as at the practical improbability of it. See also Simes, *supra* note 10 at 36–38, and the OLRC *supra* note 6 at 3.

generation can add to the supply of wealth in a way that was previously not possible. This means that perpetual contingent interests, while still of concern, pose less of an economic threat than was previously the case.

The second development is the rise of the trust and the demise of common law land grants as the most prevalent context in which perpetuity concerns arise[53]. This is significant because trustees of modern trusts will almost invariably have a broad power of sale further to which they may dispose of the initial trust property and invest the sale proceeds[54]. As for trustee investments, the contemporary trend has been to abandon the old restrictive rules governing trustee investments in favour of prudent investor legislation[55]. The new legislation embraces modern portfolio theory whereby trustees are encouraged to appropriately diversify trust investments. Therefore, even when the beneficial interests in the trust are contingent, the trust property itself will be kept in active circulation by the trustees. That is, even if the contingent beneficial interests in the trust are for all intents and purposes inalienable by the beneficiaries, the trust property itself will be alienable by the trustees. While the inalienability of the beneficial interests may be of some concern, this is secondary to the primary objective of ensuring that the trust corpus itself remains in active circulation, which objective may be served through the power of sale and prudent investor rules rather than through the rule against perpetuities[56].

The third development is the rise of the income tax regime. Even if the rule against perpetuities were repealed, Canadian income tax law makes it unlikely for perpetual trusts to become commonplace. Personal trusts are, for example, subject to a deemed disposition at fair market value every 21 years[57]. This deemed disposition is a fictitious transaction that is designed for the specific purpose of precluding trust capital from being allowed to swell untaxed for prolonged periods. In addition to creating a disincentive for settlors to establish perpetual trusts, this tax rule reduces the ability of prior generations to deny the living the benefit of property, since the tax revenue generated from a perpetual trust is (at least in theory) applied for the public good regardless.

---

53 Waters, *supra* note 9 at 347.

54 Waters, *supra* note 9 at 1086–1090, and Simes, *supra* note 10 at 40–41.

55 See, for example, Waters, *supra* note 9 at 950–953.

56 See, for example, the OLRC, *supra* note 6 at 3. To this it may be noted in reply that the law does in fact frown upon the inalienability of beneficial interests in a trust. This is evidenced by the rules of law limiting the duration of non-charitable purpose trusts. Although the corpus of such trusts may be kept in active circulation by the trustees, the absence of any beneficiaries who could alienate their beneficial interests has been considered sufficiently problematic to limit the duration for which non-charitable purpose trusts may last. See, for example, Waters, *supra* note 9 at 345–346.

57 Subs. 104(4) of the *Income Tax Act*, *supra* note 2.

Advocates of the rule have responded to the preceding developments by refocusing the policy objective behind the rule against perpetuities. There is widespread agreement that concerns over the practical propensity of contingent interests to restrain alienation are substantially reduced where property is held in a shifting trust fund[58]. But a policy argument for the rule against perpetuities is still possible. The freedom of one generation to dispose of property requires some restriction on the previous generation's liberty to exercise the same freedom[59]. If, for example, one generation were able to restrict each successive future generation to a life interest in property, then even if the mode of disposition is a trust fund with a broad power of sale the first generation's freedom of testation will have been exercised in a manner that deprives each successive generation from being able to exercise testamentary freedom in respect of the property of the fund. Testamentary freedom for any given generation therefore requires some rule of law that limits the freedom of previous generations to pass property in a restricted state. The contentious issue is whether the rule against perpetuities is the most appropriate rule to attain this objective. As noted above, the technical focus of the rule against perpetuities is over remoteness of vesting. The argument could certainly be made that the rule in its current form is no longer apt and several jurisdictions have accordingly repealed or gutted the rule[60].

(v) Implications of the Rule for the Duration and Destructibility of Trusts

Just as it is important to distinguish the rule against perpetuities from its policy objective, it is important to distinguish it from the so-called rule against perpetual trusts and rule against indestructible trusts. Dealing first with the issue of duration, the rule against perpetuities is not concerned with how long a trust may last[61]. The

---

58 See, for example, Simes, *supra* note 10 at 52–56; Simes, *supra* note 47 at 253–255; Morris and Leach, *supra* note 10 at 13–18; Maudsley, *supra* note 15 at 219–223; and Waters, *supra* note 9 at 344–351.

59 See, for example, Simes, *supra* note 10 at 55–63; Simes, *supra* note 47 at 255; and Morris and Leach, *supra* note 10 at 17.

60 In Canada, Manitoba abolished the rule against perpetuities. See s. 3 of *The Perpetuities and Accumulations Act* C.C.S.M. c. P33. In the U.S., at least twenty-one states have either abolished or dramatically reduced the scope of the rule against perpetuities, including Idaho, Wisconsin, South Dakota, Delaware, Alaska, Wyoming, Nebraska, Washington, the District of Columbia, Colorado, Missouri, Florida, New Jersey, Maine, Ohio, Arizona, Illinois and Maryland. See M. Schanzenbach and R. Stikoff, "Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust" (2006) 27 Cardozo L. Rev. 2465, M. Schanzenbach and R. Stikoff, "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes (2005) 115 Yale L.J. 356, S.E. Sterk, "Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P." (2002–2003) 24 Cardozo L. Rev. 2097 at 2101–2105 and "Dynasty Trusts and the Rule Against Perpetuities" (2003) Vol. 116 Harvard Law Review No. 8 2588 at 2590 to 2596.

61 See, for example, Morris and Leach, *supra* note 10 at 2; Simes, *supra* note 47 at 253; Waters, *supra* note 9 at 345; Gray, *supra* note 11 at 237; La Forest, *supra* note 9 at 10–18; Ziff, *supra* note 15 at 257; and J.B. Clark and J.G. Martyn, *Theobald on Wills* 15th ed. (London, Sweet & Maxwell, 1993) at 604.

rule against perpetuities does not confine the lifespan of trusts to the perpetuity period or to any other circumscribed period of time[62]. Consider, for example, a trust in which there is a vested income beneficiary with an absolute entitlement to all of the income of the fund. It is a general rule of construction that "an unlimited and unrestricted gift of income carries the corpus."[63] The trust thus complies with the rule against perpetuities, since the beneficiary will be considered vested in respect of both income and capital. Nonetheless, there is no inherent limit to the duration of this trust. Most trusts will actually provide for a distribution date on which the capital beneficiaries will vest in possession. But there is no requirement for this to occur within the perpetuity period. The requirement is simply for vesting in interest to occur before the end of the perpetuity period with the possibility left open for the trust to continue longer. As is discussed below, the law imposes a limit on the duration of non-charitable purpose trusts, but this is done via a separate rule.

