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BRITISH COLUMBIA
LAW INSTITUTE PENSION DIVISION REVIEW PROJECT

Backgrounder

Report on Pension Division: A Review of Part 6 of the Family Law Act

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The subject of the report

When a spousal relationship breaks down, the separating spouses are often faced with trying emotional, financial, and legal issues. The *Report on Pension Division: A Review of Part 6 of the Family Law Act* is concerned with one set of legal issues that may arise from the breakdown of a spousal relationship. These legal issues involve the division of a pension between the separating spouses.

British Columbia has had pension-division legislation in force since July 1995. It has generally worked well, fulfilling its purpose to provide British Columbia with a comprehensive and detailed set of rules on pension division, largely sparing the courts from having to settle, in litigation, issues that call for specialized expertise. Part of the success of this legislation can be attributed to the fact that it has been regularly reviewed and improved, to keep pace with developments in family and pension law.

The latest version of British Columbia's pension-division legislation is found in part 6 of the *Family Law Act*. This legislation has been in force since March 2013. There have been some significant developments in family and pension law since that time. The time is ripe for another review of pension-division legislation.

The report contains that review. It has found that the legislation is still working well in general. But specific areas can be improved. These improvements are set out in the report's 25 recommendations for reform. Draft legislation and draft regulations are included in the report, to illustrate how these recommendations could be implemented.

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About the Pension Division Review Project

BCLI began the Pension Division Review Project in January 2019. The mandate of the project was to review part 6 of the *Family Law Act*, its allied regulation (the *Division of Pensions Regulation*), and the prescribed forms used in pension division, and to make recommendations for any improvements to part 6, the regulation, and the forms.

The bulk of time in the project in 2019 was spent considering the current law and developments in family and pension law in the seven years since part 6 came into force, identifying issues for reform, evaluating options to address these issues, and formulating tentative recommendations for reform. These tentative recommendations were published in a consultation paper, which opened a four-month period in which the public was invited to comment on the tentative recommendations. When that consultation period closed, these public comments were considered and this report's final recommendations were made.

The project committee and the project's supporter

In carrying out this project, BCLI has had the assistance of the Pension Division Review Project Committee. This 12-person, expert project committee is made up of leading lawyers, actuaries, public- and private-sector pension administrators, and public officials. The committee's role is to assist BCLI in developing recommendations for this project.

This project has been made possible by funding from the Justice Services Branch, Ministry of Attorney General for British Columbia.

Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

This report was preceded by the *Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act*, which was published in May 2020. Publication of the consultation paper opened a consultation period that ran until 15 September 2020. During the consultation period, the public was able to comment on 25 tentative recommendations for reform set out in the consultation paper. The responses received in the consultation were fully considered in developing the final recommendations for this report.

Content of the report

The organization of the report

The report is organized into 14 chapters. The bulk of these chapters is taken up with discussing recommendations for reform in the nine areas of part 6, the regulation, and forms which the committee identified as areas for improvement.

Introduction and the basics of pension division

The report begins with a brief introductory chapter, which sets out the subject and goals for this project and provides an overview of the chapters that follow.

Chapter 2 contains a high-level discussion of basic concepts in family and pension law. The chapter begins by reviewing property division for separating spouses under the *Family Law Act*. Then it discusses some of the special features of pensions, which include long timelines, the presence of administrators, and the variety of kinds of plans. These special features justify a distinct part of the *Family Law Act*, which is dedicated just to the division of pensions. This part is part 6. The chapter concludes by describing the highlights of how pension division is carried out under part 6.

Transitional provisions

The next chapter begins a series of nine chapters that are focused on recommendations for reform.

The general approach to transitions under part 6 is to favour transitioning cases to the new *Family Law Act*. This general approach is qualified by a handful of special rules, which serve to keep some cases under the old *Family Relations Act*.

The committee recommended rethinking two of these special rules. In its view, a case involving a spouse who has only filed a prescribed form under the *Family Relations Act* should be transitioned to the *Family Law Act*. The committee also recommended revising the special transitional rule that applies to spouses who have received a consultation from a plan administrator, so that these cases are transitioned to the *Family Law Act*.

Private annuities

Part 6 of the *Family Law Act* has a section that applies to privately purchased annuities. In effect, this section provides that these private annuities should be divided using the same rules that apply to the division of benefits after pension commencement.

The committee noted that there are difficulties with this section. In particular, it relies on a close association between annuities and pensions. It can be difficult to apply rules based on this assumption in practice, because annuities can lack the temporal element of pensionable service that is integral to pensions.

