Gifts or Rights?
A Legal History of Employment Pension Plans in Canada

by
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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science

Faculty of Law
University of Toronto

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2011

Abstract

This thesis explores the role played by law in the current breakdown of the employment pension system, focusing on the legal status of pension plans within the employment relationship, and on the way lawmakers have defined, shaped and enforced employee pension rights. It traces the legal status of employment pensions from their 19th Century characterization as gifts to reward employees for long and faithful service, to their current 21st Century construction as terms of the contract of employment. The thesis argues that Canadian lawmakers within all three legal regimes structuring rights and obligations within the employment relationship – the common law, collective bargaining law and statute law – have contributed significantly to the overall dysfunction of the system by cultivating both substantive and procedural legal rules that locate critical issues concerning the scope, design, durability and distribution of employee pension rights within the control of employers. Predictably, Canadian employers have used that control to shape pension plans to meet their distinct business needs, needs that frequently collide with worker needs and expectations for good pensions. Even in the heyday of the ‘Fordist’ work structures that fostered employment pension plans, the system delivered benefits very unequally, privileging the interest of elite
workers who fit the ‘male breadwinner’ mould, and failing to provide adequate and secure pensions for the majority of Canadian workers. Changes in the organization of work in Canada, including trends towards more precarious work, will continue to exacerbate the problems inherent in the system, escalating its distributional inequalities. In the current round of pension law reform, Canada’s policy makers should abandon the effort to repair a system which is flawed at its core, and should instead seek a new foundation for pensions outside the employment relationship, a foundation which will not subordinate the pension interests of workers to the business interests of employers.
Acknowledgments

I am profoundly grateful to my supervisor, Professor Kerry Rittich, and to the members of my thesis committee, Professors Brian Langille and Morley Gunderson, for the generosity with which they shared their wisdom and scholarship with me, and for their skillful and patient guidance throughout the process of producing this thesis.
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CHAPTER 1

INTRODUCTION

1.0 INTRODUCTION

In the 1950s and 1960s, Canada adopted its current system of retirement income provision. The state took on a direct and important role in the delivery of retirement pensions, but deliberately left a significant share of the work to be done by ‘private’ employment pension plans. When challenged in the 1980s to shift the boundary away from private pensions towards more generous public provision, the state instead renewed its commitment to “ensuring that employer-sponsored plans and voluntary savings continue to be a vital part of the Canadian retirement income system”.\(^1\) Employment pension plans have produced good pensions for the minority of Canadian workers\(^2\) who hold good full-time ‘career’ jobs in primary labour markets, including government employment. For the majority of Canadian workers, however, these plans do little or nothing. Employment pension plan coverage, which peaked in the late 1970s at less than 50 percent of the labour force,\(^3\) is in slow but steady decline. The uneven distribution of employment pension benefits contributes substantially to income inequality in old age, including inequality on the basis of sex.\(^4\)

Canadian governments are currently embarked on a serious review of the pension system.\(^5\) They face some challenging decisions about the continuing role of employment pension

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\(^2\) The term ‘workers’ is used to describe the body of Canadians who are the targets of retirement income policy, in contrast to the term ‘employee’, which describes the sub-set of workers in formal employment relationships.

\(^3\) See data in Chapter 6 at section 5.2. Some sources suggest that coverage peaked in the early 1990s, rather than the 1970s. Differences of opinion about peak levels reflect difficulties in the data, discussed in more detail in Chapter 6 at section 5.1. The differences are minor, however; there is no disagreement that coverage levels were virtually flat, with some minor fluctuations, between the late 1970 and the early 1990s.

\(^4\) For a broader discussion of the equality issue, see section 4 below, Chapter 6 at section 5.3, and Chapter 7 at section 3.3.2.


plans in national retirement income policy. In order to make those decisions well, they must search for answers to the question of why the employment pension system has failed to produce reliable and adequate pensions for a majority of Canadian workers, and whether the problems with the system can be fixed.

This thesis is an exploration of the role played by law, and in particular the law of the workplace, in the failure of the employment pension system. I focus on the legal status of pension plans within the employment relationship, and the role of law in defining, shaping and enforcing employee pension rights. I trace the legal status of employment pensions from their 19th Century characterization as gifts – rewards to employees for long and faithful service – to their current 21st Century status as terms of the contract of employment. I argue that choices made by Canadian lawmakers along the way have contributed significantly to the overall dysfunction of the system. All three legal regimes structuring rights and responsibilities within the employment relationship – the common law, collective bargaining law and statute law – have cultivated both substantive and procedural rules that leave such critical issues as the scope, design, distribution and durability of employee pension rights within employer control. Employers have used that control to mould pension plans to meet their business needs, needs that frequently collide with worker needs and expectations about


The term ‘law of the workplace’ encompasses the body of law governing employer-employee relations in both unionized and non-unionized workplaces, including the common law, collective labour law and statute law. The thesis does not explore in detail the important role of tax law in shaping employment pension plans, although it does touch on the early role of tax law in promoting earlier vesting of pension credits: see discussion in Chapter 2 at section 4.1.
retirement income. Even in the heyday of the ‘Fordist’ work structures that fostered employment pension plans, the system delivered benefits very unequally, failing to provide adequate and secure pensions for the majority of Canadian workers. Changes in the organization of work have and will continue to exacerbate the problems inherent in the system.

I argue that in the current round of pension law reform, Canada’s policy makers should seek a new foundation for pensions outside the employment relationship, a foundation which has the capacity to pool and distribute retirement income risk in a manner that places the interests of retired Canadian workers at the centre, instead of subordinating those interests to the business interests of Canadian employers.

2.0 THE CANADIAN RETIREMENT INCOME SYSTEM

2.1 The Three-Pillar System

In its 1994 report, *Averting the Old Age Crisis*, the World Bank popularized the model of a ‘three-pillar’ (or ‘three tier’) national retirement income system. The ‘pillars’ or ‘tiers’ metaphor, subsequently borrowed by the Organisation for Economic Cooperation and Development (“OECD”) to describe its own recipe for meeting the income needs of the elderly without impeding economic growth, has now become widespread in the language of comparative social welfare policy. Both the World Bank and OECD see their models as serving three general purposes: Pillar I addresses poverty relief, Pillar 2 is directed to basic “income (or consumption) smoothing” across the life course, and Pillar 3 provides vehicles which support individual choices to defer immediate consumption during their working lives in order to obtain a higher standard of living in retirement.

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7 Alain Supiot describes the ‘Fordist’ model of production generically as “a large industrial business engaging in mass production based on narrow specialization of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture”: In *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001) at1. The concept of Fordism and its impact on employment pension structures is discussed in more detail in Chapter 2 at section 2.2.1.


Like many developed countries whose welfare states matured in the period after World War II, Canada’s retirement income system follows this basic model. Pillar One of the Canadian system consists of a public, tax-funded universal old age security benefit (“OAS”), augmented by a guaranteed income supplement (“GIS”) for the truly needy. Pillar Two is a mandatory, publicly administered, earnings-based and contributory plan (the Canada/Quebec Pension Plan or “C/QPP”). Pillar Three, the voluntary component, consists of two types of instruments, both earnings-based and tax-assisted: employment pension plans and registered retirement savings plans (“RRSPs”). The focus of this thesis is on the first of these Pillar Three instruments, employment pension plans.

It is widely acknowledged that by international standards, the public/mandatory pillars of the Canadian system are relatively ungenerous, falling well short of the levels customary in many developed countries. Policy analysts and financial planners have conventionally used 70 percent of pre-retirement income as the benchmark for a ‘comfortable’ retirement income which allows retirees to replicate pre-retirement living/consumption standards. Countries

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10 The making of Canada’s three-pillar system is discussed in Chapter 4 at section 3.0.  
11 RRSPs are individual tax-assisted investment accounts, with contribution limits based on earned income. They were introduced in Canada in 1957. Although many employers offer ‘group RRSPs’ as a substitute for pension plans, employers do not fund or contribute to RRSPs and the income tax rules do not treat groups RRSPs any differently than individual RRSP accounts. Accordingly, the history, employment dynamics and legal status of these plans are quite different than those of employment pension plans, and they are outside the scope of this thesis. Recently, the OECD has begun to speak of RRSPs as “personal pension plans” and to lump group RRSP coverage together with employment pension plan coverage: see, for example, OECD, *Pensions at a Glance, 2009: Retirement Income in OECD Countries* (OECD, 2009) (“Pensions at a Glance, 2009”) at 178. This is highly misleading for a number of reasons, including the fact that group RRSP coverage is very difficult to identify; RRSP savings can legally be used for purposes other than retirement; and the amounts in RRSP accounts, whether group or individual, are so variable that the existence of an account provides no useful information on which future retirement income can be estimated. For some discussion of the problems posed by RRSPs, see Monica Townson, “The Way Ahead” in Keith G. Banting & Robin Boadway, *Reform of Retirement Income Policy: International and Canadian Perspectives* (Kingston: Queen’s University School of Policy Studies, 1997) and Steering Committee, *Options* at 25-26. See also Chapter 6, note 134.  
12 Steering Committee, *Options* at 6-8.  
13 The ‘appropriate’ target income replacement rate for retirement income systems is widely contested. The Canadian income tax system is designed to support an income replacement level of 70 percent of pre-retirement income up to a maximum of approximately $100,000 (see Jinyan Li, *Tax Expenditure Analysis of Employer-Sponsored Registered Pension Plans* (Ontario Expert Commission on Pensions, 2007) at 17), which is in turn approximately two times average earnings. In *Old Age in the Welfare State: The Political Economy of Pensions*, rev. ed. (Lawrence, Kansas: University of Kansas Press, 1989), John Myles notes that “[e]conomists generally agree that if one is to maintain one’s pre-retirement living standard, retirement income must replace between 60-80 percent of pre-retirement earnings”: 55. See also Sebastien LaRochelle-Cote, John F. Myles & Garnett Picott, *Income Security During Retirement* (Ontario Expert Commission on Pensions, 2007) at 6. Despite lack of consensus about appropriate levels, replacement rates are a frequent standard used for making international comparisons of retirement income adequacy.
such as Sweden, the Netherlands and Austria readily meet the 70 percent target from mandatory pension sources for employees at up to one-and-a-half times the average wage level. In Canada, public pillars aspire to supply only about 40 percent of pre-retirement income, and that only for average wage earners, leaving a very substantial gap between retirement income needs and public provision for many Canadians. To fill the gap, Canada relies heavily on private sector market instruments, and in particular, on employment pension plans.

2.1 Employment Pension Plans

What are employment pension plans? For purposes of this thesis, the term applies to plans which provide pensions to employees as part of their terms and conditions of employment. Such plans are often labeled ‘private’ plans since they are not provided by government, except to its own employees. They may also be called occupational pension plans, workplace pension plans or registered pension plans. In this thesis, I have chosen to use the term employment pension plan for two reasons: first, because the historical perspective I take predates the modern registration system, and second, because I seek to maintain the focus on what for my purposes is the most salient feature of these plans: the fact that they are tied to individual employment relationships. Such plans are available in Canadian workplaces only where employers have chosen to establish plans, or where a union with bargaining rights has been able to persuade the employer to establish or participate in a plan through collective

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15 OAS supplies 14 percent of the average wage, while CPP/OAS supplies, at its maximum, another 25%. The actual figure for Canada in the OECD tables is 44.5 percent, the difference being accounted for in the OECD’s models by the guaranteed income supplement which is part of Pillar 1: ibid. at 119, 177-78.
16 Employment pension plans are important in Canada, in comparison to countries with more generous public/mandatory pensions, for at least four reasons: a higher proportion of workforce is currently enrolled in these plans, a larger proportion of retirees derive some income from these plans, the beneficiaries of these plans derive a larger proportion of their retirement income from the plans, and they contribute a larger share over all to the national retirement income: see Bernard H. Casey & Atsuhuro Yamada, “The public-private mix of retirement income in nine OECD countries: some evidence from micro data and an exploration of its implications” in Martin Rein & Winfried Schmahl, eds., Rethinking the Welfare State: The Political Economy of Pension Reform (Cheltenham, U.K.: Edward Elgar, 2004) 395 at 397-99. Canada ranks fourth among OECD countries in reliance on voluntar employment pension plans, after the U.K., the U.S. and Ireland: Pensions at a Glance, 2009 at 30, Figure 1.2, and 60.
17 The broad term “registered pension plan” normally refers to plans registered under the federal Income Tax Act and eligible for favourable tax treatment. Registration under provincial regulatory statutes applies to a narrower category of plans; some provinces, for example, exclude public sector plans or plans covering only a very limited number of persons (‘executive’ plans) from registration requirements, although these plans are registered under the Income Tax Act.
bargaining. Most such plans have historically been employer-‘sponsored’, a term which is not defined in pension regulatory statutes, but is widely used in the pension vernacular “to denote the one or more entities, or persons who establish the pension plan and to whom is reserved in the pension contract the ultimate power to amend or terminate the plan”\(^\text{18}\). The dominant model in Canada is the employed-sponsored defined benefit (“DB”) plan: a plan that pays out a specific and consistent income stream to employees after retirement\(^\text{19}\).

Employment pension plans pre-date public pensions in Canada. As we shall see in Chapter 2, these plans got their start in Canadian workplaces in the 19th Century because they were useful to employers as human resource management tools. Initially discretionary, pension plans evolved into more sophisticated instruments that were particularly useful to the large, bureaucratic employers who dominated primary labour markets in Canada for much of the 20th Century. Both the spread of employment pension plans and the particular forms that such plans took reflect the management needs of these enterprises. Employment pension plans offered a prospect of retirement income that was clearly attractive to workers; if it had not been, employers would not have been able to use pension plans so successfully as a control device. But the ‘bait’ of a retirement pension had in it a large and powerful hook: enhanced employer power over the workforce. It was for this reason that Louis Brandeis writing in the 1920s called pensionable employment “the new peonage”,\(^\text{20}\) and early trade unions opposed pensions as an employment benefit.\(^\text{21}\)

Despite early opposition, once trade unions secured formal collective bargaining rights after World War II, they embraced employment pension plans, and such plans became an established accoutrement of a ‘good job’. Not all jobs were ‘good jobs’, however; most Canadian workers of the immediate post-war era did not belong to pension plans. Likewise not all pensions were good pensions; as I shall show in some detail in this thesis, the structure of employment pension plans ensured that even among workers who were fortunate

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\(^{19}\) The difference between defined benefit plans and other benefit models will be discussed in detail in Chapter 6 at section 4.2.


\(^{21}\) See discussion in Chapter 3 at section 6.3.
enough to belong to plans, many received little benefit. Even in unionized workplaces, unions had difficulty getting pension issues dealt with at the bargaining table, or in obtaining recognition from arbitrators that pension plans created justiciable rights. Courts were slow to recognize that pension plans conferred rights; as late as the 1950s, courts were still insisting that pension benefits were not part of employee compensation, and were purely voluntary.  

It was this pre-existing system of employer-controlled pension plans that was incorporated into Canada’s retirement income policy in the 1960s. How well is that system doing at delivering retirement income to Canadians? By most measures, not well. A significant majority of Canadian workers do not currently belong to employment pension plans. Plan coverage for employees peaked in the late 1970s, leveled off throughout the 1980s, and has been dropping off, slowly but inexorably, since the early 1990s; currently fewer than 40 percent of Canadian employees belong to employment pension plans. Of the workforce as a whole, including the self-employed, only one in three has coverage. As a percentage of working-age Canadians irrespective of workforce status, coverage has stalled at just above 25 percent since the 1970s. Many plan members do not stay in the same plan throughout their working lives, moving in and out of pension-covered employment as well as from plan to plan, with negative consequences for their ability to accumulate adequate pension benefits. Increasing trends towards non-standard employment have further undermined the ability of workers to accumulate pension credits. Canadian women who belong to employment pension plans collect only 60 percent as much in pension benefits as male plan members, a percentage that has been dropping in recent decades, even as coverage for women has been on the increase and now more than equals that of men. In addition to gender inequities, there are other serious equality problems in the system; factors which have significant overlap with historical disadvantage in the labour market, such as part-time status, casual employment, gaps in service, multiple job turnovers, lower salary levels and lack of union representation, all decrease the likelihood of good pensions. The security of pension benefits, always hostage to the economic stability of the firms which provide those pensions, is now threatened by a variety of macro and microeconomic factors associated with increased

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22 See discussion in Chapter 2 at section 3.5.
23 The data supporting the figures provided in this section is discussed in Chapter 6, section 5.
24 See discussion in Chapter 6 at section 5.
globalization, including increased volatility in capital markets. Pension benefit streams are becoming less reliable; plans that pay guaranteed defined benefit are giving way to plans that simply accumulate lump sums and leave employees dependent on financial markets to generate a retirement income stream. Workers in general are being asked to take on an increasing share of the risk that pension funds will not be able to meet plan guarantees. The overall result is an employment pension system which does not benefit a majority of Canadians.