Turning to the issue of indestructibility, a trust will be indestructible where there is no beneficiary or group of beneficiaries who can call for the trust capital from the trustee. A consequence of the rule against perpetuities is that a private trust may not remain indestructible beyond the perpetuity period. The requirement for vesting in interest to occur within the perpetuity period is tantamount to a requirement for trusts to become destructible at the option of the beneficiaries no later than the end of the perpetuity period. This is because the vesting of all the beneficiaries will render the trust susceptible to being prematurely wound up at the election of the beneficiaries pursuant to the rule in *Saunders v. Vautier*[64] (at least in jurisdictions in which the rule applies). Thus, although the rule against perpetuities is a rule against remoteness of vesting rather than *per se* a rule against indefinite duration or a rule against indestructible trusts, the consequence of the rule is that a settlor is incapable of establishing a trust that will continue beyond the perpetuity period against the will of the beneficiaries. Since purpose trusts lack beneficiaries, they are indestructible by nature. As is discussed below, this has resulted in the development of separate rules that limit the duration of non-charitable purpose trusts.

Part II: Perpetuities and Charities

Having set out a framework for understanding the rule against perpetuities, the application of the rule to charities may now be considered. A misperception abounds that charities are exempt from the rule against perpetuities. Judges have contributed

---

62 There are several cases in which it was held that a trust was void if it could last longer than the perpetuity period. These cases have since been overruled in favour of the view that vesting in interest must occur within the perpetuity period but not necessarily vesting in possession. See Simes, *supra* note 47 at 314 and Gray, *supra* note 11 at 240.

63 See, for example, Waters, *supra* note 9 at 1192, *Coward v. Larkman* (1887) 57 L.T.R. 285 and *Halifax School for the Blind v. Kelley Estate* [1937] S.C.R. 196.

64 (1841), 4 Beav. 115.

to this misperception through the imprecise and inconsistent use of terminology. Consider the following judicial statements on the matter:

> "*No charitable trust can be void on the ground of perpetuity*".[65]

> "*[T]he rule against perpetuities is not applicable to a charitable trust*".[66]

> "*Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the Rule against Perpetuities, while a gift in perpetuity not being a charity is void*."[67]

> "*The Rule against Perpetuities does not apply to charities*".[68]

These statements need to be read with caution[69]. The judges who authored the above quotes were loosely referring to the rule against perpetuities as though it were a rule against the perpetual tying up of property in inalienable and indestructible trust funds[70]. When the rule is understood in this light, it is correct to say that charities are exempt from the rule against perpetuities, since charitable trusts, unlike all other trusts, may be expressly made to last forever. However, as has already been discussed, the rule against perpetuities is properly understood as a rule against remoteness of vesting. It is true that this rule is applied leniently in relation to charities, but there is no blanket exemption for charities.

The following discussion is divided into two parts. The first part critically reflects on how the rule against perpetuities applies to contingent transfers of property to charity. The second part critically reflects on the law's allowance of perpetual charitable purpose trusts. The recurrent theme is that the special treatment of charities under the rule against perpetuities has not been adequately justified.

---

65 *Goodman v. Mayor of Saltash* (1882) 7 App. Cas. 633 at 642. Quoted in *Verge v. Somerville*, [1942] A.C. 496 (P.C.).

66 *Halifax School for the Blind v. Kelley Estate* [1937] S.C.R. 196 at 204.

67 *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531 at 580–81.

68 *Att.-Gen* v. *National Provincial Bank* [1924] A.C. 262 at 266.

69 See, for example, Waters, *supra* note 9 at 649; La Forest, *supra* note 9 at 10–45; Gray, *supra* note 11 at 567; and Morris and Leach, *supra* note 10 at 185.

70 This confuses the rule itself with the practical implications of the rule. See the discussion above regarding the implications of the rule against perpetuities for the duration and destructibility of trusts.

(a) Contingent Transfers of Property to Charity

An analysis of contingent transfers of property to charity demonstrates the error in the statement that charities are exempt from the rule against perpetuities. The authorities are consistent in support of the conclusion that, subject to limited exceptions, the rule against perpetuities applies to contingent transfers of property in support of charity. Consequently, a transfer of property upon the satisfaction of some contingency to a specific charitable institution or to a trustee to be held for a charitable purpose will fail due to remoteness of vesting in either of two circumstances: (1) It can be discerned from the outset that it is impossible for the contingency to be satisfied within the perpetuity period[71]. (2) It is possible for the contingency to be satisfied within the perpetuity period, but after "waiting and seeing" the contingency remains unsatisfied at the conclusion of the perpetuity period[72].

Examples include circumstances where a testator establishes a testamentary trust under which one or more interests in the trust are followed by a contingent interest in support of either a specific charitable institution or a charitable purpose. The prior interests could take the form of one or more life interests followed by a contingent remainder for charity. Alternatively, the prior interests could take the form of determinable or defeasible interests in a trust followed by a gift over for charity. In either case, if the charity does not vest in interest within the perpetuity period, it will be void for remoteness of vesting. As noted by Morris and Leach, this certainly would not be the case if charities truly were truly exempt from the rule against perpetuities[73].

There are, however, exceptions. Courts have been particularly lenient where a contingent transfer of property in favour of charity is *not* preceded by a prior interest. The typical scenario involves a testator's direction to his executors to either transfer property directly to a charity or to apply property in furtherance of charitable purposes once certain conditions are first satisfied. While courts have on numerous occasions struck such contingent transfers for want of compliance with the rule against perpetuities[74], in many instances courts have bent over backwards to spare such contingent transfers[75]. One technique used to do this has

---

71 See para 4(1)(a) of the *Perpetuities Act, supra* note 4.

72 See para 4(1)(b) of the *Perpetuities Act, supra* note 4.

73 See Morris and Leach, *supra* note 10 at 188.

74 For a discussion of these cases, see *Chamberlayne v. Brockett* (1872) L.R. 8 Ch. App. 206, *Jewish Home for the Aged of British Columbia v. Toronto General Trust Corp. et al.* (1961) 28 D.L.R. (2d) 48 (S.C.C.) and Morris and Leach, *supra* note 10 at 187.

75 See, for example, Morris and Leach, *supra* note 10 at 187; Waters, *supra* note 9 at 652; and Gray, *supra* note 11 at 581.

been to characterize what is in substance a contingent transfer of property to charity as a vested transfer subject only to a contingent mode of execution. By interpreting the contingency in this light, courts have been able to claim that the rule against perpetuities has no application. The doctrine of *cy-près* can then be invoked to vary the so-called “contingent mode of execution.” This exception has the appearances of being little more than a targeted attempt to spare charities from the full force of the rule against perpetuities[76].