In view of this consideration, the committee recommended a new and more nuanced approach to private annuities. This approach would turn on whether the annuity is in pay when it is being divided. If it is in pay, then it should be divided under part 6. If it isn't, then the division should take place under the general provisions on property division found in part 5 of the *Family Law Act*.

Disability benefits

The committee recommended a small improvement to part 6's approach to the division of disability benefits. The improvement would ensure that the limited member retains an option to begin receiving a share of the pension benefits, even though the member is receiving disability benefits. The recommendation addresses a scenario such as the following: a

spouse becomes a limited member at a time when the member isn't disabled and no one contemplates the member becoming disabled. By the terms of the plan, the member is entitled to begin receiving a pension at age 55. But the member does, in fact, become disabled and begins receiving disability benefits. As a result, the member now won't receive pension benefits until age 65. The committee's recommendation would ensure that a limited member in this case could opt to receive a share of the benefits when the member turns 55, rather than having to wait until the member actually receives those benefits at age 65.

Waiving survivor benefits after pension commencement

The committee recommended changes to how part 6 deals with a spouse's ability to waive survivor benefits after pension commencement. Part 6 of the *Family Law Act* tightened the law on this topic, and introduced a dedicated prescribed form, but still some confusion persists. In the committee's view, part 6 could be improved if it referred to "assigning" rather than "waiving" the survivor benefit, because this would more accurately reflect the fact that the survivor benefit is actually the spouse's property. In addition, the committee favours requiring spouses to work out the legal and tax issues inherent in such an assignment in an agreement or a court order. These issues are too complex to be dealt with in a prescribed form, so the committee recommended repealing the form.

Commuted value: transfer and calculation

The committee made two recommendations touching on commuted value.

The first recommendation was intended to make it clear that a spouse's options on the transfer of the commuted value of a pension benefit must mirror the options available to the member under the plan.

The second recommendation was intended to correct an anomaly in which interlocking provisions in the *Family Law Act* and the *Division of Pensions Regulation* use different dates in the calculation of commuted value, in cases involving the death of a member.

Locked-in retirement accounts and life income funds

Locked-in retirement accounts and life income funds are currently divided under part 5 of the *Family Law Act*, even though they have features that align them with pensions. The committee recommended amending part 6 to allow for the division of locked-in retirement accounts and life income funds. The committee also recommended that the rules applicable to division of benefits under the transferring pension plan apply to the locked-in retirement account or life income fund.

Death of a spouse before becoming a limited member

The committee recommended an amendment to part 6 to deal with a scenario in which a spouse dies before becoming a limited member. Pension division involves a right arising at one point in time (upon the separation of spouses) and then further steps being required to perfect that right (such as negotiating an agreement, obtaining a court order, or filing a

form). The time that passes before the right can be perfected creates the possibility that the spouse will pass away before completing the steps necessary to divide a pension by becoming a limited member. The committee recommended a clarifying amendment to part 6, confirming that a personal representative has the power to take the steps needed to perfect the right.

Administrative fees

The committee made two recommendations on administrative fees.

First, the committee recommended raising the maximum administrative fee for registering the spouse as a limited member of the plan from \$750 to \$1 000 and raising the maximum administrative fee for transferring a proportionate share of the member's defined contribution account to the credit of the spouse from \$175 to \$200.

Second, the committee recognized that administrative fees can sometimes be a barrier to spouses completing the pension-division process. Part 6 recognizes this point and addresses it with an enabling provision, allowing an administrator to deduct the fee from the payment of benefits. The committee recommended converting this enabling provision into a default rule. This would mean that the fee must be deducted from the payment of benefits, unless the parties agree to some other arrangement for its payment.

Forms

The committee recommended numerous improvements to the language of the prescribed forms.

Extension of the rule providing for no further entitlement after division of benefits

The committee considered one issue for discussion. This issue involved potentially extending a rule in part 6 that provides a spouse has no further entitlement to pension benefits after the division of the pension. This rule doesn't apply if the pension at issue is federally regulated or is regulated under the laws of another province. The committee decided that it couldn't address this issue within its mandate, so it didn't make a recommendation concerning it. But it did include a discussion of it in this report, to highlight the issue and to urge organizations with a mandate that enables them to address this issue to consider adding it to their plans for law reform.

Draft legislation and regulations

The report includes chapter setting out draft legislation and draft regulations. This chapter is intended as an illustration of how the committee's recommendations could be implemented by legislative and regulatory amendments.

Conclusion

The report ends with a brief concluding chapter, summing up the recommendations and issue for discussion.

Conclusion

The report contains recommendations that would improve pension division under part 6 of the *Family Law Act* and the *Division of Pensions Regulation*. BCLI encourages the swift implementation of these recommendations.