3.0 THE INTERNATIONAL RETIREMENT INCOME POLICY CHALLENGE

Canada is confronting its current retirement income policy challenge within the context of a broad international debate in developed, developing and transitional economies about the efficacy and sustainability of national retirement income systems. World-wide, states are confronting the aging of their populations. Increasing longevity means that workers now experience much longer retirements. Falling birthrates mean that as older workers leave the labour force, there will be fewer younger workers to take their place. Economists anticipate significant shifts in ‘dependency ratios’ (i.e. the ratio of active members of the labour force to the rest of the population), with consequent pressure on the tax base, on health care costs and above all on public pension systems. Countries like Canada that experienced post-World War II baby booms face additional challenges as a particularly large cohort of workers nears and reaches retirement age. Uneven and uncertain economic growth since the late 1970s, accompanied by recurrent and widespread national, regional and global fiscal crises, has put pressure on public finances. This confluence of factors has been described by more than one

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commentator as a “demographic time bomb” about to explode and wreak havoc on national economies if states do not act quickly to reform national retirement incomes systems.26

The current pressures on national pension systems have been predictable for many years now. For the past two decades, key international organizations preoccupied with financial and economic issues, such as the World Bank27 and the OECD28 have been issuing studies, manifestos, guidelines and directives on retirement income policies, comparing national systems, outlining ‘best practices’ and offering prescriptions for national pension reform which include the promotion of tiered or pillarized models of the type Canada embraced in the 1960s.29

26 See, for example, Laurence T.Kotlifoff & Scott Burns. The Coming Generational Storm: What You Need to Know About America’s Economic Future (Cambridge, Mass.: MIT Press, 2004). The characterization of these demographic developments as a ‘crisis’ requiring immediate and drastic policy action is contested; other commentators have pointed out that retired citizens pay taxes too, that the reduction in the proportion of children to the population as a whole will restore some balance to dependency ratios and result in a reduction in costs associated with youth dependency, and that increasing productivity may well soak up many of the increased projected costs: see, for example, Monica Townson, Pensions Under Attack: What’s Behind the Push to Privatize Public Pensions (Ottawa: Canadian Centre for Policy Alternatives & James Lorimer, 2001)
29 While both the World Bank and the OECD promote 3-pillar systems, they are not entirely consistent in their classifications of particular pension instruments. They both see Pillar 1 as a basic citizens’ pension. The World Bank has always reserved Pillar 2 for mandatory instrument, and places voluntary instruments in Pillar 3, regardless of whether or not they are tax-assisted: see Averting the Old Age Crisis, supra note 27 at 10-16. In Maintaining Prosperity in an Aging Society, supra note 28 at 133-34, the OECD places occupational (employment) pension plans in Pillar 2, reserving Pillar 3 for what it calls ‘personal’ pension plans “in the form of savings and annuity schemes”. In Reforms for an Aging Society, supra note 28 at 134-135, the OECD lumps all mandatory and voluntary tax-assisted instruments together in Pillar 2, reserving Pillar 3 for savings that support retirement without any government assistance. In both these OECD schema, employment pension plans are Pillar 2 instruments. In its recent Pensions at a Glance, 2009, the OECD now appears to have harmonized its model with the World Bank model, reserving its “second tier mandatory savings” category for mandatory (or quasi-mandatory) instruments, and its third tier for voluntary savings, which includes voluntary employment pension plans on the Canadian model: supra note 11 at 19-20. Both organizations emphasize the need for diversity among national systems in recognition of different histories, and current economic and social circumstance. They also urge nations to consider other forms of transfers (such as tax breaks for pensioners) and other forms of accumulated ‘wealth’ (such as home ownership) as additional “pillars” which should be taken in to account in assessing the resources and income needs of the elderly.
The three-pillar models promoted by these agencies reflect a distinctly neo-liberal perspective on the role of the state in retirement income provision. Both the World Bank and the OECD see an indispensable role for government at the Pillar 1 level. They urge, however, that Pillar 1 be kept small, and preferably ‘targeted’, in order to ensure that it remains strictly confined to performing poverty-relief functions. Outside of Pillar 1, they favour individual defined contribution accounts over collective measures guaranteeing defined benefits, urging strong links between earnings-based contributions and benefits, in order to discourage market ‘distortions’ and market-evading citizen behaviour. Egalitarian concepts do not feature prominently in the vocabulary of international pension reform, losing out consistently to ‘sustainability’, ‘efficiency’ and the reduction of ‘public debt burdens’. There is much emphasis on the virtues of self reliance, individual thrift, and the ‘flexibility’ to make individual choices about retirement living standards. Pension provision outside of Pillar 1 is consistently described as “savings”. There is no language invoking collective responsibility or the socialization of pension risk. Interestingly (and quite inconsistently, in view of their overall embrace of the minimal state) both organizations support the concept that although ‘income smoothing’ instruments should be ‘private’, they should at least in part be mandatory as well, a result which can be achieved only through state intervention.

It is clear that the twin messages of privatization and individual responsibility, promulgated since the mid-1980s, have fallen on fertile ground internationally in recent years. The timing of the World Bank’s Averting the Old Age Crisis in the early 1990s was not accidental. It was designed to and has been highly successful in influencing transitional economies in their choice of national retirement income systems to replace communist-era state pension provision. The message was also directed to ‘corporatist’ and social democratic governments in developed countries with a history of generous public pension systems.

30 The generalizations in this paragraph are based primarily on World Bank, Averting the Old Age Crisis, supra note 27, and OECD, Maintaining Prosperity in an Aging Society, supra note 28.
31 See, for example, OECD, Pensions at a Glance, 2009, supra note 11 at 19 and passim.
32 World Bank, Averting the Old Age Crisis, supra note 27 at 15-16; OECD, Maintaining Prosperity in an Aging Society, supra note 28 at 62.
33 In The Three Worlds of Welfare Capitalism (Princeton, N.J.: Princeton University Press: 1990) (“Three Worlds”), Danish sociologist Gøsta Esping-Andersen developed his now-famous three-category taxonomy in which he divided welfare states into three “regime-types”: corporatist states, social-democratic states and liberals states. Corporatist states are conservative regimes which readily acknowledge social rights and a broad role for the state in promoting welfare, but ensure that state programs reinforce rather than challenge existing
These countries are now being told that the post-war welfare state is no longer ‘affordable’, and that rising welfare costs must be met not with increased public revenues, but with reductions in public benefits and the downloading onto individuals of risks that had formerly been dealt with collectively. Many of these countries are clearly listening. Recent OECD documents report that private pensions are now playing a growing role in old age provision in its member countries, the result of two kinds of policy initiatives: cut-backs in public plans, leaving a ‘pension gap’ which market instruments have moved in to fill, and the mandating of private plans instead of or on top of public plans. Many of the cutbacks have been drastic, and have occurred in states like France and Sweden with strong public pension traditions.

The international organizations are much less concerned about liberal democracies like Canada, the U.S. and the U.K, which rely heavily on employment pensions as part of their overall retirement income systems. Canada in particular gets high marks from the international institutions for its ‘mix’ of public and private measures which relieves the public treasury of much of the retirement income burden. Ironically, however, just as other countries are adopting increased private provision, the flagship liberal democracies are experiencing serious difficulties of their own, as market-based pension systems break down. In those countries where employment pension plans are an important component of national retirement income policy, coverage has been dropping consistently. Defined benefit

status differentials. Social-democratic regimes assign to the state an explicit role in promoting equality, establishing social welfare programs that go well beyond poverty reduction and aspire to meet middle class standards (27). Canada, together with the U.S. and the U.K., is a prime exemplar of Esping-Andersen’s liberal welfare state, slow to acknowledge social rights and quick to favour the market and minimize the role of government in the production of social welfare and the management of social risk. He describes the social policy of liberal states as “residualist”, characterized by “means-tested assistance, modest universal transfers, or modest social-insurance plans”. They “encourage the market, either passively – by guaranteeing only a minimum – or actively – by subsidizing private welfare schemes” (26-27).

36 Estelle James, “Canada’s Old Age Crisis in International Perspective” in Keith G. Banting &Robin Boadway, eds., Reform of Retirement Income Policy: International and Canadian Perspectives (Kingston: Queen’s University School of Policy Studies, 1997). Estelle James was the lead researcher for the World Bank’s Averting the Old Age Crisis project. The World Bank’s main critique of Canada’s 3-pillar system is that Pillar 2 is publicly rather than privately managed. See also OECD, Maintaining Prosperity in an Aging Society, supra note 28 at 56, where the ‘targeted’ aspects of Canada’s system are credited with contributing significantly to “income adequacy”.
plans, which provide pensioners with reliable lifetime income streams after retirement, are giving way to defined contribution plans and other approaches to retirement ‘savings’ that produce lump sums for retirees rather than reliable monthly income streams. In addition, private pension plans of all types have been rendered less secure by the impact on pension funds of volatility in international capital markets in recent years. The OECD reports that “[c]onfidence in private pensions is at an all-time low”,\footnote{Ibid. at at 10.} in 2008, private pension funds lost $5.4 trillion U.S. in OECD countries as a whole, 23 percent of their overall assets.\footnote{Ibid. at 9 and 25.} For defined benefit plans, in which employers guarantee pension payments, threats to the solvency of pension funds are threats not just to employees’ retirement income security, but to the solvency of the business itself. As public systems come under increasing pressure, the neo-liberal project of supplying pensions through market instruments is experiencing a crisis of its own.

4.0 EQUALITY AND RETIREMENT INCOME SYSTEMS

The objectives embedded in the three-pillar systems put forward by the World Bank and the OECD are characterized as poverty relief, income or consumption smoothing, and opportunities for further deferral of consumption to improve retirement living standards. In Old Age Income Support in the 21st Century: An International Perspective on Pension Systems and Reforms, World Bank economist Robert Holzmann and Richard Hinz expand on these basic objectives, arguing that national pension systems should be evaluated on the basis of their adequacy, affordability, sustainability and robustness.\footnote{Holzmann & Hinz, supra note 27 at 6.} In its recent Pensions at a Glance, 2009, the OECD lists a series of “clear objectives and principles that all well-designed pension systems share”: coverage, adequacy, financial sustainability and affordability, economic and administrative efficiency and security.\footnote{OECD, Pensions at a Glance, 2009, supra note 11 at 85.}

These lists of “objectives and principles”, and the three-pillar systems that implement them, are presented as value neutral. Both lists place much less focus on distributive outcomes than they do on implications for public finance. Their language implies that the recommended models simply ‘operationalize’ an international consensus about what national retirement
income systems should be seeking to achieve, based on a series of core assumptions: that the ‘prime directive’ is economic growth; that national welfare policy will be calibrated to promote that goal; that citizens should ‘pay their own way’, in the absence of specific misfortunes that render them unable to do so; and that ‘redistribution’ is a well-understood and market-distorting evil to be minimized except where necessary to alleviate poverty.

There is, in fact, no such international consensus. The agencies’ terminology is anodyne and elastic, papering over the reality that its substantive content is highly contested. While there may be agreement that systems should provide ‘adequate’ pensions, working definitions of adequacy vary widely. The OECD often uses the term “adequacy” in ways that suggest it is synonymous with poverty relief; many nations that do not subscribe to neo-liberal orthodoxy may take a more generous view of adequacy. Words like “affordable” and “sustainable” are obviously freighted with assumptions about appropriate and acceptable levels of taxation. There is consensus that retirement income systems function as forms of insurance, directed towards pooling and sharing the risks of welfare loss in retirement.

Buried not far beneath the surface of that consensus, however, are a series of long-standing and fundamental international welfare debates. The first is about the range of retirement risks that ‘social’ insurance should properly protect against: in other words, about the range of risks that should properly be addressed on a collective basis. Second is the closely related but conceptually separate issue of what role the state should play in protecting against risks, regardless of whether they are individual or social. Third is the debate about what normative principles should be brought to bear on pooling and distributing retirement risks.

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42 See, for example, ibid. at 19, 55 and 86. The OECD sets its poverty line at 50 percent of median national income: ibid. at 63.
43 See, for example, World Bank, Averting the Old Age Crisis, supra note 27 at 15 and passim.
45 Esping-Andersen argues that risks become ‘social’ for three reasons: when the fate of the individual has social consequences, when risks arise from sources originating outside a individual’s control, and when society is prepared for normative reasons to recognize them as risks that should be addressed by the state: see Social Foundations of Postindustrial Economics, ibid. at 37.
What policy decisions are made on these issues about allocation, pooling and distribution of risks have critical consequences for equality, a term notably absent from the list of World Bank/OECD objectives. Equality is not a goal generally espoused by the international agencies. In fact, as Kerry Rittich points out in *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform*, the World Bank, far from seeing inequality as undesirable, sees it as a necessary engine of economic growth.\(^{46}\) Like adequacy and sustainability, equality is open to a wide variety of interpretations. Esping-Andersen observes:\(^{47}\)

> There exist few concepts with such variegated meanings as equality. It can denote fairness and justice (that is, issues of equity), the distribution of opportunities, resources, and capabilities (which address the equality of life chances), the allocation of rewards and the differentiation of living conditions (a more static, ‘here and now’ equality), or permanent social cleavages (a question of class formation). Equality is also invoked when, for example, social reformers or trade union organizers call for universalism or solidarity – issues of equality or rights and duties.

Accordingly, even among those countries that espouse equality as a social goal, there is no consensus on where that goal leads for retirement income policy. Some national retirement income policies seek to track and replicate pre-retirement labour market income in retirement; for them, equality means maintaining rigid links between earnings, contributions and eventual pension benefits, with the result that high earners benefit disproportionately from the tax subsidies within the system, producing redistribution from *low* to *high* earners.\(^{48}\) Others are committed to more substantive notions of equality; their systems may contain features that seek to accommodate unequal opportunities in the labour market and within the family, often with a specific focus on gender equality.\(^{49}\)

What position does Canada take in these international policy debates? In fact, Canada has never articulated clear retirement income policy objectives. The closest Canada has ever come is the preamble to the 1984 federal *White Paper* which laid the foundation for the

\(^{48}\) Corporatist systems are most likely to fall into this category, although liberal systems also do this.
\(^{49}\) Social democratic systems are most likely to fall into this category, although liberal systems may contain some redistributive features. Canada’s C/QPP contains features which compensate for time out of the labour force related to parenting responsibilities: see discussion in Chapter 4 at section 4.3.
pension reforms of the 1980s. According to the White Paper, Canada’s national retirement income system is based on three principles:  

- Elderly Canadians should be guaranteed a reasonable minimum income.  
- The opportunities and arrangements available to Canadians to provide for their retirement should be fair.  
- Canadians should be able to avoid serious disruption of their pre-retirement living standards upon retirement.

The White Paper does not tell us what a “reasonable minimum” income is. It does not tell us what benchmarks we should apply in judging whether opportunities to provide retirement income are “fair”. It does not tell us what level of disruption in pre-retirement living standards should be regarded as “serious”. It does not tell us what role employment pension plans are expected to play in achieving these highly nebulous overall goals, a question of major significance to the issues addressed in this thesis.