Another exception, the one with which this part of the article shall attempt to explain, is that a contingent gift over from one charity to another is not subject to the rule against perpetuities. The leading case dealing with a contingent gift over from one charity to another is *Christ’s Hospital v. Grainger and another*.[77] The court considered a will in which the testator left property to the corporation of Reading in trust for charitable purposes. The will provided that if the corporation of Reading should fail to perform the trust or should misemploy the trust property and such failure or misemployment should continue for one year[78], then the fund was to be transferred to the corporation of London to be held in trust for the Christ’s Hospital[79]. As it turned out, this contingency was not satisfied until well outside of the perpetuity period, approximately two hundred years after the death of the testator. The facts raised squarely whether a contingent gift over from one charity to another can vest beyond the perpetuity period. The court held that it could and its holding has since been followed[80].

In Alberta, British Columbia, and the Yukon, perpetuities legislation expressly provides that the rule against perpetuities does not apply to a gift over from one

76 No court has ever adequately explained what the distinction is between a contingent transfer of property to charity versus a vested transfer subject to a contingent mode of execution. The distinction sounds dubious and a careful examination of the cases may be anticipated to reveal that it is without substance.

77 (1849) 47 E.R. 1521 (H.C. Chanc.).

78 Was it the testator’s intention that misemploying trust property for less than one year was okay? One wonders what drafting considerations informed the preparation of this will.

79 This is often described as a gift over from one charity to another. The term “gift over” is something of a misnomer, since the facts actually do not involve a common law gift, but rather alternative distributions from a trust.

80 Subsequent cases have held that the principle applies regardless of whether the “gift over” is in favour of a charitable trust or a charitable corporation. See, for example, the judgment of Lord Cohen in *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 (H.L.). For Canadian decisions on point, see *Re Mountain* (1912) 4 D.L.R. 737 (Ont. C.A.) and *Re Short Estate* (1914), 7 O.W.N. 535 (O.H.C.). For additional authorities, see Morris and Leach, *supra* note 10 at 190 f.n. 24 and Gray, *supra* note 11 at 572.

charity to another[81]. In Ontario, it is at least arguable that *Christ's Hospital* has been overruled by statutory reform to the rule against perpetuities. Subs. 4(1) of Ontario's *Perpetuities* Act[82] provides that "every contingent interest in property" is valid until events establish that it either has not or that it is incapable of vesting within the perpetuity period. The phrase "every contingent interest" is unquestionably broad enough to include a contingent gift over from one charity to another. Ultimately, the issue turns on how the purpose of subs. 4(1) of the *Perpetuities Act* is construed. Did this provision alter the common law only to the extent that it introduced the "wait and see" rule? Or did this provision go further and restate the rule against perpetuities? The issue has yet to be ruled upon, but there are reasons to conclude that it is the former, which is the basis on which the analysis here continues[83].

What is the rationale behind this exemption from the rule against perpetuities? Morris and Leach incisively observe that "[n]o adequate reason as to why this exception should exist has ever been given/"[84] Some courts have simply cited the authorities in support of the rule and applied it without explanation[85]. Others courts have noted that the rule should be applied because to do otherwise would disrupt planning undertaken on the basis of it[86]. But surely there is a better reason than its pedigree to apply the rule. Another explanation is that there is a "leaning of the court in favour of charity."[87] That may be, but it offers no insights into what is unique about a contingent gift over from one charity to another compared to other contexts in which courts apply the rule against perpetuities to charities. If the court's "leaning" in favour of charity is all there is to it, then this is a fickle leaning indeed.

81 *Perpetuities Act*, R.S.A. 2000, c. P-5, subs. 19(4); *Perpetuity Act*, R.S.B.C. 1996, c. 358, subs. 23(5); *Perpetuities Act,* R.S.Y. 2002, c. 168, subs. 19(4).

82 *Supra* note 4.

83 A similar point may be made in relation to subs. 5(1) of the Northwest Territories *Perpetuities Act*, R.S.N.W.T. 1988, c. P-3. A key argument in support of the view that *Christ's Hospital* remains good law in Ontario is that similar statutory reforms in other jurisdictions have not been understood as overruling *Christ's Hospital*. See Waters, *supra* note 9 at 650.

84 Morris and Leach, *supra* note 10 at 192.

85 In *Re Mountain*, Chancellor Boyd offered no explanation for the application of the rule. He simply cited *Christ's Hospital* as the authority on point. See *Re Mountain, supra* note 79 at 745.

86 In *Royal College of Surgeons*, *supra* note 79, Lord Tucker held at 663 that "an interpretation which has been accepted and acted on for more than a hundred years should not now be disturbed."

87 See the Lord Cohen's reasons for judgment in *Royal College of Surgeons, supra* note 79 at 667. For similar observations, see also the reasons for judgment by Lord Tucker and Lord Morton at 663 and 650, respectively.

Commentators have by and large justified the exemption on the ground that charitable purposes are of public benefit. This is typified in following justification for the rule offered by the authors of *Oosterhoff on Trusts*:[88]

> "*Where there is a gift over from one charity to another on the happening of an uncertain event, the gift over is not void for perpetuity. The reason is that it makes no difference which charity is benefited, because the effect is the same*; ***the money is applied for the benefit of the public*.**" [Emphasis added.]

The authors of the Ontario Law Reform Commission Report on the Law of Charities are less explicit in this regard but appear to offer a similar view:[89]

> "*The rationale for this exemption is that, despite the change in ownership, the property remains devoted exclusively to charity*".

What is significant about an exclusive devotion of property to charity as opposed to an exclusive devotion to non-charity? The OLRC presumably has in mind the public benefit of charitable purposes.

It is doubtful, however, that the public benefit of charity is all that there is to the exemption. If it were, then it would be reasonable to expect a blanket exemption for charities from the rule against perpetuities, since a remote transfer to charity will foster public benefit regardless of the kind of interest it is preceded by[90]. The absence of a blanket exemption suggests that some other considerations are at play. The most likely explanation is that a blanket exemption has been rejected because, although it would foster more charity and thus more public benefit than does the current limited exemption, it would undermine the policy objectives behind the rule against perpetuities in a way that the holding in *Christ's Hospital* does not. If this is right, then to make sense of the current limited exemption one has to look not to the public benefit of charitable purposes but internally to the rule against perpetuities itself.

The judgment of Lord Cottenham in *Christ's Hospital* is instructive. Lord Cottenham attempted to make sense of the exemption for remote gifts over from

---

88 Oosterhoff, *supra* note 9 at 408. For a similar statement, see La Forest, *supra* note 9 at 10–46.

89 Ontario Law Reform Commission Report on the Law of Charities (Toronto: Ontario Law Reform Commission, 1997) at 409. For a similar statement, see Maudsley, *supra* note 15 at 181.

90 If there is public benefit in charity continuing beyond a remote contingent gift over from one charity to another then surely there is also public benefit in charity commencing after a remote contingent gift over from non-charity to charity. However, there is no exemption from the rule against perpetuities for the latter gift over.

charity to charity in light of the policy objective behind the rule against perpetuities. He held as follows:[91]

> "*[The rule against perpetuities prevents] property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account.*"

There are two important issues that Lord Cottenham alludes to but glosses over:

(1) Why was the property in question inalienable in the first place?

