



BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia

Vancouver, British Columbia V6T 1Z1

Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org

Website: www.bcli.org

BRITISH COLUMBIA
LAW INSTITUTE PENSION DIVISION REVIEW PROJECT

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

Date: 20 May 2020

The subject of the consultation paper

When a spousal relationship breaks down, the separating spouses are often faced with trying emotional, financial, and legal issues. This consultation paper 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.

This consultation paper 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 consultation paper's 25 tentative recommendations for reform.

The underlying purpose of this consultation paper is to give the public an opportunity to comment on these tentative recommendations. BCLI is interested in hearing from all per-

spectives on its proposals for reforming pension division. Public comment is an important part of the law-reform process. It can have a major impact on the development of a project's final recommendations. To ensure that your comments are considered when the final recommendations for this project are being formulated, BCLI must receive them by **15 September 2020**.

About the Pension Division Review Project

BCLI began the Pension Division Review Project in January 2019. The mandate of the project is 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. The project is now focused on consulting with the public. Once the consultation period closes, the project will move on to considering the responses it has received from the public and developing recommendations for reform for the project's final report. This final report is projected for publication later in 2020.

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.

Content of the consultation paper

The organization of the consultation paper

The consultation paper is organized into 13 chapters. The bulk of these chapters is taken up with discussing tentative 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 consultation paper 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 tentative 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 tentatively 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 tentatively 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 tentatively 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 tentatively 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 tentative 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, be-

come disabled and begins receiving disability benefits. As a result, the member now won't receive pension benefits until age 65. The committee's tentative 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 has tentatively 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 tentatively recommended repealing the form.

Commuted value: transfer and calculation

The committee made two tentative recommendations touching on commuted value.

The first tentative 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 tentative 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 tentatively recommended amending part 6 to allow for the division of locked-in retirement accounts and life income funds. The committee also tentatively 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 tentatively 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 proposes 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 tentative recommendations on administrative fees.

First, the committee tentatively 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 proposed 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 tentatively 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 tentative recommendation concerning it. But it did include a discussion of it in this consultation paper, 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.

Conclusion

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

Conclusion

BCLI encourages readers to respond to this consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Pension Division Review Project.