There is resistance in Canada to addressing the normative questions imbedded in retirement income policy-making. Policy-makers prefer to assume that our text-book three-pillar system makes our value choices for us. In fact, the important value choices do not come ready-made within the standard three-pillar approach. Decisions about the size of Pillar 1 ‘basic’ pensions require fundamental normative judgments about what income ‘floor’ is appropriate for elderly citizens, based on national conceptions of social justice. Choices about the size of Pillar 1 have important implications for the scope, shape and size of Pillars 2 and 3. Choices about appropriate target income replacement rate are not mere ‘technical’ decisions about whether the focus should be ‘before tax’ or ‘after tax’ income, or how heavily to discount projected retirement income needs based on presumed home ownership; they reflect important normative judgments about the appropriate standard of living for the elderly, and the appropriate sharing of resources across and within generations. Choices about whether pensions will be universal or targeted, earnings-based or flat rate, funded or pay-as-you-go, all have implications for distributive outcomes. In approaching the question of redistribution, the difference between ‘distribution’ and ‘redistribution’ is itself a value judgment about

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appropriate initial principles of resource allocation. These choices are not questions of mechanics; they are decisions that reflect national values.

What values are reflected in our current system? A recent report produced by the Institute for Research on Public Policy notes that Canada, together with the Nordic countries, is a world leader in the alleviation of poverty among the elderly. OECD data establishes that the average disposable income of Canadians age 65 and older is above 90 percent of the average income of adult Canadians as a whole, a ratio well above the OECD average of 82.4 percent, an achievement that John Myles describes as “a remarkable turnaround from a few decades ago when Canadian seniors fared poorly by international and even by U.S. standards”. Although I have described Canada’s public pensions as ungenerous by international standards, they are more generous at the lower end of the income scale than many other countries whose overall performance is superior; for those whose pre-retirement income is 50 percent of the average wage, public pensions replace 76.5 percent, considerably higher than the U.S. at 50.3 percent or the U.K. at 51 percent, and higher than the OECD average of 72.2 percent. The OECD attributes that anti-poverty effect to a specific design feature of Canada’s three-pillar system: the fact that it takes a classic liberal ‘targeted’ approach, tilting its Pillar 1 pensions towards the poorest elderly Canadians, rather than taking the more universal approach characteristic of many OECD countries.

High income Canadians also do well within the system, which offers relatively high levels of tax support for personal retirement savings as well as savings within registered pension

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51 Institutions like the World Bank and the OECD see normal distribution as the distribution made by the market; ‘redistribution’ is distribution on any basis that departs from market principles. For example, allocation of pension credits for time spent out of the paid work force for purposes of bearing and/or raising children would be seen as redistributive.

52 Patrik Marier, Improving Canada’s Retirement Saving: Lessons from Abroad, Ideas from Home (IRPP Study No. 9, September 2010) at 3, citing Quebec. Régie des rentes, Evaluation of the Quebec System of Financial Security at Retirement in Relation to that of Other Industrialized Countries (Quebec: Régie des rentes Québec, 2004).

53 OECD, Pensions at a Glance, 2009, supra note 11 at 56-57. This figure is an average; to put it in perspective, the elderly in the U.S. have a slighter higher average income than Canadians, but the U.S. has an old age poverty rate almost six times higher than Canada’s: ibid at 64.


55 Pensions at a Glance, 2009, supra note 11 at 119 (this OECD data groups mandatory private pensions with public pensions.)

56 OECD, Maintaining Prosperity in an Aging Society, supra note 28 at 56.
plans.\textsuperscript{57} There is considerably more reason to be concerned about pension outcomes for the ‘middle class’.\textsuperscript{58} In a recent study, economist Keith Horner concludes that under Canada’s current arrangements, “in the modest/middle earnings range about 40 percent of households are not saving enough for full maintenance of their pre-retirement consumption, and about 28 percent face significant shortfalls in their living standards.”\textsuperscript{59} In his 2009 study for the Ontario government, economist Bob Baldwin reaches a similar conclusion.\textsuperscript{60}

As noted above, there has been a significant reduction in poverty rates among the elderly in Canada over roughly the same period that employment pension income has been growing dramatically as an overall percentage of Canadian’s retirement income. The reduction in poverty rates is not due, however, to the increase in employment pension income. The research demonstrates that the dramatic statistical improvements in poverty rates since the mid-20\textsuperscript{th} Century represents the short-term impact of the maturation of Canada’s \textit{public} pension systems, introduced in the 1950s and 60s and reformed in the 1980s.\textsuperscript{61} The force of those effects is now spent. The impact of employment pension plans is just the opposite. Employment pension income is what economist and sociologists describe as a “concentrated” source of income, disproportionately distributed to wealthier Canadians.\textsuperscript{62} Those who receive employment pension coverage income are among those who already enjoy labour market advantage: those with full-time jobs, long-term job security and high salaries. Those without those advantages lose out, a problem that will only get worse as job quality deteriorates and income inequality in general continues to grow.

\textsuperscript{57} See Steering Committee, \textit{Options}, supra note 5 at 19.
\textsuperscript{58} The Steering Committee defines the group of concern as those currently earning between $30,000 and $100,000/year: \textit{ibid.} at 19.
\textsuperscript{60} Research Study on the Canadian Retirement Income System, supra note 5. Baldwin concludes that the status quo “may leave a significant minority of people with moderate to high earnings facing a decline in their standard of living in retirement, and force many people to rely on sub-optimal pension and retirement savings institutions” \textsuperscript{vii}.
\textsuperscript{61} Myles, \textit{The Maturation of Canada’s Retirement Income System}, supra note 54 at 3, 6, 8, 19.
\textsuperscript{62} Pension wealth is very highly concentrated, with more than 80 percent being held by one-quarter of households”: Bob Baldwin, \textit{The Long-Term Capacity of Workplace Pension Plans to Deliver Retirement Income: A Review of Key Issues} (Caledon Institute of Social Policy, March 2007) at 16. See also general discussion in Chapter 6 at section 5.2.
Within the overall system, it is clear that employment pension plans are significant contributors to retirement income inequality. This is true regardless of what definition of equality is selected from those within the range offered by Esping-Andersen; the system produces both unequal opportunities and unequal outcomes. An important objective of this thesis is to examine why employment pension plans produce such unequal outcomes of Canadian workers, and what contribution the Canadian legal framework for pensions has made to that result.

5.0 THE CENTRAL ARGUMENT OF THIS THESIS

This thesis examines the role of law, and particularly the law of the workplace, in shaping employment pension rights. I argue that the choices and decisions of lawmakers have been significant contributors to the failure of the system to produce good pensions for most Canadians. The legal keystone is the foundational choice of governments to assign a major role in Canada’s overall retirement income policy to pension plans which were controlled by employers, and to regulate those plans without challenging the principle of employer control. That policy choice left a significant segment of retirement income to be generated and distributed by the labour market, and specifically, by the employment relationship. While that relationship is conventionally characterized as contractual, it is well recognized in Canada that employees do not have equal bargaining power with employers. Accordingly, the policy choice to leave employment pension plans to the market was, in essence, a choice to place in the hands of employers the power to make decisions fundamental to the welfare of retired workers. The government’s companion decision to impose statutory minimum standards on pension plans disrupted ‘pure’ market outcomes by providing protection for accrued benefits. It did little, however, to disrupt existing power relations in the workplace. Employers use their power to design pension plans to further their own business objectives rather than the needs of employees for secure and reliable sources of adequate retirement income.

Adjudicators interpreted and applied the basic legal framework in ways that enhanced the superior bargaining power of employers. After some initial attraction to a trust law paradigm which would have placed some modest limits on employer discretion to amend or abandon pension obligations, common law courts have firmly embraced the contract paradigm, with its convenient dependence on the ‘intention of the parties’, despite clear empirical evidence that in individual employment relationships and often in unionized relationships as well, no meaningful mutual intention can be discerned. They have interpreted pension contracts to permit employers to write, and rewrite, their own obligations, provided only that they comply with regulatory standards. Labour arbitrators have followed a similar, employer-friendly path. At the urging of employers arguing that pensions are complex financial instruments unsuited to collective bargaining, arbitrators have crafted doctrines like reserved management rights theory and tests for arbitrability which aided employers in keeping pensions off the bargaining table, outside the scope of the collective agreement and unfettered by arbitral review. Like the courts, arbitrators have also been influenced by arguments that the pension system is fragile and can survive only if employers are permitted the flexibility to respond to business imperatives unfettered by future-looking obligations to employees.

Except for the minority of workers whose patterns of work mesh with those of the ‘career worker’ the system was designed to reward, this system has not responded well to the need of workers for adequate and secure pensions to fill the ‘gap’ left by public pensions. This should not be surprising; it was not designed to respond to their needs, and gives them no legal levers with which to reshape it. Recent efforts to modernize employment pension structures on a more co-operative basis within the existing voluntary framework are not likely to change the overall distributive impact of the system in favour of employees; the new pensions structures have been more successful at shifting pension risks from employers to employees within sectors of the labour market where pensions have long been present than they have at increasing pension coverage or improving pension quality.

I argue that because of the inequality of bargaining power at the heart of the employment relationship, and the fact the legal system has not provided employees with any effective counterweight to employer power, retirement instruments generated within the employment
relationship will inevitably reflect employer business interests rather than employee retirement income needs. Accordingly, the employment relationship is not an appropriate foundation upon which to build retirement income instruments, and should not be relied upon as a significant component of Canada’s retirement income policy. I develop this argument as follows.

In Chapter 2, I explore the genesis of employment pension plans as employer-generated tools for human resource management, designed to recruit and retain a superior workforce, promote long-term, stable employment relationships and facilitate the retirement of older and less productive workers. Employers used their control over plan design to retain complete discretion over all key pension decisions, a discretion of which they took full advantage to increase their leverage over employees at minimal cost. Courts interpreting early plans were readily persuaded that pensions were simply gifts from benevolent employers to deserving employees, conferring no rights. In the early days, pension plans were confined to such highly bureaucratized and regulated enclaves as railways and government employment. They began to expand more broadly into other parts of the economy throughout the late 1930s and 1940s. Although employers were careful to maintain control over plan design, governance and administration in order to ensure that pensions continued to serve their business needs, the increasing prevalence of Fordist management methods led them to adopt plans that increasingly structured their discretion, but allowed them to retain the power to amend plans to devalue benefits, or to terminate plans altogether when their business needs changed. These plans benefited the elite workers Fordist employers sought to recruit and retain – typically employees whose work patterns fit the ‘male breadwinner’ mould – and frequently excluded or otherwise discriminated against less advantaged groups of workers. They also assisted employers to implement and enforce mandatory retirement policies. Despite a tendency towards more formal plans which recognized some measure of employee entitlement, Canadian courts remained firmly wedded to a gift theory of pensions, refusing to construe plans as creating employee rights and employer obligations.

Chapter 3 examines how the advent of trade unions and collective bargaining affected employee pension rights. With collective bargaining came recognition that employment pension plans were part of the wage package. Pensions were acknowledged early as falling
within the scope of bargaining. As a practical matter, however, employers vigorously resisted encroachments on their unilateral control over pension plans, holding on with particular tenacity to their right to impose mandatory retirement policies unimpeded by the seniority and just cause provisions common in collective agreements. Employer bargaining and litigation strategies to keep pension plans outside the purview of collective agreements enjoyed initial success, and have continued to be effective. Successive generations of arbitrators have held that pension issues lie at the core of fundamental managerial prerogatives, and have been reluctant to interpret collective agreements as interfering with those prerogatives. Canadian labour law provides unions with neither the tools nor the incentives to enhance pension coverage, and offers them little effective assistance in seeking to reconfigure pension plans to better meet the needs of their members. Collective bargaining has therefore had limited impact on the structural deficiencies of the employment pension plan system. At the same time, however, the logic of collective bargaining, and in particular the reserved management rights doctrine, saddles unions with responsibility for pension outcomes.

For more than forty years now, pension rights in both unionized and non-unionized workplaces have evolved against the backdrop of regulatory statutes designed primarily to provide plan beneficiaries with benefit security they cannot obtain from the market. In Chapter 4, I examine Canada’s regulatory framework for employment pension plans as it evolved through two important rounds of law reform. The first of these, in which Canada’s three-pillar system was crafted, culminated in the mid-1960s in the creation of a mandatory earnings-related public pension plan, the Canada/Quebec Pension Plan, twinned with a regulatory scheme governing employment-based plans, which were expected not only to continue but to thrive in a climate in which public benefits were pegged at relatively low levels. It was a system shaped by liberal ideology, preoccupied with the effect of pension policy on business interests – employer human resource policy and the role of pension funds in capital accumulation – to a much greater degree than with the optimal design for employee pension interests. The second round, known as Canada’s Great Pension Debate, culminated in the mid-1980s with enhanced minimum standards for employment pension plans, but an adamant refusal on the part of governments to shift the boundaries between private and public plans, despite recognition that problems like gender equity resist solution outside
broad-based public systems. The regulatory regime establishes and protects an important employee right – the right to benefits which have already accrued – but has refused to recognize any employee right to continue to earn benefits throughout a working life. In addition, the regulatory system has generally failed to address the important ‘conflict of interest’ issues posed by unilateral employer control within a voluntary system. Accordingly, while regulation has unquestionably brought about some important improvements in benefit quality, it has done little or nothing to fill substantive gaps in coverage, or to ensure benefit equality or adequacy.

Chapter 5 picks up the common law where Chapter 2 left off, in the post-war period. My analysis of modern employment pension litigation shows the civil courts now ready to recognize pension plans as part of a matrix of employment rights, but struggling with the nature and content of those rights. The courts were seduced by the trust form of pension funding instruments into a brief romance with the possibilities of trust law as an anchor for employee pension rights, and a counterweight to the very evident employer conflicts of interest in the design and management of pension plans. They quickly retreated, however, into a sterile form of contractualism which, like statutory regulation, protects only accrued benefits, and like both collective bargaining and statutory regulation, leaves employers with broad scope to control pension plans in their own interests. As with collective bargaining, the logic of the common law contract preserves the convention that law is neutral by attributing the resulting outcomes to employee ‘consent’. In the employment context in general, that consent has been recognized as almost entirely fictional; this is even more obvious in the pension context where both the nature of pension plans and the historical and practical circumstances in which they were generated makes it clear that they do not reflect the ‘intention of the parties’ in any meaningful sense. Courts have continued to pay lip service to the proposition that employers who control pension plans have fiduciary obligations to plan beneficiaries. They have had serious conceptual difficulty giving content to those fiduciary obligations, however, in a system built on a foundation of employer self-interest. The “two hats” doctrine licenses employer to make critical decisions affecting pension rights without regard to employee interests, at the same time as it continues to insist they are governed by high fiduciary standards in the administration of pension plans. The “two hats” doctrine conveniently defines the conflict of interest problem out of existence, leaving
employees vulnerable where they most need protection: at the point where the employer’s business interest conflict with their pension needs.

Chapter 6 performs three functions. First, it focuses on the limitations of the dominant employment pension model in Canada – the single-employer defined benefit model – and explores the question of whether there are alternative employment-based models that might produce better outcomes: models like multi-employer plans and jointly-sponsored pension plans. The chief attraction of these models for employers is that they transfer to employees, individually or collectively, risks borne under the dominant model by employers; for employees, they are attractive only as alternatives to pure DC models or to no pensions at all. I argue that these alternative models work well only in distinctive labour markets, such as the public sector and heavily unionized ‘itinerant’ industries, and are unlikely to become widespread impelled solely by market forces. Second, the chapter takes a close look at the outcomes of the employment pension system for Canadians, with a particular spotlight on its distributive impact from the perspective of gender equality. The research demonstrates that the system fails most Canadian workers, promoting inequality through its asymmetrical distribution of benefits. Third and finally, I examine some of the proposals for alternative pension models which have emerged at the beginning of Canada’s current and third round of pension reform. I argue that these proposals largely accept the premise that the system will function only if employer are left in control; indeed, to the extent that these proposals promote a reduction in statutory regulation, they may lead to even more employer control, an approach that has not produced good outcomes for employees to date.

In Chapter 7, I draw some conclusions about the role played by law and lawmakers in shaping employee pension rights, and explore the consequences for employees of the contradictory legal framework within which employment pension plans function in Canada. I argue that as a policy instrument for providing adequate and secure retirement pensions for Canadian workers, the system was flawed from the outset by the conflict of interest that lies at its core: within a voluntary system, employers will provide pensions for employees only where it suits their interests to do so, and they will design those plans to maximize their own advantage, rather than maximizing the quality of the pension. The Canadian legal system, including the collective bargaining system, has failed to provide employees either with
effective procedures or effective legal rules with which to influence pension outcomes. The voluntary employer-controlled approach has produced successful outcomes for some employees in specific types of workplaces, but in general, pension plans shaped by employer imperatives do not and will not meet the broad needs of retired Canadian workers.

