LAW REFORM COMMISSION OF BRITISH COLUMBIA

RESPONSE TO ACCESS TO JUSTICE: THE REPORT OF THE JUSTICE REFORM COMMITTEE, 1988

LRC 101

DECEMBER 1988

Table of Contents

INTRODUCTION: TWO LAW REFORM BODIES

The Justice Reform Committee[1] was constituted in 1987. Its broadly-stated goal was "to cause the justice system of the Province of British Columbia to be accessible, understandable, relevant and efficient to all those it seeks to serve." More detailed terms of reference stressed a critical examination of the machinery of justice and the procedures and institutions through which it operates.[2]

The Law Reform Commission welcomed the creation of the JRC. We viewed it, not as a competing law reform body, but as one whose functions neatly complemented our own. In this regard, the JRC's terms of reference might be compared with those of the Commission, as set out in section 2 of the Act under which it is constituted:[3]

> The Commission is to take and keep under review all the law of the Province including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law ...

The general thrust of this passage is a concern with the development and improvement of the substantive law.

While each of the two law reform bodies has particular areas of competence and credibility, no firm line separates them. Nor is it desirable that such a line should exist, given that both are striving toward the same objective. There are, therefore, areas and issues touched on by the Report of the JRC in which the Law Reform Commission also has an interest, either in the form of past Reports, work in hand or future projects. In some cases, the Commission work constitutes a more detailed exploration of one aspect of a matter or policy endorsed by the JRC Report in broader terms. In other cases, the Commission work provides an alternative view or attack on the a problem identified by the JRC. A number of areas were also suggested by the JRC as suitable for examination by the Commission.

This "Response" is intended to focus attention and discussion on these areas of overlapping interest and on the particular topics which have been suggested for examination by the Commission.

FAMILY PROPERTY ISSUES

A. Reform Generally

1. RECOMMENDATION 38

Many family law issues received attention in the JRC Report, and particular comment was directed toward the general rules respecting the sharing of family property.[4] After outlining the background to the

---

1. Hereafter referred to as the JRC.

2. *See Access to Justice: Report of the Justice Reform Committee, 1988*, iv.

3. *Law Reform Commission Act*, R.S.B.C. 1979, c. 225.

4. JRC Report 59.

enactment of the *Family Relations Act*, the Report observed:

> The effect of the *Family Relations Act* on family property is that as a general rule, those things that are 'family assets' are divided equally between the spouses ... If the system is working properly, the law evolves in a cautious but thoughtful way to respond to changes in society.
>
> But if the statute is vague or ambiguous ..., the law will grow less and less certain. Rather than clarifying the meaning of the statute the case law will muddy the waters. When the law is unclear lawyers cannot advise their clients as to the likely outcome of their case and so they have no basis for making an agreement. Every case could go to trial.
>
> The problem seems to be that the Act dose not contain a statement of the philosophical basis for entitlement to share in family property. Until that statement is clearly made, judges will continue to apply their own ideas as to how marriage affects property rights.

The JRC's analysis echoes the sentiments expressed in the *Study Paper on Family Property* issued by the Law Reform Commission in 1985. The JRC responded to this problem with its Recommendation No. 38:

> The Attorney General of British Columbia, after consultation with the Family Law Section of the British Columbia Branch of the Canadian Bar Association and the Law Reform Commission of British Columbia, should revise the *Family Relations Act* provisions which deal with family property.
>
> The revision should make a clear statement of the principles on which family property is to be shared by spouses or former spouses.

2. OUR RESPONSE

(a) Family Property Generally

We share the perception of the JRC that there is a need for a re-examination, reform and restatement of the principles on which family property is to be shared on a marriage breakdown. The Commission is engaged on a project on Family Property which involves a thorough review of Part 3 of the *Family Relations Act*, the development of rational principles to determine what property should be subject to sharing and the way it should be shared. The development of draft legislation will be part of this process. The Commission's normal consultation processes involve the appropriate sections of the Canadian Bar Association.