(2) Why would finding the gift over void for remoteness fail to safeguard alienability?

On the first point, unlike most cases in which a remoteness issue arises, the source of the inalienability in this case was not *per se* the remote contingent interest in favour of Christ's Hospital. The source of the inalienability was instead the kind of trust established by the testator. The corporation of Reading had been appointed by the testator as the trustee of a charitable *purpose* trust. Trusts established for charitable purposes are by their nature considered to be inalienable. Purpose trusts lack beneficiaries who hold an interest of any sort (vested, contingent, legal or equitable) in the property of the fund. The trustees of a charitable purpose trust may have the power to substitute the property of the fund through investments, but the initial trust corpus and any proceeds of disposition received therefore are exclusively devoted to the fund's purposes. This property is inalienable in the sense that it will escape the absolute ownership of any person throughout the entire life of the trust[92].

As for the second point, consider what would have happened had the court found the contingent gift over void for remoteness. While it is not entirely clear from the judgment, it appears that the gift over was on a condition subsequent. The general rule is that a gift over on a remote condition subsequent results in the prior interest taking effect as it would have had the condition subsequent never been included[93]. From what little is said in the judgment about the terms of the will, it appears that

---

91 *Supra* note 76 at 1524.

92 This point is further developed below in the discussion of the law's countenance of perpetual charitable purpose trusts. See also R. Lisle, *supra* note 5 for a specific discussion of the point in connection with the decision in *Christ's Hospital* and also J. Gray, "Remoteness of Charitable Gifts" (1893–1894) 7 Harv. L. Rev. 406.

93 See *supra* note 40.

the first trust would therefore have become a perpetual charitable trust if the contingent gift over had been struck. This would have done nothing to advance in any way the alienability of the first fund because, as discussed above, the inalienability of the first fund was owing to its very nature rather than to the contingent gift over in favour of Christ's Hospital. In fact, rather than promote alienability, striking the contingent gift over for remoteness in these facts would have rendered the first fund inalienable forever.

Note from the preceding that there are two senses of the term inalienable. Property can be inalienable because it is encumbered by remote contingent interests. This kind of inalienability is practical rather than theoretical[94]. The rule against perpetuities is specifically directed at limiting this kind of inalienability. Property can also be inalienable because there is an abeyance of beneficial title due to the property being held in a purpose trust. With this kind of inalienability, there is an open market for the property of the fund but the fund and whatever proceeds of sale are realized on its disposition are bound to a purpose and thereby removed from the absolute ownership of any person. The fund is inalienable rather than the individual items of property held in the fund. The rule against perpetuities is not specifically directed at and is arguably incapable of limiting this kind of inalienability[95].

Relating this back to *Christ's Hospital*, the case may be defended from a perspective internal to the rule against perpetuities. A remote contingent interest need not be struck where doing so will fail to promote alienation by the present tenant[96]. In other words, it is necessary to consider what impact striking a contingent interest for remoteness will have on the power of alienation by the holder of the present interest. If it will enhance the power of alienation, then the rule against perpetuities should be applied. If it will not, then the rule need not be applied, since doing so will fail to achieve the policy objective of promoting alienability. In the fact pattern at issue in *Christ's Hospital*, striking the contingent gift over void for remoteness would not have promoted alienability. The first fund was inalienable by its nature and striking the gift over would have enabled it to continue to be inalienable in perpetuity. Putting aside the public benefit of charity, there was arguably no policy objective

94 In theory, such property remains alienable. In practice, however, there is a depressed market for property bound by remote contingent interests.

95 There is widespread agreement that rules that remedy the inalienability of purpose trusts by limiting the duration of such trusts are separate from the rule against perpetuities. See *infra* note 117.

96 In a very helpful article, E. Fraser made the point as follows:

> "[T]he rule against perpetuities took *the form* of a rule against remoteness of vesting, but its object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served the rule should not apply." [Emphasis in original.]

See E. Fraser, *supra* note 47 at 570.

cognizable to the rule against perpetuities that supported the application of the rule here.

This will not, however, always be the case. What if the initial interest had not been a charitable purpose trust? The facts could have involved a devise of a defeasible fee simple to a charitable corporation with a remote contingent gift over of the estate in favour of a second charitable corporation. Here, the initial interest would not have been inalienable by nature. As a discrete legal person holding legal and beneficial title to an estate in land, the first charity was at liberty to alienate the estate[97]. The problem, of course, is that the contingent gift over in favour of the second charity renders the first charity's estate practically inalienable. There is a depressed market for land subject to future contingencies. The two charities could collectively convey an absolute estate but this is unlikely[98]. Since this is exactly the kind of inalienability that the rule against perpetuities is designed to remedy, the failure to strike the contingent gift over as void for remoteness undermines the policy objective of the rule. It is no answer to this to note that the two grantees are charitable. There is a sense in which the failure to apply the rule here harms rather than advances charity. In particular, the effect of the remote contingent gift over is that the first charity will be able to sell its estate at only a depressed price. As a result, allowing the contingency to stand in perpetuity could impede rather than advance the ability of the first charity to fund its charitable activities[99].

Therefore, the rule that a contingent gift over from one charity to another may vest remotely will not always be inoffensive to the policy objective of the rule against

---

97 There is a parallel of sorts here to a charitable purpose trust. The charitable corporation would not have been at liberty to do anything with the proceeds of disposition but would have instead been obliged to apply the proceeds in favour of charitable objects. The precise legal mechanic by which it would have been so obliged has never been fully explained. In particular, it has never been established in Canadian law that a charitable corporation is necessarily a trustee of all of its property and that charitable corporations are thus incapable of holding property beneficially. Accordingly, a devise of land to a charitable corporation does not render inalienability through an abeyance of beneficial title as does the settlement of a charitable purpose trust.

98 If the two charities disagree on the likelihood of the contingent gift over ever vesting, then they will be unable to agree on how to allocate the proceeds of disposition between then.