While it is not part of this project to develop proposals for alternative vehicles with which to replace employment pension plans, I also discuss in Chapter 7 some lessons to be learned from this research for future policy-making. These include the core conclusion that the individual employment relationship is not a workable foundation for generating good pensions for most Canadian workers; I maintain that employment pension plans should no longer play an important role in national retirement income policy. My complementary conclusion is that as long as the employment relationship remains an important site of pension provision, deregulation and deference to the pension contract is not a viable policy option for protecting employee pension rights. I argue that positive next steps in the pension reform process must include defining the goals and values that we as a nation want to shape our retirement policy, and designing new vehicles to meet those goals. Policy-makers should undertake this design exercise without regard to whether those vehicles are classified as public or private, since in the pension context, no meaningful functional or ideological lines can be drawn between them. The guiding imperative should be whether they will do the job of producing adequate and secure pensions on an equal basis for Canadians.

6.0 THE SCHOLARLY CONTEXT

This thesis is in part a work of legal history, tracing the evolution of Canadian law as it has constructed, interpreted and applied employee pension rights over time. Scholarship of this type requires research in caselaw and statute law – the legal ‘texts’ – but also in the ‘real world’ facts which those texts organize and classify into categories of legal rights and obligations. There is no comprehensive history of occupational pension plans for Canada, although Canadian political scientist and labour activist Richard Deaton’s *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* provides useful historical background on the evolution of both occupational and

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public pensions in Canada from a comparative perspective. For both factual background and analysis of the evolution of employment pension plans in Canada, one of the most valuable resources is also one of the oldest, Murray Webb Latimer’s 1932 two-volume opus, *Industrial Pension Systems in the United States and Canada*, which examines employment pension plans from an historical perspective. Latimer’s book reviews in meticulous detail the provisions of existing plans and the funding basis that supported them, as well as the early jurisprudence that interpreted them. Important in shaping my understanding of the historical relationship between labour markets and employment pension plans is the work of scholars who have studied the history of similar plans in comparable economies and legal systems. Business historian Leslie Hannah’s history of employer-sponsored workplace pension plans, *Inventing Retirement: The Development of Occupational Pensions in Britain* is the leading history of employment pension plans in the United Kingdom. Hannah’s work is limited for my purposes by its omission of any discussion of the role of the courts or the labour movement in shaping the legal rights created by U.K. plans. Economist Steven Sass’s *The Promise of Private Pensions: The First Hundred Years* offers a more comprehensive history of the evolution of employment pension plan in the United States, including analysis of the role of legal regulation. Sass’s integration into his historical analysis of the important role played by organized labour in the evolution of employment pension plans has been particularly useful in light of the close operational and institutional relationships between the labour movements in the U.S and in Canada, and the close parallels between the two countries in the evolution of labour law.

This thesis is also in part a study in the legal sociology of work – work in society – attempting to understand and explicate the complex and dynamic relationships among the state, the market and the family in shaping employment pension plans. The legal framework for employment pensions addressed in this thesis is rooted in the economic and social

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organization of work, and its intersection with other domains such as the state and the family. My understanding of these issues has been significantly informed by the work of legal scholar Judy Fudge, whose collaborative and individual work has been particularly helpful in understanding the implications of the employment pension system for workers who do not fit the Fordist model of full-time career employee. Also important in adding interdisciplinary depth to my understanding of the relationship among workplace pension plans, workplace legal structures and inequality has been the extensive research of sociologist Leah Vosko on precarious work and its relationship to social inequality, some of it in collaboration with Judy Fudge and other legal scholars. I have also drawn on the work of scholars writing from a variety of disciplinary and interdisciplinary perspectives on retirement income policy and the modern welfare state, important among them Canadian sociologist John Myles, who has written extensively about Canadian and international retirement income policy, and Danish


sociologist Gøsta Esping-Andersen, with whom Myles has frequently collaborated. The detailed empirical work of Canadian labour economists – in particular, Morley Gunderson and his colleagues at the University of Toronto – has been helpful in keeping my legal critique grounded in the real world of the Canadian workplace. There are very few Canadian scholars writing about gender issues in pension policy. Exceptional in this regard is Canadian economist Monica Townson, who has been engaged in this work outside the academy since the mid-1970s. Her accessible analyses of the gender implications of various aspects of both public and private pension systems were the genesis of my interest in this issue, and have been invaluable in enriching my understanding not only of the gender economics of pensions but also of the role of gender impact analysis in the Canadian pension public policy process.

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Most fundamentally, this thesis is an exercise in the application of critical legal theory to the problem of defining and enforcing the employment pension rights of workers. Robert W. Gordon has observed that:74

Critical legal theory helps to identify what’s been privileged and what’s been suppressed. It tries to reveal the backstage devices – the empirical assumptions, the contestable visions of society, the beliefs about directions of historical change – that mainstream legal discourse uses to close off the dark side of the status quo and embedded progressive alternatives to the status quo. As a constructive method, it describes how the alternative historical or currently functioning leeways and opportunities in the legal system may be strategically exploited and extended and generalized in the service of progressive politics.

In particular, three key ideas borrowed from critical legal scholarship have been useful to me in approaching the unique issues raised by employment pension plans within the Canadian legal framework.75 The first is that no intelligible ‘bright’ line can be drawn between public and private realms for purposes of understanding how law functions in society.76 The attempt to establish and maintain clear boundaries between public and private retirement income provision has been both an important driver of Canadian public policy on retirement income provision, and an important part of its legitimating ideology. As this thesis will show, attempts to maintain a conceptual and functional separation between public and private pension instruments are at best not useful, and at worst a serious impediment to good

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policy. The second is the understanding that adjudication, as well as legislation, is a species of ‘law-making’. Adjudicators do not simply interpret and apply the law; they also create law through the choices they make within existing doctrinal and institutional constraints, choices which have important normative consequence despite efforts to package them as inevitable, neutral and technical. Those choices may either reinforce or disrupt the social and economic power relations within which competing rights claims arise. The close analysis of the caselaw on employment pension rights reflected in this thesis demonstrates both the contingent nature of the legal rules which have evolved to structure employment pension rights, and the extent to which those legal rules have, with surprising consistency, reinforced the concept of employer control of employment pension plans. The third is the insight that law plays a key role not only in creating but also in legitimating outcomes which reflect and reinforce pre-existing social and economic power. Critical legal scholars have pointed to the fundamental conceptual frailty of the notion of consent within the law of contract, a notion which is particularly implausible in the context of the contract of the employment. This study clearly illustrates both the abstract nature of the legal decision-making process in creating fictitious contracting scenarios for employment pension plans, and the legitimating function played by those scenarios in imagining consent and ascribing responsibility to the employees themselves for pension outcomes, often in the teeth of clear evidence that the employees had no meaningful – indeed, often no role whatsoever – in framing employment pension rights.

Critical legal theory has been particularly useful as a methodology for understanding the relationship between the legal texts – the case law and legislation – and the social context within which those texts function to define and enforce legal rights. In obtaining a general critical understanding of the evolution of the common law of contract and trust, I have relied primarily on American critical legal scholarship. In dealing with the labour law issues

77 See in particular discussion in Chapter 7 at section 3.3.
78 Duncan Kennedy “Form & Substance in Private Law Adjudication” (1976) 89 Harv. L. Rev. 1685
raised by this study, I have found particularly useful the work of critical labour law scholars, Karl Klare and Katherine Van Wezel Stone. Their influential law review articles, “The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941” and “The Post-War Paradigm in American Labor Law” have helped to shape my understanding of the relationship between legislative and adjudicative law-making. In addition, their insight into how courts, labour boards and arbitrators have used legal instruments, legal concepts and legal reasoning to maintain and enhance existing power relations and imbalances between employers and employees, and to “deradicalize” more egalitarian legislative initiatives, have guided my exploration of the approaches taken by Canadian adjudicators in constructing a legal paradigm for employment pension plans in which employee rights based on contract and trust principles, and regulatory constraints on employer conflict of interest, co-exist with and are reconciled to continuing employer control over employment pensions plans. Stone’s more recent work on employment law outside the collective bargaining context has been valuable in helping me understand the impact of changes in the organization of work on the distribution of employment benefits.

Absent from this survey of the scholarly context for my work is any Canadian legal scholarship on employment pension plans as terms and conditions of employment, and as artifacts of the law of the workplace. In fact, very little attention has been paid to pension

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83 See in particular, Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace, ibid.
policy by Canadian labour and employment law scholars. It is my hope that this thesis will begin to fill that gap.
CHAPTER 2

PENSIONS AS GIFTS:
EMPLOYMENT PENSIONS PLANS IN THE PRE-COLLECTIVE
BARGAINING ERA

1.0 INTRODUCTION

In this chapter, I will explore why employment pension plans took root and grew in Canada prior to the advent of collective bargaining legislation, focusing on the period from the later 19th Century to the end of the Second World War. Employment pension plans in Canada were initially established unilaterally by employers, in both the public and private sector, to assist them in establishing and maintaining leverage over employees in the labour market, with retirement income adequacy and security for employees very much a subordinate concern. To maximize the leverage they could obtain from pensions, early adopters of employment pension plans took pains to ensure that plan documents did not create enforceable contractual obligations. At least up to the mid-20th Century, courts generally cooperated with employer pension objectives, subscribing to the view that pensions were not legal entitlements, but gifts made by benevolent employers to faithful servants, and imposing on employers only minimal obligations of fair play in the administration of their plans.

Although the courts were prepared to grant employers virtual carte blanche in designing pension plans to maximize their discretion and control, Canadian pension plans gradually began to recognize some measure of employee rights, influenced mainly by changing labour markets, but spurred on as well by government policy. Canadian courts were slow to track these changes, however; as late as mid-century, they continued to insist that employment pension plans gave employees no legal rights. Furthermore, despite these positive changes, at the end of World War II employment pension plans still benefitted only a minority of employees. They were found only in a very few sectors of the economy, and even in workplaces which had pension plans, many categories of workers were typically excluded.
from plan membership. Many others in pensionable employment reached retirement age without earning good pensions because structural features of typical plans, such as delayed vesting, were designed to provide adequate pensions only to long-service ‘career’ employees. Marginal members of the workforce, including women workers, were particularly badly served by the system.

2.0 A BRIEF HISTORY OF PENSION PLANS IN CANADA

2.1 Introduction

Canada was an early adopter of employment pension plans. Pension plans for the federal civil service in Canada were first introduced in 1870, some fifty years before the United States took similar steps. The first industrial employment pension plan in North America was a Canadian plan, established by the Grand Trunk Railway in 1874. Employment pension plans spread very slowly at first; exclusive of the railway plans, only seven pension

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3 A year later, American Express established the first employment pension plan in the United States: see Sass, The Promise of Private Pensions, supra note 1 at 23. Companies and governments in both the United States and Canada had paid pensions earlier than these dates. For example, Saskatchewan had a teachers’ pension plan as early as 1853. These were not employment pensions plans as discussed in this thesis, however; they were either ad hoc payments that were never systematized as plans, or were restricted to the disabled and the destitute: Joanette, supra note 1.
plans have been identified in Canada up to 1900. The pension movement gained some momentum in the early part of the 20th Century, however; despite the Great Depression, which put severe pressures on employment pensions, the 1937 National Employment Commission survey of Canadian pension plans found a total of 722 plans, covering workplaces employing approximately 400,000 workers.

Two valuable contemporary resources assist us to trace the proliferation of employment pension plans in Canada in the pre-collective bargaining era. The influential work of Murray Latimer, and in particular his two-volume 1932 study, *Industrial Pension Plans in the United States and Canada*, explores the universe of what the author calls “voluntary industrial pension plans” in the United States and Canada, including their historical development, financial, actuarial and administrative aspects, economic impact and legal status. The work includes much valuable statistical data, laboriously assembled by Latimer and his researchers, as well as a detailed analysis of the terms of all three hundred and

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4 See Task Force on Retirement Income Policy (Harvey Lazar, Chairman), *The Retirement Income System in Canada: Problems and Alternative Policies for Reform* (Ottawa, Ministry of Supply and Services, 1980), 2 vols., Appendix 1 (vol. II). Hart D. Clark, “The Development of the Retirement Income System in Canada”, 1-11. Six of these seven plans were in the financial services industry, while the seventh was in manufacturing.

5 This figure included what the study describes as both formal and informal plans. As the Queen’s Study points out, the fact that workers were employed at firms which offered pension plans did not mean that they were covered by such plans; the plans frequently excluded various classes of employers, provided for voluntary participation, or established age and service requirement for eligibility for benefits that few employees ever met: 9. The National Employment Commission study surveyed only large industrial employers, excluding government, public education, the churches and the banking industry, all of which were pioneers in the pension field: see discussion of this study in Industrial Relations Section, School of Commerce and Administration, Bulletin No.1, *Industrial Retirement Plans in Canada* (Queen’s University, Kingston, Ontario, 1938) (the “Queen’s Study”) at 9.

6 Murray Webb Latimer, by profession an actuary, was hired by the U.S. federal government in 1933 and headed up the subcommittee of Roosevelt’s Committee on Economic Policy that focused specifically on the Social Security Act of 1935. His papers are housed in the special collections at George Washington University: [http://www.gwu.edu/gelman/spec/ead/ms2082.xml](http://www.gwu.edu/gelman/spec/ead/ms2082.xml)


8 Latimer’s “voluntary industrial pensions plans” correspond to employment pension plans as that term is used in this thesis.
ninety-seven formal industrial pension plans which fell within the purview of his review. In addition to Latimer’s work, Canadian pension historians also rely on a 1938 study, *Industrial Retirement Plans in Canada*, conducted by the then newly-established Industrial Relations Section at Queen’s University (the “Queen’s Study”). The *Queen’s Study* drew upon Latimer’s data from the early 1930s, supplemented by the 1937 Canadian National Employment Commission Survey of private occupational pension plans in Canada, to explore the types of plans that were being adopted at the time, the nature of their provisions, the industries in which they were to be found, and the motivation behind their establishment.

Both these studies focus on the private sector. They tell us that employment pensions first took firm root in the railways in both Canada and the United States. Public utilities were the next important group to establish pension plans for their employees. In Canada the financial services industry – banking and insurance companies – were also early entries into the field. While employment pension plans were slower to develop in manufacturing, by 1932 they were visible in certain large manufacturing enterprises, most of which were Canadian subsidiaries of large U.S. corporations in particular, iron and steel, petroleum, and the electrical apparatus and supplies industries. Subsequent periods of economic expansion saw plans introduced in additional industries such as the manufacturing of rubber, and in mining and utility companies. The size of a company was an important predictor of whether or not it would establish a pension plan. Latimer notes the fact that corporations with pension plans were usually “much larger than the average…. the larger the company the greater the

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9 Latimer provided a detailed outline of his methodology: *Industrial Pension Systems* supra note 7 at 4-11. He limited his study to formal plans, and although he does not explicitly say so, he focused on “business”, which effectively excluded civil service plans and the plans of municipal governments. Although there were no reliable public sources of statistical information at that time, he documented the exhaustive efforts of himself and his research staff to obtain information on every existing pension plan in a business enterprise up to 1932, including plans that had been discontinued.

10 *Queen’s Study*, supra note 5.


12 This was not true in the U.S.. Latimer attributes the slower spread of pensions in the U.S. banking industry to the fact that in the U.S., banks were much smaller, while in Canada they were large corporations with many small branches: ibid. at 36.

13 The *Queen’s Study* found that prior to World War I, most employment pension plans in Canada were found in the railways, or in the Canadian branch plants of large U.S. corporations: ibid. at 20.