This topic has, in fact, been part of the Commission's program since late in 1987 and our work has advanced to the point where a draft working paper is virtually settled. We expect to begin our consultation processes, which will involve the appropriate sections of the Canadian Bar Association, in 1989. If it would assist the Attorney General in evaluating JRC Recommendation No. 38, we would be pleased to make a copy of the most recent draft of the working paper available.

(b) Spousal Agreements

There is one aspect of the Law Reform Commission's work on family property which is complete. It concerns agreements which spouses have entered into respecting family property. The courts currently have a wide power to vary agreements which they perceive to be "unfair." This jurisdiction is troublesome from a number of points of view. It produces needless litigation. It is inconsistently exercised and creates the same kind of uncertainty the JRC found objectionable in the general law of family property.

In 1986 The Law Reform Commission submitted a *Report on Spousal Agreements* which concluded that the power of the courts to alter consensual distributions of family property is unnecessarily wide.

Recommendations were made to rationalize this jurisdiction and confine it within its proper limits. This is an aspect of family property which lends itself to immediate implementation through legislation if early action on at least part of Recommendation 38 is thought desirable.

B. Pensions

The *Family Relations Act* stipulates that in appropriate circumstances, pension rights are to be regarded as property which is subject to division under the Act. As a statement of general policy this has much to commend it. The Act, however, provides no specific machinery for the enforcement of orders that pensions be divided. The JRC identifies one particular situation in which this hiatus is perceived as creating difficulties. Recommendation 39 is directed at "deferred sharing" situations and suggests that legislation should provide for automatic severance of pension benefits at source.

Late in 1987 the Law Reform Commission added to its program a project on "The Division of Pension Rights on Marriage Breakdown." This project addresses a variety of issues that arise from imposing property concepts on a stream of payments. While our research is still in its preliminary stages, it suggests that caution is called for. First, dealing with a single aspect of pensions, in isolation from other relevant issues, may lead to distortions. Second, the approach taken in Recommendation 39 is not necessarily the only, or the best, solution to the problem at which it is aimed. We suggest that action on Recommendation 39 be deferred until the conclusions of the Law Reform Commission on aspects of pension sharing are available.

C. Enforcement Issues

Recommendations 40 and 41 deal with certain remedies which are, or should be, available in the enforcement of rights to family property. While, technically, these fall within the scope of our general work on Part 3 of the *Family Relations Act* it is unlikely that our conclusions would differ materially from those of the JRC and we endorse early action on them.

PARTICULAR STATUTES REFERRED FOR STUDY

A. Introduction

The JRC indicated that a number of submissions had been made which it felt merited further study. In Recommendation 182 it was suggested:

> The following statutes should be referred to the Law Reform Commission of British Columbia for further study: The *Limitation Act*; *Negligence Act*; *Patients Property Act*; *Municipal Act* (60 day notice provision); *Workers Compensation Act*; and the *Insurance Act* (regarding claims for losses for interruption of business).

The reasons given by the JRC for focusing on these particular statutes are set out below.

B. *Limitation Act*

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> The *Limitation Act* should be studied in detail and brought into conformity with the form of legislation which is now being considered in other provinces. Any reform process should review the special limitation periods applied to particular classes of people, such as medical doctors. Any special limitation periods should be fully justified and all similar classes should be treated in the same manner.

2. OUR RESPONSE

We confess a degree of surprise at the breadth of this suggested reference to the Commission. The limitation laws of the province were, in fact, the subject of intense study by us in the early 1970's which resulted in a major *Report on Limitations* which was submitted in 1974.[5] The recommendations made in that Report were implemented in 1975 by what is now the *Limitation Act*. That reform process also eliminated virtually all the special limitation periods of the kind that appear to be of concern to the JRC.

Particularly puzzling is the suggestion that "the *Limitation Act* should be ... brought into conformity with the form of legislation which is now being considered in other provinces." The fact is that British Columbia has been in the forefront in modernizing its limitation laws, and if any trend is evident it is for other Canadian jurisdictions to bring their legislation closer to ours.[6]

In the 13 years the *Limitation Act* has been in force we have monitored its operation closely and have seen nothing which suggests that a wholesale re-examination and reform is required. If major difficulties were brought to the attention of the JRC, we are anxious to receive particulars of them so we may pursue their correction.