99 The charities could resort to settled estates legislation to resolve a dispute over the alienation of the land. In Ontario, for example, the *Settled Estates Act*, R.S.O. 1990, c. S. 7 contains provisions authorizing a sale of settled land (para. 13(1)(b)). The proceeds of sale could be paid to the estate holders or used to acquire other land (s. 23). This, however, is an imperfect solution to the problem. The process requires the time and expense of a court application. The consent of all estate holders must be sought (subs. 19(1))). The court has the authority to order a sale against the objections of one party (subs. 19(5)), but may reasonably be reticent to do so. Moreover, the court is expressly precluded from ordering a sale if it is of the view that this is contrary to the wishes of the grantor. Besides, non-charities have access to the same statutory remedy and that has not been considered sufficient to exempt them from the rule against perpetuities. Why should it be any different for charities?

perpetuities or even always cohere with the "leaning" of the court in favour of charity. It is arguably relevant to look at the manner in which the successive charitable interests are structured. If the initial interest is in the form of a charitable purpose trust, then, as in *Christ's Hospital*, there is arguably no need to apply the rule. However, if the initial interest is held legally and beneficially by a charity, then there is a case to be made for the rule's application. Nonetheless, the orthodox view would appear to be that a contingent gift over from one charity to another may vest remotely regardless of how the interests are structured[100]. This may reflect a conscious desire to keep the exception simple and rid an already difficult area of the law of excessive complexity. Alternatively, jurists may have reasoned that a remote contingent gift over is no more a perpetual dedication of property to charity than is a perpetual charitable purpose trust. Since the law allows the latter, then it should allow the former, or so the argument goes[101]. However, the fact that a testator could have made property inalienable by establishing a perpetual charitable purpose trust does not mean that he or she should be at liberty to render *otherwise alienable property* inalienable through a remote contingent gift over from one charity to another[102].

In sum, *Christ's Hospital* can't be justified on the basis of the public benefit of charitable works. It can, however, be rationalized in terms of the policy objective underlying the rule against perpetuities. The exception has, however, been extended beyond the facts of *Christ's Hospital* to differently structured contingent gifts over between charities that are more difficult to justify consistently with the policy objectives of the rule against perpetuities. Nonetheless, the exception is firmly entrenched and it is unlikely that a court would ever restrict it to the facts of *Christ's Hospital*. This is made all the more doubtful by the fact that the rule against

---

100 The rule is, for example, described in Waters, *supra* note 9 at 650 as follows:

> "This appears to involve the proposition that any number of successive gifts over to charitable purposes or institutions would be valid."

See also the descriptions of the rule at Oosterhoff, *supra* note 9 at 408, the OLRC, *supra* note 88 at 409 and La Forest, *supra* note 9 at 10–46. The statutory enactments in Alberta, British Columbia and the Yukon establish it as a general rule that the rule against perpetuities does not apply to a gift over from one charity to another. See *supra* note 80.

101 In *Christ's Hospital v. Grainger*, (1847–1848) 60 E.R. 804, Shadwell V.C. held as follows at 810:

> "In this case, there is a gift in trust for one charity, and, on the happening of a certain contingency, a gift in trust for another charity. There is no more perpetuity created by giving to two charities in that form than by giving to one."

This reasoning works where, as in *Christ's Hospital*, there is a remote contingent gift over from a charitable purpose trust to another charity. However, this is not the only way for a gift over from charity to charity to be structured.

102 Therein lies the important aspect of *Christ's Hospital*. The initial fund was already inalienable and would be made no less inalienable by applying the rule against perpetuities to the gift over.

perpetuities is increasingly viewed as a historical relic with the result that a strict policing of the exceptions for charities is improbable.

(b) Perpetual Existence and Charitable Trusts

The law allows charitable purpose trusts to last in perpetuity. On this point, there is no ambiguity among the cases or commentators: The settlor of a charitable purpose trust may expressly direct that the trust is to last forever. That is, the settlor may direct with the full backing of the law that the corpus of the fund never be expended. Since charities are subject to the statutory rule against accumulations[103], the income of the fund will be prohibited from being accumulated beyond the applicable accumulations period. However, the law allows for the initial capital, all income earned during the accumulations period, all capital gains and all property substituted for any of the preceding to be forever locked up in the trust fund. As a matter of property and trust law, the only amount that would ever need to be actually expended in furtherance of the charitable purposes of the fund is the income (exclusive of capital gains) generated from the fund in all years after the expiration of the accumulations period[104].

The law's countenance of perpetual charitable purpose trusts appears to contradict the rule against perpetuities. The rule against perpetuities militates against indestructible and inalienable trusts of unlimited duration but this is exactly what the law expressly allows in the case of charitable purpose trusts. Such trusts are inalienable in the sense that, even though the trustees may have the power to alienate each individual item of property of the fund through the continual investment and reinvestment of it, a block of capital - albeit a shifting one - remains forever removed from the beneficial ownership of any person. Since beneficial ownership of the initial capital and any property substituted therefore is never held by any person, it is forever inalienable[105]. Another way to characterize this is to note that, even if

---

103 See, for example, *Jewish Home for the Aged of British Columbia v. Toronto General Trusts Corp. et al.* (1961) 28 D.L.R. (2d) 48 (S.C.C.), *Frost* v. *Greatorex* [1900] 2 Ch. 541, *Wharton* v. *Masterman* [1895–1899] All E.R. Rep 687 (H.L.), *In re Monk* [1927] 2 Ch. 197 (C.A.), *Re Bradwell's Will Trusts* [1952] Ch. 575 (Ch. D.), *Re Burns* (1960) 25 D.L.R. (2d) 427 (Alb. S.C.), 118 of *Halsbury's Laws of England* 4th ed. *2001 Reissue* (London: Butterworths, 1973-) and Waters, *supra* note 9 at 657.

104 Under paragraphs 149.1(2)(b), (3)(b) and (4)(b) of the *Income Tax Act*, *supra* note 2, registered charities are required to expend on charitable activities or in gifts to other charities in each year an amount equal to their disbursement quota (defined in subs. 149.1(1)). A charitable purpose trust may be structured such that the disbursement quota in relation to the fund is only 3.5% per year of its average value. So long as interest income equal to or in excess of this amount is being generated there will be no need to resort to capital to meet the annual disbursement quota in respect of the fund.

105 This is why purpose trusts are described as being inalienable even though the trustees may have the power to alienate each item of property held in the fund. See, for example, Maudsley, *supra* note 15 at 171.

the trustees have the power to vary the investments of the trust, they can't dispose of the proceeds of disposition as they wish[106]. The initial corpus and any property substituted therefore is forever committed to the charitable purposes of the fund. Such trusts are indestructible in the sense that, since there are no beneficiaries, there are no persons who can at any time terminate the trust by calling for the corpus of the fund. The rule against perpetuities notwithstanding, the law allows for perpetual, indestructible and inalienable charitable purpose trusts.

In reply, it may be noted that the unlimited duration and indestructibility of charitable purpose trusts is not *per se* contrary to the rule against perpetuities. Recall from the discussion in Part I(b)(v) above that the rule against perpetuities is not directly aimed at either limiting the duration of trusts or ensuring their destructibility. The most that may be said is that the practical consequence of the rule against perpetuities is that a settlor is unable to impose his or her desire for the trust to continue beyond the perpetuity period against the wishes of the beneficiaries. Once the beneficiaries have all vested, which must happen no later than the end of the perpetuity period, they can join together to invoke the rule in *Saunders v. Vautier*[107] and call for the capital of the trust[108]. The requirement for vesting in interest within the perpetuity period is therefore tantamount to a requirement for trusts to become destructible at the option of the beneficiaries no later than the end of the perpetuity period. In recognition of this, few settlers even attempt to control the distribution of the trust property for much beyond the perpetuity period. Destructibility and limited duration thus generally follow as a consequence of the rule against perpetuities, but they are not technical requirements of the rule.