14 Ib id.. The *Queen’s Study* argues that much of this expansion of pension plans into industry was influenced either directly (extensions of plans to Canadian subsidiaries) or indirectly (patterning terms and conditions of employment on those prevailing in similar industries) by developments in the United States.
likelihood of its having a [pension] plan”\textsuperscript{15}. The authors of the \textit{Queen’s Study} likewise observed that “[f]ormal retirement plans in their early development years were, on the whole, confined to large, well-established industries”\textsuperscript{16}. Indeed, the National Employment Commission’s 1937 survey excluded all workplaces employing fewer than fifteen workers, an omission which the \textit{Queen’s Study} felt would not affect the reliability of its results since such firms were “unlikely to have made special provision for retirement”\textsuperscript{17}. Overall, Latimer estimated that approximately 14.4 percent of employees in the occupations he surveyed were protected by pension plans,\textsuperscript{18} a figure very close to the 15 percent identified in the \textit{Queen’s Study} for the same period\textsuperscript{19}. Of these, over 80 percent were to be found in railways and public utilities\textsuperscript{20}. While neither Latimer nor the \textit{Queen’s Study} looks at the public sector,\textsuperscript{21} from other sources we know that pension plans were well entrenched there from quite early in this era\textsuperscript{22}.

2.2 The Purpose, Structure and Function of Early Pension Plans

2.2.1 From Charity to Efficiency

Pension historians are agreed that occupational pension plans were an artifact of employers, designed, established and maintained to meet the evolving human resource needs of modern business enterprises\textsuperscript{23}. Crafted by employers, they took the shape they did to promote business efficiency, responding to specific managerial needs and objectives of employers in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} \textit{Ibid.} at 55-56.
\item \textsuperscript{16} \textit{Ibid.} at 16.
\item \textsuperscript{17} \textit{Ibid.} at 8.
\item \textsuperscript{18} \textit{Ibid.} at 55. Latimer notes here that the occupations he surveyed included all employed individuals outside of agriculture, the public service and professional and allied occupations. Unfortunately, he does not report data separately for the United States and Canada, and this 14.4 percent figure may be an estimate (he describes it as a “maximum figure” (55)) for U.S. companies only.
\item \textsuperscript{19} The \textit{Queen’s Study} was reporting a figure from the 1931 Canadian Census: \textit{supra} note 5 at 9.
\item \textsuperscript{20} \textit{Ibid.} at 54.
\item \textsuperscript{21} The \textit{Queens Study} covers “industrial concerns, including manufacturing, commerce, transportation, finance, and public utilities both publicly and privately owned: \textit{ibid.} at iii
\item \textsuperscript{22} See discussion at 2.2.5, below.
\item \textsuperscript{23} See Hannah, \textit{Inventing Retirement: The Development of Occupational Pensions in Britain} supra note 1; Sass, \textit{The Promise of Private Pensions}, supra note 1; W. A. Graebner. \textit{History of Retirement} (New Haven: Yale University Press, 1980). Some trade unions established pension plans for their members, in competition with employment pension plans in the late 19\textsuperscript{th} and early 20\textsuperscript{th} Century. These plans, not linked to particular employers or workplaces, collapsed in the Great Depression (see discussion in Chapter 3). The new union-sponsored multi-employer models that evolved subsequent to the Depression have both similarities with and important differences from the typical single-employer model with which this thesis is primarily engaged. This issue will be discussed at more length in Chapter 6.
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the enterprises that emerged from the industrial revolution, and evolved into the modern bureaucracies and mass production enterprises of 20th Century capitalism. As Desmond Morton and Margaret E. McCallum note in their short history of pension plans in Canada, in the eyes of the business executives who implemented them, a pension plan “is not philanthropy and it is not benevolence: it is a cold-blooded business proposition”.24

Such explicit disavowal of benevolent purposes clashes sharply with popular idiom surrounding early pension plans, which characterized them as gifts from grateful employers to old and faithful servants. Pension rhetoric was heavily influenced by idealized images of noblesse oblige arising out of an agricultural society: the aged nanny still inhabiting the nursery long after the children are grown, the grizzled labourer with spine bent and twisted after years at the plough, no longer of use but allowed to live out his few remaining years in the tied cottage. Some early informal pension schemes, particularly in family-run enterprises, were no doubt motivated by genuine ethical concerns on the part of the owners of the enterprise.25

Particularly in circles influenced by welfare capitalism, benevolent rhetoric also accompanied the creation of formal employee pension plans.26 Not far beneath that rhetoric, however, lurked very hard-headed calculations about the business benefits of pension plans.

By the 1930s, while the language of charity might still have a place in company public

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25 In Canada, benevolent sentiment is particularly evident in situations involving wealthy business magnates who established testamentary and other trusts for the purpose of providing discretionary welfare assistance to aged (and otherwise needy) employees. Typical of such trust was the Charles Massey Employees’ Fund established in 1916 for purposes which included aid for “aged and infirm employees, either as pensions or special appropriations because of age, infirmity, disease or accident”, but also included “the employment of hired help to enable the wife or mother of any of said employees to obtain rest”, and the “purchase of toys for the children of said employees”; see Re Massey, [1959] O.J. 697; [1959] O.R. 608 (Ont. H.C.J). See also cases like Re Cox, [1951] O.J. No. 548, [1951] O.R. 205 (C.A.), [1952] S.C.J. No. 53, [1955] J.C.J. No. 4, Re Allanson, [1971] O.J. No. 1620; [1971] 3 O.R. 209 (C.A.) and Jones v. T. Eaton Co., [1973] S.C.J. No. 65. In these cases, courts wrestled with whether these types of trusts were truly charitable trusts, or whether they violated the venerable rule against perpetuities. Despite the relatively late dates on these case reports, they deal with pension trusts created in the 1930s or earlier.

26 For a discussion of the role of welfare capitalism in Ontario in the first part of the 20th Century, see M.E. McCallum, “Corporate Welfarism in Canada, 1919-1939 (1990) 71 Canadian Historical Review 46. While her study begins somewhat later than the period in which the CPR and other railroads were establishing their pension plans, her discussion of the labour relations objectives and strategies of welfare capitalists is very apposite to the history of pension plans in the Canadian railroad industry and elsewhere. For a U.S perspective, see Stuart D. Brandes, American Welfare Capitalism: 1880-1940 (Chicago: University of Chicago Press, 1970).
relations literature, it had certainly disappeared from company communications to shareholders, subsumed by the language of efficiency and managerial bureaucracy. Murray Latimer, in tracing the development of employee pensions from *ad hoc* practices to more formalized pension schemes, identified a clear evolution in employer sentiment from *noblesse oblige* to the frank acknowledgment that pension plans serve important utilitarian purposes. His 1932 study observed that “[a]s the pension movement has spread, and as experience with the operation of the plans has become broader, the relief aspects have tended to decline in importance although perhaps never to disappear entirely, and economic motives have come more to the fore.”  

First among these motives, Latimer cites the role of pension plans in facilitating the easing out of older workers. The *Queen’s Study* saw “humanitarian” motives behind the decisions of early employers to establish pension plans. The Study conceded, however, that the charitable motives of early employers were discernibly giving ground to more material motives: elimination of inefficient workers, improvement of morale, attraction of better workers, creation of favourable public opinion, reduction of labour turnover, and the exercise of a restraining influence on employees, “particularly in relation to organization and strikes.” Employers were now focused on the “practical business value” of such plans: “the tendency of employers is to regard retirement plans as measures by which efficiency may be improved”. Indeed, for both Latimer and the authors of the *Queen’s Study*, it was simply common sense for employers to be preoccupied with what pension plans could do for business; the purpose of a business enterprise was to turn a profit, and such initiatives as pension plans must necessarily be justified on the basis of what they could contribute to the bottom line.

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28 Ibid.
29 *Queen’s Study*, supra note 5 at 4-5.
30 Ibid. at 5-6. The Study expresses some skepticism about the efficacy of pensions as a tool to discourage strikes. Whether or not a pension plan was an efficient tool for such purposes, it is clear that Canadian employers clearly used the threat of loss of pension to quell industrial unrest and discipline strikers: see discussion at 2.2.4, below.
31 Ibid., at 7.
32 In *Buschau v. Rogers Communications Systems*, [2006] 1 S.C.R.973, Deschamps J., speaking for the majority, has the following to say about the business purposes behind the establishment of Canadian pension plans:

Pension plans have a complex history and constitute a response to a multitude of needs. As Richard Deaton puts it:
2.2.2 Pension Plans and Business Purposes

Pension plans contributed to the bottom line in a wide variety of ways. First, employers saw pension plans as highly serviceable tools for recruiting and retaining ‘good men’. Because pension benefits were not payable until the end of a career, they were seen as primarily attractive to those who viewed themselves as ‘career’ employees, committed to a single employer throughout their working lives. Since plans were typically structured to offer the highest rewards to the employees with the longest service, they ensured that those same ‘committed’ employees would have an increasing investment in remaining with the employer until they reached retirement age.

Second, because pension plans gave employees a significant stake in keeping their jobs, they served a useful disciplinary function, particularly for large enterprises which depended for their profitability on the competence, good conduct and productivity of their employees, but were organized on principles that made it difficult and/or expensive to provide the levels of direct supervision that would ensure that employees were meeting standards: for example, railways and financial institutions where individual work locations were widely dispersed geographically. By increasing the price of job loss, pension plans provided an incentive to employees to ‘self monitor’ at relatively low cost to the employer. This disciplinary function of pensions was particularly important in keeping at bay that bane of the welfare capitalist, trade unionism. Employers saw pension plans as a tool for securing the loyalty of their workers against the blandishments of trade unions, using the threat of loss of pension as an additional lever to enforce ‘yellow dog contracts’ and other personnel policies making union...
membership and union activism a discharge offence. Even in workplaces where participation in a strike was not cause for immediate discharge, ‘disloyalty’ could seriously affect pension income, both for current employees and for pensioners. Under the terms of the early 20th Century railway pension plans, for example, participation in a strike could be penalized by loss of pre-strike service as a basis for calculating pension, and retirees on pension could be summoned back to work to support their former employers by strike-breaking, on pain of losing their pensions if they refused.

Third and very importantly, pension plans served as a lever to enforce retirement policies designed to help clear workplaces of older and presumptively less productive workers. Politicians justifying the establishment of civil service plans explicitly made this link. Sir Francis Hincks, then Minister of Finance, upon introducing the bill that subsequently became the first pension plan for federal civil servants, advised the House of Commons that the legislation “was not for the benefit of employees, but for the protection and benefit of the public and to enable the Government to get rid of persons who had arrived at a time of life when they could no longer perform their work efficiently.” Private sector employers used equally explicit cost-benefit analyses in linking the ‘pensioning off’ of older workers with improved workplace productivity. At least initially, the types of retirement policies that

36 Ibid. at 85. Pension historians have argued about the importance of anti-union motivation in the evolution of pension plans. In Labor’s Capital: The Economics and Politics of Private Pensions (Cambridge, Mass.: MIT Press, 1992) at 14, economist Teresa Ghilarducci questions whether this was an important explanatory factor for the growth of pension plans outside the railroads, and points to Latimer’s skepticism about the utility of pension plans for such purposes: 14ff.. But see Brandes, supra note 26 at 105. Whether or not pensions were widely used as an anti-union strategy in other industries, they certainly served that function in the railway industry: see Graebner, supra note 23 at 132, and discussion at 2.2.4, below.
37 Canada, House of Commons Debates, 16 April 1870 at 1054.
38 It is also important to note that in addition to supporting retirement on account of age, early employment pension plans served a related function as disability plans, enabling employers to rid themselves of workers who were physically unable to continue in productive work. The earliest plans often did not differentiate between debility due to old age and debility due to other causes, making incapacity a qualifying condition for any type of pension, and paying the same benefits on the same basis to employees leaving the workforce for incapacity regardless of the reason. Later plans removed the requirement that retired employees be incapacitated, and established different qualification and different levels of benefits for retirement benefits than for disability benefits. Unlike simple ‘old age’, however, a departure from the workforce due to disability could potentially engage an employer’s legal liability, depending on the cause of the disability. In industries in which industrial accidents were routine, it was not uncommon for pension plans to make it a condition of receipt of pension benefits that the employee would give up his right to sue the employer for damages. For example, the Grand Trunk Railway Company made membership in the company’s “provident society” compulsory; the society’s constitution contained a clause requiring that all members waived liability against the company for
went hand in glove with pension plans were less rigid than modern compulsory retirement policies. Latimer notes that many pension plans contemplated flexible retirement dates, which gave employers the ability to retain the employees they still valued, and made the plans overall less expensive. The flexibility belonged to the employer, however; from the perspective of the employee, retirement was compulsory whenever the employer said it was. As industry became increasingly bureaucratized, automatic retirement rules became more prevalent as a component of employment pension plans; Graebner notes that large, complex organizations placed particular value on the fact that pension plans depersonalized and bureaucratized the retirement decision, relieving the employer of any ‘blame’ for forcing aging employees to leave their employment.

Purely as a legal matter, employers were clearly under no obligation to provide pensions as a quid pro quo for the introduction of a mandatory retirement policy. At least potentially, a pension was much more costly than complying with common law notice requirements. Why, then, did employers and their business advisors see a pension plan as an important component of compulsory retirement policies? According to Latimer, “the reputation of a company and its ability to induce capable persons to enter its employ made necessary a humane method of meeting the pressures of the aged and incapacitated”.

Graebner puts the same point more bluntly, arguing that pension plans functioned as a tool which gave damages arising out of work accidents. After this provision was successfully relied on by the company as a defense in a number of employee court actions, such compulsory “waivers of liability” were ultimately prohibited by legislation for railway companies. The company’s attempt to get the courts to declare this legislation ultra vires the federal parliament was ultimately dismissed by the Privy Council: see 1901 Labour Gazette at 315-6, 365-6; 1902 Labour Gazette at 482-3; 1903 Labour Gazette at 713; 1906 Labour Gazette at 694-5.

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40 Graebner, *supra* note 23 at 121.
41 It is difficult to gauge the precise state of the law of wrongful dismissal in Canada in the early part of the 20th Century; if common law notice obligations were widespread, they were not onerous and severance costs could be entirely avoided simply by giving notice. In the U.S. where the employment pension plan model first became widespread in industry, the ‘employment at will’ doctrine was well established as early as the 1880s: see Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004) (“From Widgets to Digits”) at 24. Stone’s explanation of the importance of employee morale to the proper functioning of the modern industrial enterprises helps us to understand the business importance to employers of maintaining employee good will even in the absence of a legal obligation: see particularly 41-43, 56-58, 87-92.
corporations some public relations cover for “sloughing off traditional obligations to older workers.”

The importance of each of these diverse functions of pension plans varied with the type of enterprise and the nature of the employee group included in the plan. The labour market needs of the governments, regulated industries and large bureaucratic business enterprises where pension plans first took shape were by no means identical. Steven Sass, in his thorough study of the development of employment pension plans in the United States, identifies three separate sets of motivations for pension plans, evolving over time and linked to the differing labour market needs of employers. He argues that governments and other “rationalizing industries” such as banks and insurance companies wanted their pension plans to help attract and maintain a “loyal, experienced and permanent administrative staff”. Membership in the pension plans of these employers was not normally offered to uneducated or unskilled employees, who were employed to perform services that required no special training and were therefore expendable in most early 20th Century labour markets. By contrast, welfare capitalists running large enterprises such as railways and other transportation networks wanted their pension plans to assist them both to maintain a trained workforce and to rid themselves of workers “injured or worn out in the service” of the company. They put more focus on the disciplinary functions of the plans, and sought to foster the belief among their employees that their employers could and would provide a “protective safety net against the hazards of proletarian life”, including the hazard that workers would outlive their ability to provide for themselves and their families by working. Finally, the new commercial enterprises that Sass describes as “the large and highly organized big business enterprises that would dominate economic life in the twentieth century” were modern, managerial bureaucracies. They required a highly specialized and

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43 Graebner, supra note 23 at 149. Graebner argues that unions collaborated with companies in permitting this “sloughing off” of older workers.
45 Ibid. at 19-23.
46 Ibid. at 27.
47 Ibid. at 28. These are the industrial production enterprises described in the first part of Stone’s From Widgets to Digits, supra at note 41. Stone sees benefits like pension plans facilitating the operation of what she calls (borrowing the language of labour economists) “internal labour markets” in these enterprises, where the retention of a loyal, co-operative and competent workforce was an important part of the business plan: see 51-
differentiated labour force, clear promotional hierarchies, and a management style that routinized day-to-day administration and removed discretion from the hands of front-line supervisors, an approach to work organization and personnel management often called “Fordism” after its most famous proponent, Henry Ford, who pioneered it in the Ford Motor Company in 1908. Fordist firms, most of them large manufacturing enterprises, needed pension plans that would assist in recruiting and retaining a capable, intelligent trainable workforce who would stay with the firm, move up through the ranks and depart as they became older and less productive without damaging the corporate image or demoralizing the remaining workforce.