Major difficulties aside, experience under the Act has identified a few discrete areas in which its operation might be improved or clarified.[7] Our present view is that any re-examination of the Act should be a relatively narrow one which is confined to these areas. If it is the Attorney General's wish we would be pleased to undertake this.

C. *Negligence Act*

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> The *Negligence Act* should be studied in the light of the decision of the British Columbia Court of Appeal in *Leischner* v. *West Kootenay*, [1986] 3 W.W.R. 97. That case established that if a plaintiff has been contributorily negligent then the liability of the defendants is several only, and not joint and several.

2. OUR RESPONSE

This matter, we are pleased to advise, has already been dealt with by the Law Reform Commission.

---

5. LRC 15.

6. For example, the *Uniform Limitation of Actions Act*, recently promulgated by the Uniform Law Conference of Canada bears a distinct resemblance to our Act in language, structure and approach.

7. For example the operation of s. 8 (ultimate limitation period) under which the medical profession does enjoy special protection.

In October 1986 we submitted our *Report on Shared Liability*[8] which addressed the problems created by the *Leischner* case as well as a number of other procedural and substantive issues which may arise when two or more persons share liability to another.

The Report contained a draft act based on uniform contributory fault legislation promulgated by the Uniform Law Conference of Canada. This is a matter on which early legislative action is possible.

D. *Patients Property Act*

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> Several people recommended that the *Patients Property Act* be amended to recognize the various areas in which a person may be competent or incompetent, such as residential, vocational, social, medical, legal or financial. The Act, it is said, should be amended to allow for a degree of flexibility where the patient is somewhat capable of managing his affairs but does need assistance in some areas. This is a matter that should be looked at.

2. OUR RESPONSE

The establishment of an appropriate legal framework to secure the rights of those whose competence for various purposes may be impaired has recently been the subject of interest and activity by law reformers in Canada and elsewhere. In the past, consideration has been given to the addition of such a study to our program but, for a variety of reasons, that has not been done.

One impediment has always been that a project of this kind is potentially very large and would call for a commitment of resources the Commission simply does not have. To add it to our program and attempt to give it any kind of priority, without additional resources, would mean that other, equally worthy, projects would have to be abandoned or allowed to languish.

A second concern has been that the Commission, which is composed solely of lawyers, may not be the best body to develop credible recommendations in this area. We note that in other jurisdictions when these matters are brought under study, the tendency is to constitute a broadly based group with significant representation from the health and social work disciplines.[9]

In the past the Commission's involvement in this area has been directed at the examination of relatively discrete issues such as those addressed in our *Report on Powers of Attorney and Mental Incapacity*.[10] It is our perception that we can make our most useful contribution in this way.

E. *Municipal Act*

---

8. LRC88.

9. For example The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (Fram Committee, Ontario) whose Report was recently released.

10. LRC 22, implemented in R.S.B.C. 1979, c. 334, s. 7. A re-examination of the "enduring power o attorney" is being considered as a future Commission project.

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> The suggestion was made to the Committee that the 60-day notice provision in the *Municipal Act* should be repealed. This is the section that requires a person to give notice to a municipality within 60 days of an injury or lose the right to bring a lawsuit against the municipality.

2. OUR RESPONSE

Reference was made above to the Commission's 1974 *Report on Limitations*. In that Report, the Commission considered the notice provision contained in the *Municipal Act*, and a similar provision contained in the Vancouver Charter. It recommended that both provisions be repealed.[11] This recommendation appears to have been accepted, initially, by the Government in 1975 since the first reading version of the *Limitation Act* contained a provision repealing them. At some stage of the legislative process the repeal provision was lost. The two notice provisions remain on the statute book and, as the Report of the JRC attests, continue to be a source of complaint.

The conclusions set out in the 1974 *Report on Limitations* respecting these notice provisions retain their force as formal recommendations of the Commission. If it is the Attorney General's wish that they be re-examined, we would be pleased to do so.