There remains, however, the problem of the inalienability of charitable purpose trusts. The law's acceptance of this stands in contradiction to the policy objective of the rule against perpetuities, which is to preclude settlors from establishing trusts that fetter alienability for any longer than the perpetuity period[109]. Why then does the

106 See R. Lisle, *supra* note 5.

107 *Supra* note 63.

108 This can even happen before the beneficiaries have all vested provided that the all persons who could vest are alive, *sui juris* and consent to invoking *Saunders* v. *Vautier*.

109 More accurately stated, the objective of the rule against perpetuities is to preclude the alienability of property (legal and equitable) from being fettered for any longer than the perpetuity period *through the creation contingent interests*. The alienability of property may be fettered for longer than the perpetuity period in other ways without offending the rule against perpetuities. For example, trusts by their very nature fetter alienability and they are permitted to last longer than the perpetuity period. This is true even when all interests held by beneficiaries are vested. See Simes, *supra* note 47 at 314.

law allow charitable purpose trusts to last in perpetuity?[110] One argument is that charitable purpose trusts simply fall through the cracks. Recall from the discussion in Part I that the mechanic by which the rule against perpetuities operates is the rule against remoteness of vesting. The problem is that, since purpose trusts lack beneficiaries, there are no persons in whom the equitable interest in the trust property may be required to vest pursuant to the rule against perpetuities. This could be interpreted as meaning that charitable purpose trusts are void *ab initio*[111]. The law does not, however, manifest this view. A contingent interest in property must first exist before vesting can be required[112]. Since no person holds a contingent interest in the equitable title to the property of a purpose trust, vesting is not required in respect of the equitable title. In this sense, charitable purpose trusts are not cognizable to the rule against perpetuities and thus escape its strict application[113].

To leave it at that, though, would be incomplete. Not all commentators agree that equitable title fails to vest with purpose trusts[114]. An explanation for the unlimited duration of charitable purpose trusts that does not proceed from this premise is therefore needed. Besides, the law does not merely tolerate perpetual charitable trusts as though they are a technical anomaly but actually encourages them in ways that the preceding discussion fails to explain. Consider a trust of which a charitable

---

110 If charitable purpose trusts were permitted to last for no longer than the perpetuity period, then a settlor would be unable to fetter the alienability of property through a charitable purpose trust any more than he or she could through a private trust.

111 Since the equitable interest in the property of a charitable purpose trust will never vest, non-compliance with the rule against perpetuities can always be predicted from the outset of the trust. Under both the traditional common law approach and the statutory "wait and see" approach, the trust fails if non-compliance is known from the outset. See, for example, paragraph 4(1)(a) of Ontario's *Perpetuity Act, supra* note 4.

112 This is implicit in Gray's celebrated formulation of the rule: "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 interests." See Gray, *supra* note 11 at 191. It is explicit in paragraph 4(1)(a) of Ontario's *Perpetuities Act, supra* note 4.

113 Note that this observation does not apply in respect of the legal title to the property of a purpose trust. The law generally requires the legal title to the property of a charitable purpose trust to vest within the perpetuity period except where the fund is a gift over from a prior charitable trust. See the discussion above.

114 Simes contends that the equitable interests in a charitable purpose trust are vested in the charitable purposes, an analysis that he concedes is "pure fiction" but one that he notes has "never been questioned." See Simes, *supra* note 10 at 113. The authors of Waters, *supra* note 9 reject this view on 345 and 351 where they note that a charitable purpose is not a juristic personality in whom vesting may occur. E. Fraser contends that both the legal and equitable title are vested in the trustees. See E. Fraser, *supra* note 47 at f.n. 55 on 575. If it is true that the equitable title may be considered to be vested (in either the purpose or the trustee), then charitable purpose trusts don't fly under the radar of the rule against perpetuities but instead comply with it. Perpetual duration then follows as a mere consequence of the fact that, where vesting occurs within the perpetuity period, the rule against perpetuities does not limit the duration of trusts.

institution is the beneficiary[115]. Assume that the trust instrument is silent as to the capital but there is an unlimited and unrestricted entitlement to the income in favour of the charitable beneficiary. In the ordinary course, the income beneficiary of such a trust could terminate the trust pursuant to *Saunders v. Vautier*.[116] But where the income beneficiary is a charitable institution, courts disallow the charity from invoking *Saunders v. Vautier*.[117] There is no technical reason why such a trust needs to last in perpetuity. In fact, the technicalities support the trust's destructibility, since the charitable beneficiary is vested as to both income and capital. The outcome here instead reflects a judicial policy preference for (not mere toleration of) perpetual charitable trusts.

Consider also the law's treatment of non-charitable purpose trusts. Charitable and non-charitable purpose trusts are identical in form. The only real difference is that the former are established for purposes considered to be charitable at law. Nevertheless, only charitable purpose trusts are allowed to last in perpetuity. At common law, non-charitable purpose trusts were not allowed to last longer than the perpetuity period[118]. In Canada, jurisdictions that have enacted statutory reforms to

---

115 This is distinct from a charitable purpose trust because here there is a beneficiary, one itself established for charitable purposes, but a beneficiary nonetheless. Since there is a beneficiary, there is no technical impediment to equitable title vesting in interest in the charity. See *supra* note 96.

116 *Supra* note 63. See, for example, Waters, *supra* note 9 at 1192, *Coward v. Larkman* (1887) 57 L.T.R. 285 and *Halifax School for the Blind v. Kelley Estate* [1937] S.C.R. 196. The general rule at play here is that an unlimited and unrestricted entitlement to the income extends to the trust capital.

117 Charities who are beneficiaries of trusts are usually able to invoke *Saunders v. Vautier* in the same way as any other beneficiaries. See, for example, *Wharton* v. *Masterman* [1895] A.C. 186 (H.L.); Waters, *supra* note 9 at 1191; and the OLRC, *supra* note 88 at 430. However, unlike other beneficiaries, a charity can't invoke *Saunders v. Vautier* to terminate a trust in which it has an unrestricted entitlement to income. See the OLRC, *supra* note 88 at f.n. 68 on 413 and 430, and Waters, *supra* note 9 at f.n. 97 on 647 and 1192 and the cases cited therein.