2.2.3 The Structure of Early Pension Plans

Although early pension plan designs clearly reflect the diverse purposes which they were established to serve, they were structured around some key common features. Central to these plans was the element of employer discretion. Almost invariably, all important aspects of plan administration, including who would be eligible for plan membership, who would actually retire on pension, the timing of retirement, how pension benefits would be calculated and how long they would last, were to be determined solely by the employer. The importance of maintaining employer discretion around all aspects of pension provision is clearly reflected in the language of the plans. Latimer’s 1932 study documents the great pains taken by employers to draft plans which excluded any but the most limited notions of entitlement on the part of plan beneficiaries. His detailed analysis of the plans he studied showed considerable variation, but a common tendency to avoid language that could be construed as contractual. Plan texts included clauses expressly providing that pensions under the plan were not a “right”, and that companies were free to terminate employees without pensions. Plans typically ensured that decisions about who would get a pension, and if so,
how much, rested in the sole discretion of the employer, often exercised through a Pension Committee made up of appointees of the employer. Almost all plans expressly reserved the right of the employer to amend or terminate the plan at any time, resulting in the loss of all pension rights for current employees.\textsuperscript{52}

Latimer concluded that only about 32.5 percent of the plans he surveyed provided “some protective guarantee to the persons who actually are placed on the pension roll”.\textsuperscript{53} Only 17 percent guaranteed any form of pension payment to employees who sought to retire once they met the qualifications established by the plan.\textsuperscript{54} And only one plan of the total of three hundred and ninety-seven plans he studied provided for pension rights that accrued irrevocably throughout the period of employment (the concept we now call “vesting”),\textsuperscript{55} and provided for a deferred annuity regardless of whether the employee continued in the employer’s service, or attained retirement age.\textsuperscript{56} Latimer stated categorically that of all the plans he examined, “[i]n no case…does any company pension plan contain any promise for its indefinite future maintenance…”.\textsuperscript{57} Some plans provided explicitly that even where the pension plan continued, pensions already granted were retractable at the discretion of the company, with or without cause.\textsuperscript{58} From the employee perspective, then, there could be no reliance on a retirement pension. Pension benefits depended on employer discretion. In most cases, they also depended on two additional contingencies: living to reach retirement age and holding on to pensionable employment until retirement. An employee who died or left his

\textsuperscript{52} \textit{Ibid.} at 707. Latimer’s example is the following clause:

The right to change from time to time any of the foregoing provisions and substitute others in their stead and the right to alter from time to time the plan under which this pension system has been established or to abandon said system is hereby reserved.

\textsuperscript{53} \textit{Ibid.} at 742.
\textsuperscript{54} \textit{Ibid.} at 743.
\textsuperscript{55} See fuller discussion of the concept of vesting at 4.1, below.
\textsuperscript{56} Latimer, \textit{Industrial Pension Systems, supra} note 7 at 743.
\textsuperscript{57} \textit{Ibid.} at 707.
\textsuperscript{58} “Cause” might consist of misconduct, or competition with the employer. In one notorious case involving a Canadian railway, retired employees were threatened with the loss of their pensions if they refused to return to work as strikebreakers: Murray W. Latimer, \textit{Trade Union Pensions Systems and Other Superannuation and Permanent and Total Disability Benefits in the United States and Canada} (New York: Industrial Relations Counselors, 1932) at 9.
employment prior to retirement age, voluntarily or otherwise, normally got nothing from the plan.

Another important common feature of early plans was that even where the ultimate pension benefit was discretionary, the value of the benefit normally increased with long service. Pensions were held out as rewards for long service: the longer the service, the more generous the reward. Typical formula paid a ‘defined benefit’ of 1-2 percent of ‘salary’ per year of service. The salary used to calculate the benefit was often final salary, or an average of the last few years of salary, since only by offering some assurance that an employee’s pre-retirement standard of living would be maintained would the ‘carrot’ of a pension compensate for the ‘stick’ of job loss. Both Latimer and the Queen’s Study point out that ‘final salary’ formulae produce pay-outs that favour more highly paid employees. According to Latimer, 59

> [E]mployees in the lower ranks receive relatively few pay increases during their working life, and in many instances the wages of manual laborers tend to decline once their prime is passed. At the other end of the scale, those who advance farthest for the most part are those in the upper range of executives whose salaries frequently increase with greatest rapidity in their final years of service.

The Queen’s Study noted a trend in new plans towards formulae based on career average earnings; it clearly approved this trend, which allowed for more accurate estimates of the cost of pensions, and produced, in its view, a fairer distribution of benefits. 60

Early pension plans took a range of approaches to the issue of mandatory retirement, depending on the needs of the particular employer. Invariably, they proceeded from the assumption that in ordinary circumstances, the timing of employee retirement would be determined by the employer, not the employee. All formal plans established a ‘normal age of retirement’. While the earliest plans had often pegged that age at seventy, the Queen’s Study noted that many employers had subsequently reduced the retirement age: “Employers have discovered that setting a high retirement age has been an expensive mistake, since it may frequently result in the retention on the payroll of ‘hidden pensioners’.” 61 By the 1930s, the more common retirement age was sixty-five for both men and women, although the Study

59 Latimer, Industrial Pension Systems, supra note 7 at 766; Queens Study, supra note 5 at 43.
60 Queen’s Study, supra note 5 at 43.
61 Queen’s Study, supra note 5 at 29-30.
noted that many plans were then decreasing the normal age of retirement for women to age 60.62 Plans varied, however, as to precisely what was expected to occur at the normal age of retirement. Very few plans of this era made retirement an entirely automatic event. In a typical plan, a retirement with pension could be initiated at the request either of the employer or the employee. Since an employee request either to retire or to receive a pension could be refused, however, the employer retained effective control over the timing of employee retirements, a discretion normally used to retain particularly valuable employees. Some plans with a normal retirement age of 65 did not permit the retention of employees beyond age 70.

Despite the care lavished on these plans – or perhaps because of it – early pensions were largely chimerical. Under early employment pension schemes, the available evidence suggests that the vast majority of employees, regardless of whether or not they fell within the class of employees the pension plan was designed to benefit, never actually received any pension. In her detailed study of the pension plan established by the Canadian Pacific Railway in 1903, discussed in more detail below, Mary MacKinnon concludes that fewer than seven percent of CPR employees ever actually retired on pension.63 Jennifer Klein, examining this issue from the perspective of the U.S. occupational pension plans of this era, argues that pension consultants, actuaries and welfare capitalists alike recognized that “the likelihood of an employee’s actually getting any benefits from a self-administered plan was exceedingly slim”.64

How were these common structural features deployed in specific workplaces? To answer that question, I propose to examine in detail the early pension schemes in two specific employment contexts: the railways and the public service.

62 Ibid, at 30. No explanation is given for the difference in retirement age for men and women, although the study comments that in general employers were reducing retirement ages in the interests of efficiency.
63 MacKinnon, supra note 1 at 69.
64 Jennifer Klein, For All These Rights: Business, Labor and the Shaping of American’s Public-Private Welfare System (Princeton: Princeton University Press, 2003) 63. The reference to “self administered” (by which Klein means ’not insured’) plans is important. Insured plans were far more likely to make payouts to employees, one of the reasons why they were less popular with employers who valued the leverage and cost savings that came with broad discretion: see discussion at section 2.3, below.
2.2.4 Railway Pension Plans: The Canadian Pacific Railway ("CPR") Plan

In Canada, as in the United States, the railways were the first private sector enterprises to adopt employment pension plans on a large scale. Latimer notes that by 1908, almost seventy-five percent of Canadian railway workers were employed by companies with pension plans; by 1927 the number of Canadian railway workers covered by pension plans had risen to more than 90 percent. Although many railways were private, profit-seeking ventures, they were heavily regulated from the outset, and while the state never mandated pension plans in the railways, it certainly enabled them; the Railway Act was amended in 1896 to authorize railway pension plans, an amendment that provided for retroactive confirmation of any plans which had been implemented prior to the amendment.

Pension plans were attractive to railways for a number of reasons linked to their very specialized labour market needs. Railways relied heavily on skilled labour, and many of the skills utilized in railway employment were very industry-specific. Railway companies therefore made a significant investment in employee training, and valued personnel tools that would retain trained and skilled workers. Not all railway workers were skilled, of course, but pensions served a number of functions equally valuable for both the skilled and unskilled. First, life on the railways in the late 19th and early 20th Century was quite dangerous. There were very high worker accident rates. In addition to the hazards to employees, a high accident rate exposed the railways to liability for personal injuries and property damage both to passengers and the general public: “the safety of the traveling public could be at risk if elderly employees remained in positions that required good eyesight, hearing, and quick reflexes.” The railways badly needed a mechanism to rid themselves of older and disabled workers with a minimum of damage to their reputations and potential

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66 Latimer, Industrial Pension Systems, supra, note 7 at 28-30; the comparable figures in the United States were 39.8 percent and 82.4 percent.
68 Peitchinis, supra note 65 at 46-7, 120.
69 Ibid. at 61.
liability to the corporations. A well-designed pension plan could meet that need, functioning both as a form of disability insurance, and as a lever for imposing timely retirement.\footnote{In her discussion of the reasons why the CPR moved in 1903 to establish a pension plan, Mary MacKinnon argues that “the final, obvious explanation for the timing of the introduction of the CPR plan is the emergence of a substantial number of elderly workers”: MacKinnon, supra note 1 at 63} Second, railways faced the challenge of managing a large and diverse workforce scattered widely but thinly across the entire country. For such employers, pensions served a number of useful ‘disciplinary’ functions, providing incentives for employees to maintain productivity and competence and to ‘self-monitor’ their conduct in order to maintain eligibility for retirement pensions.\footnote{Ibid.} Pension plans also served the railways as a valuable tool for combating strikes and unionization.

As noted above, the first private sector pension plan not only in the railway sector, but in North America as a whole, was established in 1874 by Canada’s Grand Trunk Railway. The Grand Trunk plan was not, however, a durable model. It applied only to ‘inside’ employees, the managerial cadre described by Sass as members of the “officer class.”\footnote{Sass, The Promise of Private Pensions, supra note 1 at 22.} It was a contributory plan with voluntary membership. While it provided benefits to “superannuated” employees, it did not establish any principle of compulsory retirement. A plan of this type simply did not meet the needs of late 19th Century and early 20th Century railways, reliant not only on white-collar managerial employees, but also on a blue-collar workforce for whom the normal insecurities of working class life were exacerbated by the dangerous nature of the work. To operate effectively in the railway labour market, pension plan membership would have to be extended broadly to the whole work force (which meant in practice that membership had to be compulsory) and would have to link benefits to fixed retirement dates. The old Grand Trunk plan reflected none of these features.\footnote{Pursuant to enabling legislation passed in 1907, the Grand Trunk replaced its earlier plan with a new one modeled on the plan adopted in 1903 by the Canadian Pacific Railway. The terms of the new Grand Plan were published in full in the Labour Gazette of February 1908.} In 1903 the Canadian Pacific Railway established its own pension plan on a completely different model.\footnote{A copy of the plan was obtained from the archives of the Canadian Pacific Railway, and is in my files.} In the preface to the new plan’s Rules and Regulations, Thomas
Shaughnessy, the then-President of the Canadian Pacific Railway, described the purpose of the CPR’s new pension initiative in typical welfare-capitalist terms:  

…by thus voluntarily establishing a system under which a continued income will be assured to those who after years of continuous service are by age or infirmity no longer fitted to perform their duties and without which they might be left entirely without means of support, to build up amongst them a feeling of permanency in their employment, an enlarged interest in the company’s welfare, and a desire to remain in and to devote their best interests to the company’s service.

Shaughnessy clearly saw the plan as a management instrument designed to create and cement employee loyalty to the CPR, and did not hesitate to describe it as such. It was to attract stable, responsible employees looking for long-term employment, reduce turnover and cement employee loyalty; an “enlarged interest in the company’s welfare” meant a personal stake in the company’s prosperity, expected to translate into both increased quality and quantity of work. This new CPR plan differed from the 1874 Grand Trunk model in a number of important ways. First of all, it was applicable not just to the “officer class”, but to all permanent full-time employees. Second, it did not require any employee contributions. Third, it clearly spelled out eligibility requirements: employees aged sixty-five with ten or more years of service were eligible for pension. And fourth, it provided for compulsory retirement at age 65, with discretion to waive this requirement “if in their opinion it is in the interest of the Company to do so”, or to impose earlier retirement.

The plan established a high-level governing body, or Committee, consisting of the President, the Vice-Presidents and the company’s General Solicitor. This Committee was empowered, subject to the approval of the Board of Directors, to both make and enforce the Rules and Regulations of the plan, and to determine the eligibility of employees to receive pensions, including the amount and any conditions on receipt of pensions. The benefit initially

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75 Rules and Regulations, Preamble.
76 Rules and Regulations, Preamble and ¶6.
77 Rules and Regulations, Preamble and ¶20.
78 Rules and Regulations, ¶7. The Committee had the discretion “to add additional years to the actual term of service”, with the approval of the Board of Directors: ¶8.
79 Rules and Regulations, ¶7–8. The plan spelled out that the compulsory retirement obligation applied regardless of whether or not the employee was eligible for pension. Despite the clearly compulsory nature of the retirement obligation, the plan spelled out that “[s]ix months’ previous notice shall be given to employees who are compulsorily retired”: Rules and Regulations, ¶8.
80 Rules and Regulations, ¶1.
81 Rules and Regulations, ¶3.
established in the initial plan was based on a formula of one percent per year of continuous service, multiplied by earnings based on average earnings for the ten year period preceding retirement.\(^{82}\)

While the plan did establish conditions of eligibility, meeting those conditions did not guarantee a pension. To remove any doubt that the payment of pension benefits was entirely discretionary, the plan spelled out in the clearest possible terms its refusal to make any binding commitment either to retain any employee in its service long enough to qualify for pension, or to pay a pension to those employees who qualified:\(^{83}\)

The establishment and continuance of this system of pensions is entirely a voluntary act on the part of the Company, and as the employees do not in any way contribute towards it neither the action of the Board of Directors in establishing such a system, nor any other action now or hereafter taken by them or by the Committee in the inauguration of operation of the Pension Department, shall be construed as giving an Officer or Employee of the Company a legal right to be retained in its service or any legal right or claim to a Pension Allowance. While it is the policy of the Company to encourage its employees to remain with it, and by faithful service to earn a pension, the Company expressly reserves its right and privilege to discharge at any time any Officer, Agent or Employee, when the interests of the Company, in its judgment, may so require, without liability for any claim for Pension or other Allowance than the salary or wages due and unpaid.

The plan spelled out that “persons voluntarily leaving the employment of the Company when their services are required thereby become ineligible for pension allowance”.\(^{84}\) Furthermore, an employee who had been granted a pension could forfeit that pension “in case of gross misconduct”,\(^{85}\) or if he engaged in other business after retirement without the Committee’s consent.\(^{86}\) Pensioners were required to report to the Company annually in order to provide “satisfactory evidence” to the Company that they “still com[e] within the rules of the Pension

\(^{82}\) Rules and Regulations, ¶13. The plan gives the following example: “For instance, an employee has been in the service for forty years and received on an average for the last ten years fifty dollars per month, the Pension Allowance would be forty per cent of fifty dollars, or twenty dollars a month.”

\(^{83}\) Rules and Regulations, ¶20. The Labour Gazette of 1903, citing this provision, notes that the CPR pension plan established in that year “gives no employee a legal right to be retained in the company’s service or a legal claim to any allowance”.

\(^{84}\) Rules and Regulations, ¶12.

\(^{85}\) Rules and Regulations, ¶14.

\(^{86}\) Rules and Regulations, ¶19.
In this way, the company retained control over the conduct of its employees even after they retired.

While there is no evidence that the CPR deliberately adopted the pension plan as an anti-strike tool, it clearly used it as such. The company denied pension benefits to employees involved in the Railway Shopmen’s strike of 1908, and also to those who participated in the 1919 Winnipeg General Strike. The CPR remained adamant in its refusal to budge from this punitive position despite significant political pressure; its policy of denying pension benefits to employees who had participated in the Winnipeg General Strikers persisted until 1948.