F. *Workers Compensation Act*

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> The *Workers Compensation Act* was also the subject of comment. The Committee heard recommendations that the Boards of Review system be abandoned in favour of a review by a Superior Court Judge. Also, it was said that the court should be given authority to review decisions under the Act to deal with obvious injustices.

2. OUR RESPONSE

The *Workers Compensation Act* and its operation, as a potential Law Reform Commission project, is something we would approach cautiously. The reason for this caution has been described in identifying the criteria that should be applied in determining whether a particular topic is suitable for examination and report by the Commission. In successive annual reports we have said:[12]

> Many issues brought to the Commission's attention do not turn on defects in the substantive law. Rather, the defects are in matters of administration and the institutions through which the law is applied. While there is no hard and fast position on this, the Commission tends to be cautious in approaching topics which appear to call for altered institutional arrangements rather than "self-executing" changes in black letter law.

---

11. LRC 15 at 116.

12. *Annual Report 1987/88*, 4 (LRC 95).

While we would, of course, respect any reference of this topic made to the Commission for study and report, we do question whether the Law Reform Commission is the appropriate body to undertake such a task if it is thought necessary.[13]

G. *Insurance Act*

1. BACKGROUND TO THE RECOMMENDATION

The JRC Report stated:

> The *Insurance Act*, it was recommended, should be amended to allow the *Appraisal Act* to apply to claims for losses due to interruption of business.

2. OUR RESPONSE

This is not a matter on which we can comment without more complete information about the concerns raised and the exact nature of the problem to be addressed. We are in the process of acquiring that information.[14]

A NEW APPEALS PROCEDURE ACT

A. Recommendation 114

In its Report, the JRC described the variety of procedures provided for in the provincial statutes through which the decision of a government agency or tribunal can be appealed to a court. These procedures tend to vary from statute to statute in ways which to not appear to serve any useful purpose. The range of issues which may be raised on appeal is frequently unclear. The JRC observed:

> There need only be two distinct appeal procedures; a new trial, or a review on a point of law. There should be an *Appeals Procedure Act* that would clearly set out the procedures to be followed on each of these. There may well be room for variations within these two models, to accommodate particular circumstances but any appeal to a Court should be able to fit within one of the two.

These views formed the background to Recommendation 114:

> A new *Appeals Procedure Act* should define two distinct appeal processes: a new trial or a review on a question of law.
>
> Each statute that provides for an appeal to a Court should either clearly define the appeal procedure or refer to the *Appeals Procedure Act* and designate which of the two procedures applies.

B. Our Response

---

13. We understand, moreover, that a Report on this topic was recently submitted to Government by D.R. Munroe Q.C. and the concerns referred to in the JRC Report may now be overtaken by events.

14. Some confusion arises out of the fact that thee is no provincial statute called the "Appraisal Act" which might be made applicable.

We are in substantial agreement with the views of the JRC on the need for reform and the development of a new *Appeals Procedure Act*. Our own perception of this need led us to add a project on administrative appeals to the Commission's program in July 1988 and preliminary work has commenced. The JRC's blueprint for legislation may ultimately commend itself to us but, in our own project, other approaches to reform would also be explored. One strategy under consideration would achieve substantially uniform appeal procedures without requiring amendments to the numerous individual statutes which authorize appeals.

COURT ORDER INTEREST ACT

A. Recommendation 177

The JRC Report pointed out that the rate of interest on judgments is set by a federal Act and is fixed at an uneconomically low rate. The repeal of this Act would clear the way for the operation of provincial legislation which fixes the rate at a more reasonable level. This legislation was enacted in 1982 and it will come into force automatically when the federal Act ceases to apply. The JRC recommended:

> The Federal Government should be urged to promptly repeal the sections of the *Interest Act* (Canada) so that the *Court Order Interest Act, 1982* may be proclaimed.

B. Our Response

We agree that the withdrawal of the federal government from this field is highly desirable. The regulation of judgment interest should be a matter solely for the province. We believe, however that a better regime exists to define rights to both prejudgment and postjudgment interest than is to be found in the *Court Order Interest Act* (as amended). This regime was described in detail in our *Report on the Court Order Interest Act*[15] which was submitted in 1987. We urge that legislation based on the recommendations made in that Report should be in place to provide for judgment interest when the federal interest legislation ceases to apply.