118 Scholars have struggled as to how to characterize the rules restricting the duration of non-charitable purpose trusts. There is agreement that such rules are separate from the rule against perpetuities, since, although the rule against perpetuities bodes implications for the duration of private trusts, it does not actually speak to the issue of duration (and is incapable of doing so with purpose trusts). See Maudlsey, *supra* note 15 at 167; Morris and Leach, *supra* note 10 at 7 and 325; La Forest, *supra* note 47 at 10–54; and Simes, *supra* note 47 at 319. However, there is disagreement on what the rule limiting the duration of non-charitable purpose trusts should be called. The writers variously describe it as the rule against perpetuities, the rule against inalienable trusts and the rule against indestructible trusts. Much confusion results from the inconsistent terminology. Where the phrase "rule against inalienability" is used, one has to be particularly careful not to confuse the rule limiting the duration of non-charitable purpose trusts with the rules against direct restraints on alienation. See Waters, *supra* note 9 at 646 for a passage in which the two can easily be confused. One wonders why a clear and distinct phrase, such as "the rule against unlimited duration," has never caught on. For a general discussion of these matters, see Morris and Leach, *supra* note 10 at 321–327; Maudsley, *supra* note 15 at 171; OLRC, *supra* note 88 at 413; Simes, *supra* note 47 at 314–315; and Waters, *supra* note 9, at 644 to 648.

he common law rule against perpetuities generally restrict non-charitable purpose trusts to 21 years[119]. The fact that neither common law courts nor legislatures have pronounced similar limits on the duration of charitable purpose trusts reflects a deliberate desire to confer on such trusts the unique privilege of unlimited duration[120].

But this just redirects us back to the question under question: Why does the law privilege charitable purpose trusts with unlimited duration? The answer commonly given in support of this privilege is that charities are of public benefit[121]. In a statement that is representative of the published commentaries, the OLRC framed the matter this way[122]:

> "*[T]he law is clear and coherent and there are no deficiencies…[G]iven the inherent value of charitable projects, wealth devoted to them for long periods of time or in perpetuity is wealth well devoted.*"

But is this really all there is to it? There are limits as to the extent to which the public benefit of charitable purposes is capable of justifying the perpetual existence of charitable purpose trusts. Public benefit is a prerequisite for charitable status[123]. Public benefit is also a category of charity under the *Pemsel* classification of charitable purposes. The proposition that the perpetual existence of charitable trusts is justified because such trusts are of public benefit becomes circular at some point. It is tantamount to asserting that charitable purpose trusts should have unlimited duration simply because they are charitable. This is more a statement of the rule than it is a justification for it. In any event, even if the public benefit of charitable purposes is capable of explaining why charity is generally privileged over non-charity, it is not capable of accounting for the range of the legal privileges available for charity. That is, the public benefit rationale can't account for why charities are

119 See, for example, s. 16 of Ontario's *Perpetuities Act*, *supra* note 4.

120 As per one commentator: "[O]ne cannot provide for a complete and perfect disposal of property forever, save by giving it to charity." See R. Lisle, *supra* note 5 at 214.

121 See, for example, Maudsley, *supra* note 15 at 167 and 179; Simes, *supra* note 47 at 318; and Simes, *supra* note 10 at 116.

122 OLRC, *supra* note 88 at 414.

123 No purpose may qualify as charitable at law unless it is of "public benefit" in the charity law sense. This principle is so foundational to charity law that it need not be attributed to an authority. Nonetheless, see Oosterhoff, *supra* note 9 at 343 for a discussion of this principle.

privileged in relation to perpetuity matters but not in relation to certain other legal rules[124].

The public benefit justification appears to be predicated on two claims that warrant critical reflection. The first claim, an empirical one, is that allowing for perpetual charitable trusts results in more charity and thus more public benefit than would otherwise be the case. If it does not, then the public benefit of charitable purposes is arguably moot. Why endure the economic and social cost of perpetual charitable purpose trusts if allowing for such trusts results in no additional funds for the charitable sector and by extension no additional public benefit?[125] The second, a normative claim, is that whatever public cost is associated with perpetual charitable purpose trusts is offset by the additional public benefit that is fostered by allowing such trusts.

As for the empirical claim, the mainstream Canadian literature in the area cite no statistical data to suggest that more charitable giving results from the law's countenance of perpetual charitable trusts. There are reasons to conclude that it does not have this effect. One U.S. study concluded that states that either abolished or substantially diluted the rule against perpetuities did not from this reform alone

---

124 Charities were at one time thought to be immune to tort liability, but this doctrine was recently rejected. (See *Blackwater* v. *Plint* [2005] S.C.J. No. 59 and *Re Christian Brothers of Ireland in Canada* [2000] O.J. No. 1117 (Ont. C.A.).) Why is the public benefit of charitable purposes sufficient to justify special treatment in relation to perpetuity matters but not tort liability? Similarly, charities are exempt from federal and provincial income tax but there is no blanket exemption for charities from municipal property tax. Is there some reason why the public benefit of charitable works is salient in one context but not another? The most probable answer is that the public benefit of charitable works is in and of itself insufficient to explain the privileged legal position enjoyed by charities.

125 Some assumptions are being made here. The first assumption is that there is indeed a cost associated with perpetual charitable trusts. This assumption may seem to contradict my assertion elsewhere in the paper that perpetual trusts no longer pose as great a concern as may have once been the case. Recall, though, that the prevalence of income tax considerations in modern wealth succession was cited as a key reason why perpetual trusts are of less concern today. This observation does not apply in respect of charitable trusts, since such trusts are exempt from income tax. The second assumption is that a departure from the usual trust and property law rules is justifiable only if it can be demonstrated to result in additional donations to the charitable sector—that the law should not privilege charitable donations for their own sake but only where doing so functions as a demonstrably effective incentive for increased charitable giving. Some may contend that this reflects a rather parsimonious view of how and when the law should privilege charitable donations. Some may further contend that this is inconsistent with well-established rules of law. (Trust law, for example, relieves charitable trusts from the usual requirement for certain of objects even though doing so seems unlikely to result in enhanced charitable giving.) However, if we accept as our starting point the proposition that the rules of property and trust law have been crafted to serve pressing social and economic objectives, then it makes sense to generally (although perhaps not always) restrict departures from those rules to circumstances where enhanced charitable giving is the result.

experience an influx of trust assets[126]. While the conclusions of this study may not carryover to the charitable gifting context, they suggest that perpetual charitable trusts do not provide an incentive to donate to charity. Specifically focused empirical research is necessary before a conclusion may be drawn.

As for the normative claim, the inalienability wrought by perpetual trusts must be balanced against the enhanced charitable works that such trusts are assumed to foster. Very little analysis occurs in the literature as to how one unit of inalienability may be weighed against one unit of charity. A strange dynamic of opposing policy preferences, both internal to the rule against perpetuities itself and in its application to charitable trusts, plays out here[127]. On the one hand, the rule against perpetuities is designed to preserve a free market for property, the very market that supports the freedom of persons to dispose of property as such terms as they desire. The rule limits the freedom of disposition in order to protect that freedom for others. On the other hand, in the charitable realm, settlors are given the unparalleled freedom to establish perpetual trusts. An extreme view of the free market, and in particular the freedom of disposition, is harnessed to remedy through perpetual charitable trusts some of the very social ills caused by the free market[128]. The question is whether this poses a net benefit or a net loss.