When employees who had participated in strikes were granted retirement pensions, they got smaller benefits than their service would otherwise have entitled them to, because their years of service prior to the strike did not count towards pension. As late as the early 1960s, the CPR was continuing to use the threat of loss of pension rights to intimidate striking employees into returning to work.

Plans like the CPR plan were carefully crafted to meet the need of the railways to attract and retain a stable, responsible and long-serving workforce, and to divest itself of older workers at its discretion. They are impressive documents. But in fact, as noted above, very few employees actually received any pensions under these plans. Mary MacKinnon’s study found that while the railway established a retirement age of 65, most workers had left the company

Rules and Regulations, ¶17.

MacKinnon, supra note 1 at 63. For her study, MacKinnon performed a detailed analysis of the occupational characteristics associated with retiring on pension. She observes that “[g]oing on strike was the only occupational characteristic to have a clear effect on the probability of receiving a pension”(75). The CPR was not the only Canadian railway to use denial of pensions to penalize strikers. The Grand Trunk did the same in 1910. Pension rights for these Grand Trunk employees were restored in 1923 when the Grand Trunk was absorbed into the government-owned Canadian National Railway. See Morton and McCallum, supra note 1 at 3.

See Susan Mann [Trofimenkoff], Stanley Knowles: The Man from Winnipeg North Centre (Saskatoon: Western Producer Prairie Books, 1982) 96-104. Stanley Knowles was instrumental in securing a provision in the new Industrial Relations and Disputes Resolution Act (now s.94(3)(a) of the Canada Labour Code, R.S.C, 1985, c.L-2) making it an unfair labour practice to withhold pension in retaliation for participation in a legal strike.

During a legal strike in 1961, the company sent letters to strikers advising them that if they did not return to work they would lose both their jobs and their pensions: see Hotel and Club Employees Union, Local 299 v. Canadian Pacific Railway, [1961] O.J. No. 392; 61 C.L.L.C. para. 15372 at 326 (Ontario Magistrates’ Court). As the result in this case (famously reported at the Supreme Court of Canada level as Canadian Pacific Railway Co.v. Zambr, [1962] S.C.J. No. 43) makes clear, the advent of collective bargaining legislation put some limits on the extent to which employers could continue to use the “loss of pension” weapon against striking employees. Prior to that, however, the CPR evidently used it freely.
prior to that age, and only about seven percent of employees actually retired in receipt of a pension.  

2.2.5 Public Sector Plans: The Federal Civil Service Plan

When the federal government enacted its first civil service pension statute in 1870, it was quite explicit about the dominant purpose driving the legislation. The Act’s long title was revealing: An Act for better ensuring the efficiency of the Civil Service of Canada, by providing for the Superannuation of persons employed therein, in certain cases. Its Preamble explicitly linked aging and disability: “for better ensuring efficiency and economy in the Civil Service of Canada, it is expedient to provide for the retirement therefrom, on equitable terms, of persons who, from age or infirmity cannot properly perform the duties assigned to them”.

The Plan was a simple one – less than three pages and eleven sections long. The Act provided authority to the Governor in Council to pay pensions of up to 70 percent of salary to eligible “officers, clerks and other persons” who had served in an “established capacity”. Eligibility for regular pension was restricted to employees at least sixty years of age with a minimum of ten years service. Early retirement pensions could be paid to those with sufficient qualifying service who were “incapacitated by bodily infirmity from properly performing [their] duties”, or lost their jobs because of what we would now call restructuring. Employees who took early retirement as a result of restructuring were subject

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91 MacKinnon, supra note 1 at 69. MacKinnon’s study covers a sample of workers who were hired prior to 1945. It shows the number of long-service employees actually retiring with pensions increasing over the period, but the seven percent figure, which also includes short service employees, applies to the entire period; she notes that “[n]ew workers typically stayed with the company for less than a year”.  
92 S.C. 1870, c.4.  
93 Ibid., s. 1. A very specific formula was provided, based on 1/50th (2 percent) of salary for each year of service, to a maximum of 35 years, with the salary component of the formula to be calculated by averaging the employee’s salary over the last three years of employment. However, the Act permitted the addition on a discretionary basis of up to ten years of additional service for purposes of the formula for those who entered the Civil Service after the age of 40, or those who were retired early under the restructuring provisions: see ss. 3 and 7.  
94 Ibid., s.9.  
95 Ibid., s.1.  
96 Ibid.  
97 Ibid., s.7: “any person to whom the foregoing enactments apply… removed from office in consequence of the abolition thereof, in order to [sic] the improvement of the organization of the department to which he belongs, or otherwise to promote efficiency or economy in the Civil Service”.
to recall to a comparable position.\textsuperscript{98} The plan was contributory; what the Act describes as an “abatement” of salary was deducted on a compulsory basis from all employees subject to the legislation.\textsuperscript{99} There was no specific provision in the statute for any return of contributions in the event that the employee left the Civil Service without earning a pension.

The Act underlined the discretionary nature of the plan:\textsuperscript{100}

\begin{quote}
[N]or shall any person be considered as having any absolute right to such allowance, but it shall be granted only in consideration of good and faithful service during the time upon which it is calculated, and nothing herein contained shall be understood as impairing or affecting the right of the Governor in Council to dismiss or remove any person from the Civil Service.
\end{quote}

The Act did not provide for any specific age of compulsory retirement. It did, however, provide that pensions and compulsory retirement went hand in hand:\textsuperscript{101}

\begin{quote}
Retirement shall be compulsory on any person to whom the superannuation allowance hereinbefore mentioned shall be offered.
\end{quote}

By legislative fiat, no stigma was to be attached to being “pensioned off”:\textsuperscript{102}

\begin{quote}
[S]uch offer shall not be considered as implying any censure upon the person to whom it is made.
\end{quote}

In 1924 the federal government did a complete overhaul of the superannuation plan.\textsuperscript{103} The new plan was more sophisticated – covering ten pages now instead of three. It was, however, equally discretionary:\textsuperscript{104}

\begin{quote}
No allowance shall be granted to a contributor under this Act unless the Treasury Board reports that he is eligible within the meaning of this Act, and no superannuation or retiring allowance shall be granted unless the Treasury Board, on the advice of the Civil Service Commission, reports in addition that the granting of such allowance will be in the public interest.
\end{quote}

\textsuperscript{98} \textit{Ibid.}, s.8.
\textsuperscript{99} \textit{Ibid.}, s.3. The contribution rate varied with the employee’s salary level; those paid in excess of $600 per annum contributed 4 percent of salary, while those paid less contributed 2 ½ half percent. The Act is somewhat ambiguous on the issue of whether participation in the plan was compulsory, but it would appear from subsequent versions of the statute that it was.
\textsuperscript{100} \textit{Ibid.}, s.5.
\textsuperscript{101} \textit{Ibid.}.
\textsuperscript{102} \textit{Ibid.}.
\textsuperscript{103} \textit{The Civil Service Superannuation Act, 1924}, S.C. 1924, c. 69. There had been previous amendments in 1898 (“\textit{1924 Plan}”).
\textsuperscript{104} \textit{Ibid.}, s.9 (1). See also ss. 10(1) and (3).
There were a number of key changes. First of all, the plan was no longer comprehensive; it explicitly applied only to full-time employees, and there was now a minimum salary level—$600 per annum—required for membership.\textsuperscript{105} Second, the new Act established age 65 as the age of “regular” retirement, with a mandatory retirement age of 70 for any contributor to the plan,\textsuperscript{106} regardless of whether or not he was offered a pension; the earlier statute had made retirement compulsory only for those offered pension.\textsuperscript{107} Second, the Act now spelled out a right to a return of contributions (without interest), termed a “withdrawal allowance”, for plan contributors who left the civil service without a pension,\textit{provided} that misconduct was not the reason for departure.\textsuperscript{108}

Third, the Act now provided for survivors’ benefits for the dependents of civil servants. Like benefits for retiring employees, these survivor benefits for widows\textsuperscript{109} and dependent children were discretionary; the Act explicitly spelled out that no allowance would be paid “if the person to whom it was proposed to grant the allowance is, in the opinion of the Treasury Board, unworthy of it”.\textsuperscript{110} Various conditions of eligibility for widows’ pensions were clearly calibrated to avoid the possibility that ‘designing’ women would marry civil servants simply to get access to their pensions. For example, if the marriage had taken place after the pensioner reached the age of 60 or after retirement, or if the contributor died within less than a year of marriage, the widow was not entitled to a pension. In the later case, however, a pension might still be payable if “the Treasury Board was satisfied that [the contributor] was in good health at the time of the marriage and that there [were] no other objections to the granting of the allowance”.\textsuperscript{111} A widow would automatically lose her survivor’s benefits on remarriage.

The federal public service plan in both its original and revised versions had some important differences from the CPR plan, reflecting its design as a tool to address the labour market

\begin{itemize}
\item \textsuperscript{105} \textit{Ibid.}, s.2(b).
\item \textsuperscript{106} \textit{Ibid.}, s.10(2).
\item \textsuperscript{107} Mandatory retirement for those offered pension remained in the 1924 Act, making it clear that the employer had the discretion to force those between 65 and 70 to retire by offering them a pension: s.10(1). The Act did create a somewhat elaborate procedure for employees to remain past the age of 70 to a maximum or age 75, but this was clearly available only at the employer’s option.
\item \textsuperscript{108} \textit{1924 Plan}, s.5(a)(iii).
\item \textsuperscript{109} But not for widowers: \textit{ibid.}, s.5(b).
\item \textsuperscript{110} \textit{Ibid.}, s.9(2)
\item \textsuperscript{111} \textit{Ibid.}.
\end{itemize}
issues posed by a white collar rather than a blue collar workforce. First, the civil service plan paid a much more generous benefit, two percent salary averaged over the last three years of employment, as compared to the CPR’s one percent averaged over the last ten years of employment. This more generous formula would be particularly advantageous to those higher paid employees who were likely to have steeper wage curves, and would operate as a strong incentive to civil servants to remain in the government’s employ until they reached retirement age, at which time their salaries would, in the normal course, be at their highest levels. The civil service formula also explicitly contemplated that additional service credit could be granted to employees who were late entrants into the government’s employ, a feature no doubt designed to make government service attractive not just to ‘career’ civil servants but also to those who had already had successful careers in the private sector.\footnote{By contrast, 1904 amendments to the CPR plan provided that those hired after the age of 40 were ineligible for pension altogether: see MacKinnon, \textit{supra} note 1 at 64.}

Second, the CPR plan had universal coverage, at least for regular full-time employees, while the civil service plan was open only to more highly-paid employees. Third, the civil service plan was contributory, while the CPR plan was not.\footnote{The CPR plan became contributory in 1937. MacKinnon argues that the company made this change for demographic reasons: The company could foresee very large numbers of retirements in the 1940s, when employees hired during the boom years before 1914 would be reaching retirement age. A noncontributory, largely unfunded, scheme was affordable in the early years of the century because there were so few pensioners. As the workforce aged, the pension burden rose dramatically. Citing Latimer, she notes that this situation prevailed in other North American Railways as well: \textit{ibid} at 66.} Contributory plans were typically more attractive to higher earners who saw them as a form of personal savings. Employees comfortably ensconced in the middle-class would be attracted to, and could afford to pay for the survivor benefits added to the plan by the 1924 amendments, a fourth importance difference from the CPR plan, which paid no benefits to the family of an employee who died prior to retirement.\footnote{MacKinnon dates the advent of survivor benefits in the CPR plan to the mid-1950s: \textit{ibid} at 80, endnote 11.}

\section*{2.3 The Funding of Pensions}

In addition to making choices about issues of plan and benefit structure, employers also had choices about how to fund pensions. Pension pioneers took a variety of approaches to funding. Many early employers saw pensions simply as an ordinary cost of doing business,
and paid pension benefits, like salaries and wages, directly out of operating funds.\textsuperscript{115} This method of funding worked for employers in the early days of industrialization, when the workforce was relatively young and most workers covered by plans left the company without receiving any pension benefits. As pension schemes matured, however, the pay-as-you-go approach posed some significant problems, since it linked annual pension costs to the number of retirees living at any given time, a cost that might bear little relationship to annual profitability. As an enterprise aged, the number of retirees was likely to increase. In a growing enterprise, this was not necessarily a problem, since profits would also be increasing. If the business was stagnating or shrinking, however, pension costs might soon exceed the employer’s ability to pay them.

Employers committed to living up to their pension promises – and there were many of them – sought methods of funding that provided more certainty and cost predictability. One early method of funding was the ‘pension fund society’, established pursuant to the 1887 federal \textit{Pension Fund Societies Act}.\textsuperscript{116} This statute permitted federally incorporated companies to establish pension fund societies to provide pensions for officers and employees of the corporation “incapacitated by age or infirmity”, as well as survivor benefits.\textsuperscript{117} While pension fund societies were structured as employee membership organizations, they were clearly adjuncts of the corporation. They could be established only by the senior officers of a company, who then controlled the drafting of the by-laws which governed the terms on which benefits would be paid.\textsuperscript{118} The Act contemplated that pensions would be funded by contributions, and specifically empowered ‘parent’ corporations to make such contributions.\textsuperscript{119}

\textsuperscript{115} In modern pension parlance, these would be called ‘pay-as-you-go’ plans.

\textsuperscript{116} An Act to empower the employees of incorporated companies to establish Pension Fund Societies, Pension Fund Societies Act, S.C. 1887, c.21 (“\textit{The Pension Fund Societies Act}”). A Pension Fund Societies Act is still on the federal statute books (R.S.C. 1985, c.P-8) very little changed from its original form. Previous to general legislation enabling pension fund societies, there had been special legislation establishing similar societies for specific corporations: see, An Act to incorporate the Annuity and Guarantee Funds Society of the Bank of Montreal, 23 Vict. cxvii (1860) and An Act to Incorporate the Pension Fund Society of the Bank of Montreal, 48-49 Vict. c.13 (1885).

\textsuperscript{117} Ibid., s.6.

\textsuperscript{118} The Act also expressly permitted a contributing corporation to vote at general meetings in accordance with the by-laws, despite the fact that the corporation itself was not a member of the society: \textit{ibid.}, s.5.

\textsuperscript{119} Ibid. at s.7. Provisions such as this and similar provisions in the \textit{Railway Acts} may have helped Canada avoid litigation over an issue that plagued U.S. courts in the early part of the 20\textsuperscript{th} Century: the issue of whether, if
Provincially incorporated companies did not have recourse to the *Pension Fund Societies Act*. However, they could establish pension funds as ‘friendly societies’ under the auspices of provincial legislation. In Ontario, *The Insurance Corporations Act, 1892* regulated pension societies as “friendly societies”.120 The Act defined ‘friendly society’ as including:121

…any corporation, society, association, or fraternity, benevolent, mutual, provident, industrial, or co-operative, or the like, which, not being a corporation within the intent of sections 5 or 6 of this Act, required by law to be licensed for the transaction of insurance, undertakes or effects for valuable consideration, or agrees, or offers so to undertake, or effect, with any person in the Province, any contract of insurance.

It required them to register with the Registrar of Friendly Societies and regulated them as a species of non-profit insurance company. Friendly societies had considerably less autonomy than pension societies to regulate their own affairs. The Ontario *Insurance Act* contemplated that friendly societies would amass “insurance funds”, and provided some general regulatory oversight over these funds. The Act also required a considerable degree of transparency about the terms of insurance contracts,122 and supervised the application of forfeiture clauses:123

When the benefit of the contract is stipulated to be suspended or reduced or forfeited for any other reason than for nonpayment of premium moneys, or money in the nature thereof, no such additional conditions suspending, reducing or forfeiting the benefit shall be valid, unless it is held by the court or judge before whom a question relating to the contract is tried, to be just and reasonable under all the circumstances of the case…..