STRUCTURED COMPENSATION

A. Recommendation 180

The JRC commented on the disadvantages which can flow from a "lump sum" award of damages to a plaintiff who has suffered catastrophic personal injuries. It also noted, with apparent approval, the increasing use of the "structured settlement" in which the parties agree on compensation in the form of an income stream to the injured person. The JRC recommended:

> The *Supreme Court Act*, s. 42 should be amended to clearly give a judge the authority to order an award of damages to be satisfied by a structured settlement.

---

15. LRC 90.

B. Our Response

Late in 1987 a project on structured compensation (periodic payments) was restored to the Commission's program. This was in response to the same kinds of concerns which motivated the JRC in making Recommendation 180. The Commission's work is still in its early stages and we are unable to predict, at this time, the way in which it will unfold. We see considerable merit in proceeding with the implementation of Recommendation 180 and believe that experience under it might provide valuable guidance to the Commission.

There is, however, one aspect of the recommendation we believe calls for clarification. In order to exercise the authority referred to in it, must all parties have agreed that compensation be in structured form? Or may a judge compel an unwilling plaintiff to accept structured compensation when he would prefer a conventional "lump sum" award? In describing the compensation mechanism as a "settlement," the recommendation seems to suggest that a consensual element exists, but this is not clear beyond doubt.

ENCOURAGING SETTLEMENT

Recommendations 107 and 108 centred on improving the operation of certain procedures designed to facilitate a settlement between the parties to a lawsuit. These procedures are the settlement conference and the mini-trial. The Rules of Court also provide for another incentive to negotiate reasonably in order to promote settlement. Rule 57 formalizes the process by which an offer of settlement may be made and provides a costs sanction for unreasonably declining to accept it. Our *Report on Settlement Offers* considered this aspect of Rule 57 and set out a number of recommendations to rationalize it and make it more effective. Any legislative initiatives which concern settlement should also include these recommendations.

PLAIN LANGUAGE

The JRC endorsed the bundle of concepts which have come to be known as the "plain language movement." An important aspect of this is the production of legislation which is clear and easily understood. The Law Reform Commission's mandate to attend to the "simplification and modernization of the law" frequently causes us to consider provincial statutes which do not meet these standards. Such a statute may be based on legislation which is literally hundreds of years old and retains the concepts, structure and much of the language of the period in which it was enacted. A statute like this is unintelligible to everyone - the ordinary reader and the lawyer alike.

The task of the law reformer assumes an added dimension when a wholly archaic statute is encountered. To the extent that its substantive effect is to be retained, it is necessary to translate and restate that effect in language which makes it accessible to the modern reader. The Commission has done this on numerous occasions and the results, when implemented, have been highly satisfactory. There remain two Reports which have an extremely high "restatement" component and whose implementation might be justified on plain language grounds alone, apart from other reform considerations. Those Reports are:

Report on Fraudulent Conveyances and Preferences (LRC 94)

Report on Co-ownership of Land (LRC 100)

The Commission also has work in hand which will result in a restatement, in part, of the *Commercial Tenancy Act* in modern language.

CONCLUSION

In this response we have identified a number of past Reports of the Law Reform Commission which should be considered as part of any legislative initiative to implement the recommendations of the JRC. Some of these Reports put forward reforms which are within the letter of the JRC recommendations, and all are within their spirit. Those Reports are:

Shared Liability (LRC 88)

Spousal Agreements (LRC 87)

Settlement Offers (LRC 77)

The Court Order Interest Act (LRC 90)

Fraudulent Conveyances and Preferences (LRC 94)

Co-ownership of Land (LRC 100)

Limitations - General (LRC 15)
[notice provisions in *Municipal Act*]

A number of the recommendations of the JRC touch on areas of past, current or future interest to the Law Reform Commission. For the most part a good fit has been achieved. We would welcome the opportunity to discuss those areas where we have expressed concern respecting the impact of particular recommendations on the Commission's program.