Without going so far as to conclude that the cons of perpetual charitable trusts outweigh the pros, there is room in the literature for further critical reflection on the challenges posed by such trusts. The perpetual charitable purpose trust is ultimately just a funding mechanism by which property is forever committed to a given charitable object. This may not be an effective way to fund public works. Unless the trustees are given a discretionary power to encroach upon capital, only the income of a perpetual fund is available for expenditure on charitable activities. Therefore, each generation bears the full social and economic cost of the inalienability of the fund's capital but only benefits to the extent of that fraction of the fund represented by its income stream.

Also, forever is a long time and much can change throughout the life of a perpetual trust. If the fund does not keep up with inflation, then at some point the income

---

126 See M. Schanzenbach and R. Sitkoff, "Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust" (2006) 27 Cardozo L. Rev. 2465. The study suggests that perpetuity reform in and of itself is not an inducement for settlors. However, trust assets have flown into jurisdictions in which perpetuity reform has been combined with favourable tax concessions for perpetual trusts. The authors of the study suggest from this that tax considerations trump perpetuity considerations in the preferences of settlors.

127 See Simes, *supra* note 10 at 110–111.

128 This is most easily seen with charitable trusts established for the relief of poverty. The point applies less readily, if at all, in relation to other categories of charity, e.g., the arts and the advancement of religion. Nonetheless, the law does not draw distinctions between the various categories of charity for purposes of the rule against perpetuities.

stream will become too trivial to offer any relevant measure of public benefit[129]. Further, the purpose of the fund may become moot, such as where a perpetual trust is established to alleviate a disease for which a cure is eventually found. An additional problem is that the definition of charity does not remain static[130]. The purpose of a perpetual fund may at some point in the future cease to be charitable at law. The *cy-près* doctrine is intended to remedy such problems, but it represents an imperfect solution[131]. While reforms to the *cy-près* doctrine could ameliorate some of the challenges posed by perpetual charitable trusts, this only serves to underscore the primary point being made here, which is that the public benefit of charitable purposes is in and of itself an inadequate justification for the law's acceptance of perpetual charitable trusts.

In sum, although perpetual charitable purpose trusts do not *per se* fall offside the technical requirements of the rule against perpetuities, they are not altogether consistent with the policy of the rule. The fact that no other kind of trust may be expressly made to last in perpetuity reflects a deliberate intention to confer perpetual existence as a unique legal privilege available only to charitable trusts. The rationale behind this privilege is cloudy. The prevailing view is that charitable trusts should have unlimited duration because such trusts are for the public benefit. This justification masks some empirical and normative claims that may not survive scrutiny.

Conclusion

In describing the limited exemptions enjoyed by charities in relation to the rule against perpetuities, Professor John Chipman Gray once observed as follows[132]:

> "*The law may have exempted them, but such exemption is not involved in the conception of charity.*"

---

129 Due to the statutory rule against accumulations, the trustees of the fund will be unable to accumulate income beyond the applicable accumulations period. The trustees will have to appropriately diversify the fund's investments as between capital accretion and income generation. Courts have, however, at times found creative (if not strained) ways to spare charities from the rule against accumulations. See, for example, *Re Fossum Estate* (1960), 32 W.W.R. 372 (Sask. Q.B.) for a case in which a court somehow managed to distinguish between an "accumulation" and "an augmentation of principal by the application of income."

130 In one Ontario case, a scholarship fund that was considered exclusively charitable at the time of its creation over time came to be viewed as discriminatory due to the evolving public policy against discrimination. See *Canada Trust Co.* v. *Ontario Human Rights Commission* (1990), 74 O.R. (2d) 481 (C.A.).

131 See, for example, the OLRC, *supra* note 88 at 428–433. See also Simes, *supra* note 10 at 121–132.

132 Gray, *supra* note 11 at 569.

What Gray meant by this statement is that there is nothing innate in the idea of charity that logically requires an exemption of any sort from the rule against perpetuities, that the beneficial nature of charitable purposes is not in and of itself sufficient to justify even a limited exemption. For the reasons set out above, I share this view. It is important, though, not to read more into Gray's observation than what he meant to convey. The limited exemption enjoyed by charities in relation to the rule against perpetuities may not be formed by the conception of charity, but the same reasoning does not hold in the reverse. That is, the conception of charity is not itself separate from nor is it unaffected by the various legal exemptions and privileges bestowed upon charities. To the contrary, once a legal privilege for charities becomes established, it begins to play a role in shaping the future evolution of charity in law. There is no authority for this proposition, but there need not be because it is inherent in the legal construction of charity. Charitable status generally has no intrinsic legal significance. It matters in law precisely because of the legal benefits associated with charitable status. These advantages are not a mere addendum to the definition of charity, but are instead foundational to it. In a sense, the legal definition of charity is simply the mechanic by which the legal privileges of charitable status are rationed. When a court determines that a given purpose is or is not charitable, that decision is in substance a decision to grant or deny not charitable status *per se* but rather the benefits of charitable status. When charitable status is viewed this way, the following big picture conclusions may be drawn from this article.

First, the problematic justifications offered in support of the preferred application of the rule against perpetuities to charities are symptomatic of a bigger problem in charity law. Orthodox thinking over charity law matters tends to bifurcate too rigidly between the definition of charity and the privileging of charity. The very manner in which most analyses of charity law are organized subtly communicates that the advantages of charitable status are merely consequential to a given purpose being characterized as charitable. It seems from these analyses that, on the one hand, there are the "*Pemsel* categories" of charitable purposes through which the law defines charity and that, on the other hand, there are the legal advantages that follow as a mere consequence of a given purpose being characterized as charitable. There is nothing technically wrong with this framework, since it is true that the advantages of charitable status are inapplicable to purposes that fail to first qualify as charitable under the *Pemsel* framework. That said, this way of organizing the analysis of charity law can contribute to confusion. For example, the above-described framework almost invites the unhelpful conclusion that charitable purposes are privileged because, well, they are charitable. This problem is illustrated by the almost instinctive tendency for jurists to point to the public benefit of charitable purposes to justify the preferred treatment of charities under the rule against perpetuities.

Second, cloudy justifications for the lenient application of the rule against perpetuities to charities contribute to incoherence not just in respect of the rule against perpetuities but also in respect of the understanding of charity in law. Where there is uncertainty as to why a given legal privilege exists for charities there will be uncertainty as to which purposes should benefit from that privilege. This article points in the direction of a new way to think about perpetuities and charities, but more works needs to be done in the area for the sake of both the perpetuity rules themselves and also the legal construction of charity.