The Act contained numerous other provisions designed to ensure that friendly society members would get the insurance they had paid for. By insuring member rights they limited employer flexibility; accordingly, they were less widely used by employers.124

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120 1892, S.O. 1892, c.39 (“1892 Insurance Act”). Similar statutes can be found in other provinces. An earlier Ontario statute, *An Act respecting Benevolent, Provident and other Societies*, R.S.O. 1877, c.172 enabled the establishment of general non-profit corporations for such purposes.
121 1892 Insurance Act, supra note 120 at s.2(4).
122 For example, friendly societies were required to provide copies of the rules relating to insurance contracts and management of funds to any members upon demand, at a price of twenty-five cents: *Ibid.*, s.32(1).
124 The right to establish friendly societies was not, of course, limited to employers. Trade unions were permitted to establish friendly societies provided they were incorporated (s.9(3) of the 1892 Act); most were not, of course, since incorporation would attract liability for unlawful strikes. Some friendly societies were temperance societies, and s.40 continued with following proviso: “Provided that in any contract in which total pensions were gifts to employees, corporations had the legal capacity to make such gifts: see F. Hodge O’Neal. “Stockholder Attacks on Corporate Pension Systems” (1949) 2 Vanderbilt Law Review 351.
Employers had early alternatives to the pension or friendly society. One convenient alternative was the annuity contract, available in Canada for purchase on both the public and private market. The federal government began to sell annuities as early as 1908. They were initially marketed to individual lower-income Canadians, but many in the target groups could not afford to set money aside for retirement. By 1938, they were available as group annuities. Although they were excellent investments, they were never very successful in the pension market. Desmond Morton and Margaret McCallum argue that they were unpopular with employers because they provided for pre-retirement vesting rights before such rights were common in employment pension plans; from an employer’s perspective, “[w]hat was the point of offering a benefit which by the 1940s, with a twenty-year vesting rule, might be as valuable to a worker if he quit as if he stayed on?” Private insurance companies competed vigorously for a share of the pension annuity market, and by the early 1920s had developed and were aggressively promoting to employers a variety of group insurance and group annuity products. From the employer perspective, however, many privately insured annuity plans suffered from the same flaw as the government annuity plan; they operated on the basis that contributions purchased irrevocable annuities for named employees on an annual basis, limiting employer flexibility to withhold or withdraw pensions at will.

For large employers who could “self-insure”, insured plans enjoyed stiff competition from plans funded through pension trusts, which were cheaper and much more flexible to administer. Pension trusts were large pools of cash, either held by trust company professionals or simply set aside by employers, who made lump sum or annual contributions into the fund. From 1918, annual contributions for employees as well as employers were

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125 These government annuities were excellent investments, so good in fact they threatened the private insurance business, which was eventually successful in 1960 in getting the program shut down: see Kenneth Bryden, *Old Age Pensions and Policy-Making in Canada* (Montreal and London: McGill-Queen’s University Press, 1974) at 57. Morton & McCallum, *supra* note 1 at 8-16.


128 With the advent of group insurance and group annuity contracts, the party contracting with the insurance company was clearly the employer. As late as 1966, there remained some doubt about whether individual employees could enforce these contracts, or whether they would be barred by the third-party beneficiary rule: see discussion in D.C. Bjarnason, *Private Pension Plans as Enforceable Contracts*. LLM Thesis, University of Manitoba, 1966) [unpublished]
were tax deductible, and amendments to the tax laws up to the mid-1940s become increasingly favourable to pension trusts, culminating in 1945 legislation permitting trust income to accumulate tax free.\(^{129}\) When it came time to pay pensions, money would be taken from the trust rather than directly from operating funds. Like the insurance contract, pension trusts relieved employers from the perverse effects of pay-as-you-go funding, and allowed them to set aside predictable amounts of money on an annual basis to fund future pension liabilities.

Insurance contracts and pension trusts fought for ascendancy as pension funding vehicles throughout much of the 20\(^{th}\) Century.\(^{130}\) Their relative advantages and disadvantages were affected by costs, which varied both with the shifting specifics of the tax laws, and with the size of the employer. Small employers often preferred insured plans, which provided completely predictable costs, certainty and some economies of scale relative to self-administration for small groups.\(^{131}\) For employers offering pensions on a large scale, however, the cost advantage normally lay with the trust model, particularly if they opted for self-administration and could eliminate trust company profits on top of the cost of pensions. More important than costs for large employers, however, was the increased discretion the trust-funded pension gave employers in the administration of pension benefits. Employers who funded their plans through trusts could freely refuse to pay pensions to employees who left the employer’s service before retirement age, or who engaged in misconduct. Trusts also allowed the employer to retain effective control over the capital set aside in the trust to fund the pension, through its power to nominate the trustees.\(^{132}\) It is not surprising, then, that the


\(^{130}\) The Ontario Committee on Portable Pensions provides statistics for various types of plan funding in Canada: 17.8 percent of plans were funded by insurance, 24.1 percent were funded by trusts administered by professional trust companies; 23.5 percent were funded by trusts that were privately trusted; 8.8 percent were funded by federal government annuities; and the rest (25.8 percent were public service pensions, armed forces pensions or teacher/professor plans, which were either unfunded or not funded by the employer: see Ontario Committee on Portable Pensions, *supra* note 2 at 12-13.

\(^{131}\) Data provided in the *Queen’s Study* confirms the popularity of insured plans with smaller employers at least in the 1930s. Only 8 of the 47 insured plans the study identified were in companies larger than 500 employees: see *Queen’s Study*, *supra* note 5 at 17, Table V.

\(^{132}\) Modern regulatory rules would prevent this occurring now under Canadian law, but there remain highly-publicized American examples of employers requiring that employee pension funds be used to purchase shares in the employing company: see Ronald B. Davis, *Democratizing Pension Funds: Corporate Governance and Accountability* (Vancouver: UBC Press, 2008) at 28-30.
trust model ultimately became the model of choice for most large employers, although insured plans still retained a small but steady market share in Canada.133

Once pre-funding models developed, they soon became the preferred alternative to pay-as-you-go plans for most employers. Funded plans also had advantages for employees; insurance schemes and early pension trusts reduced the risk to employees that employers would not be around long enough or stay solvent enough to pay their pensions. But they by no means eliminated that risk altogether. While employers took advice from actuaries in order to protect their own interests, there was no legal requirement that such trusts be funded at any particular level. Most such trusts were funded at levels well short of modern regulatory requirements.134

2.4 Contributory v. Non-Contributory Plans

In addition to dealing with issues of funding, employers also wrestled with the question of whether or not employees would be required to contribute to their own pensions. The earliest Canadian pension plan, the Grand Trunk plan, followed British models which required employee contributions. Early civil service plans were also predominantly of the contributory type. Outside the civil service, however, most plans established in the late 19th Century followed American-style models which did not require any employee contribution. By the early 20th Century there was a clear trend in the private sector to plans wholly funded by the employer, and by the 1920s, the employer-funded non-contributory plan was the Canadian norm in the private sector.135

133 This same competition between the insured and the trustee model of pension funding is evident in both the U.K. and the U.S. over the same period: see Hannah, Inventing Retirement, supra note 1 at 18-29; Sass. The Promise of Private Pensions, supra note 1 at 61-79; 145-168
134 For example, the 1917 Labour Gazette reports that the Bell Telephone trust for pensions and employee benefits was established at $400,000: 314. The 1919 Labour Gazette reports that in 1918, the Bell trust paid out $147,265.26 in benefits. At that rate, the trust would be depleted in less than three years. Bell’s plan was to top up the fund annually, a plan which would not meet actuarial standards, although it would assist in ensuring that pensions were paid.
135 The Queens Study, which looked only at the private sector, found a very close correlation between non-contributory plans and the influence of American models:

Pre-war [non-contributory] plans were almost entirely confined to large railway companies and branches of United States corporations. Rapid development in 1915-1917 and 1919-20 were related directly to similar developments in the United States, and were either the result of direct extensions to
Why would employers choose to pay the entire cost of pensions themselves instead of requiring employees to contribute? The choice was not simply a question of funding. While requiring employees to contribute could certainly help defray the immediate cost of employee pensions, it also altered the labour market dynamics of the plan. Commenting on the reason why contributory plans had fallen out of favour by the early 1930s, Murray Latimer observed:

This policy [of establishing non-contributory plans] has the advantage, at least in the opinion of the management, of not complicating relations with trade unions, retaining full control of retirements and final judgment on the fulfillment of qualifications, discouraging strikes, and permitting retirement for the good of the services and the public safety.

Plans which were entirely funded by the employer were thought to give the employer much more control over how the pension plan operated, reinforcing the message to employees that their pensions were in the gift of their employer, and providing more scope for employer discretion in making retirement and benefit determinations. Employers believed that accepting employee contributions would raise employee expectations, and give employees a sense of entitlement. Contributory plans were seen as more like savings plans; employers would have more difficulty selling their employees on the notion that such pensions were gratuities for which they should be grateful.

It is doubtful that there was any legal basis for employers to be concerned that plan members would have a better claim to their pensions if they contributed to them. Providing that the plan drafters were careful enough, courts were quite willing to characterize contributory pensions as gratuities. Nevertheless, there was a clear correlation between contributory

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136 Economists tell us that in “complete markets”, the issue of whether employees are required to contribute to their own pensions or not is wage-neutral; either way, employees pay because they accept lower wages in return for pensions: see David McCarthy, “Occupational Pension Scheme Design” in Gordon L. Clark, Alicia H. Munnell & J. Michael Orszag, The Oxford Handbook of Pensions and Retirement Income (Oxford: Oxford University Press, 2006) 543 at 545-6.

137 Latimer, Industrial Pension Systems, supra note 7 at 44.

138 This belief is reflected in the 1903 CPR pension plan, which specifically alludes to the fact that employees make no contribution in emphasizing that the plan creates no legal employee rights: see 1903 CPR Plan, supra note 74, Rules and Regulations, ¶20.

139 After reviewing the law, Latimer concludes that: “It appears that a contributory pension plan in itself offers no more contractual safeguards to the employee in so far as the employer’s payments are concerned than does a noncontributory plan”: ibid. at 706. In a case identified as the first U.S. pension case on record, Pennie v.
plans and an increased recognition of employee pension rights. In his 1932 survey, Murray Latimer found 70 percent of contributory plans provided some financial guarantee to employees, as opposed to only 55 percent of non-contributory plans.\footnote{Latimer, Industrial Pensions, supra note 7 at 725. Latimer notes a correlation among contributory plans, a recognition of pension rights, and the use of insurance as a funding instrument.} The Queen’s Study too observed that contributory plans are more likely than non-contributory plans to recognize employee rights: “The trend toward contributory plans has been associated with a general strengthening of the contractual rights of the employees, and with an increasing tendency to look on retirement provisions as joint employer-employee savings plans rather than as rewards for service”.\footnote{Queen’s Study, supra note 5 at 21. The Queen’s Study also notes a correlation among insurance, contributory plans and pension rights: 11-21.} Latimer explained this difference by pointing to the practical reality that “where the employee himself has paid something toward his annuity he has accumulated a tangible equity”.\footnote{Latimer, Industrial Pension Systems, supra note 7 at 725. Latimer is clear, however, that this is not an ‘equity’ that has been recognized by the courts.} Any good will for employers associated with pension provision would be quickly squandered if employers were seen as confiscating employee pension contributions. Employers who preferred to make no pension commitments clearly preferred non-contributory plans.

In addition, employers who wanted plans to cover their entire workforce were more likely to choose non-contributory plans. Although there may have been no legal impediment to making contributory pensions discretionary, there were arguably legal impediments to making membership in such plans compulsory. Statutes in place in many jurisdictions prohibited employers from making unauthorized deductions from employee wages. Plan legal advisers took the view that these ‘truck act’ provisions prohibited imposing compulsory pension contributions.\footnote{British solicitors frequently advised their clients that forced pension contributions would violate the “truck acts”: see Hannah, Inventing Retirement, supra note 1 at 27, 43 and Ch. 2, note 51 (162). “Truck Acts” were originally British statutes requiring that employers pay their employees in currency and not in goods. The Acts subsequently prohibited employers from making unilateral deductions from wages without employee consent. They were designed to control abuses like forcing workers to take their wages in goods produced by or sold by the employer (the infamous “company store”), and were subsequently used to protect workers against forced deductions for the rental of machinery or of fines imposed for poor workmanship. Their equivalent in Canada} Employers who saw their pension plans as performing valuable...
‘binding’ and disciplinary functions at all levels of the workforce did not want employees, and particularly the most marketable employees, to be in a position to opt out of the plan. For many private sector employers, bearing the full cost of the pension was a price worth paying to obtain complete coverage.  

The Depression, however, forced employers to confront squarely the hazards of taking on full responsibility for pension funding. In Canada, where employee contributions to pension plans had been tax deductible since 1919, cost pressures brought contributory pension plans back into fashion. A clear sign of the times was the fact that in 1936, the CPR converted its non-contributory plan, in place since 1903, to a contributory plan. Plans established or amended during and after the Depression were much more likely to be contributory plans than they had been before the Depression; by 1965, 88 percent of Canadian plans were contributory.

3.0 THE LEGAL FRAMEWORK FOR EMPLOYEE PENSION CLAIMS AT COMMON LAW

3.1 Introduction


For public sector employers whose plans were established by statute, compulsory membership in a contributory plan did not pose any legal problems since it was authorized by statute.

This figure compares with to 40-45 percent of plans in the U.S., where employee pension contributions were not tax deductible: see Edwards, supra note 1 at 286.

It is obvious to 21st Century lawyers that employment pension schemes are earned benefits, and therefore part of the contract of employment. So firmly entrenched is this view now in Canadian law that it is easy to lose sight of how tortuous was the path by which Canadian courts arrived at the conclusion, so obvious to the Supreme Court of Canada by 2006, that “[e]mployees rightly see their pensions as part of their overall compensation.”148 Employees who sought to persuade courts that pensions were contractual entitlements enforceable at common law were up against two powerful headwinds: entrenched notions that pensions were part of the traditions of noblesse oblige governed only by the law of charitable gifts, and orthodox contract theory which could find ‘no consideration’ for an employer’s promise to continue to make salary payments after retirement. In addition, they were up against the fact that employers controlled the terms of employment pension plans. As our earlier discussion makes clear, employers who offered pension plans went to great pains to construct benefit payments as gifts; in the courts, they vigorously defended their absolute discretion to confer or withhold these gifts at will.

In the era before collective bargaining, common law courts were generally receptive to the gift theory of employment pensions. In the U.K., the U.S. and Canada alike, employers wrote the rules, and the courts saw their role as simply to enforce them. Employee advocates urged a theory of ‘unilateral contract’, in which a pension plan was an employer ‘offer’, capable of being accepted by employee conduct.149 On this approach, contractual liability to pay a pension is created once the employee had fulfilled all the conditions for eligibility set out in the pension plan; if a plan established a normal retirement age of age 60 and contemplated pensions for employees with 20 years of service, an employee had ‘earned’ a pension once


149 See S.M. Waddams, The Law of Contracts, 5th ed. (Toronto: Canada Law Book, 2005) Chapter 4, “Unilateral Contracts” ¶ 158-166. The locus classicus of unilateral contract theory is Carlill v. Carbolic Smoke Ball Co., [1892] 2 Q.B. 484, in which a company’s promotional promise to pay £100 to anybody who contracted influenza despite having used its patent remedy was found to be contractually binding in the case of a user who did catch the flu. This case is cited in both U.S. and Canadian pension cases: see, for example, Sloan v. Union Oil Company of Canada Ltd., [1955] 4 D.L.R. 664 (B.C.S.C.)
he reached age 60, provided that he had served for twenty years. A competing theory argued
that there was a binding contract as soon as the employee accepted pensionable employment;
liability was on-going, since credit accumulating towards a full pensions should be
characterized as ‘deferred wages’, earned by day-to-day service.\textsuperscript{150} Up until the 1930s, these
arguments were almost invariably rejected. \textsuperscript{151} Instead, courts relied on orthodox theories of
consideration to hold that there could be no contractual liability imposed on an employer
after the employee had retired because there was no on-going consideration for the pension
payments. While the ‘no consideration’ theory was less plausible under contributory pension
plans, courts were generally no more disposed to find contractual or equitable rights for
employee members in contributory plans than they were in non-contributory plans, if the
terms of the plan provided otherwise.\textsuperscript{152}

Those few courts that were prepared to see pension plans as part of the contract of
employment still dismissed employee claims; orthodox contract theory held that an employee
claiming the benefit of a contract must take the burden too, including the power on the part
of the employer, clearly spelled out in most pension plans of the era, to deny a pension
altogether, or to withdraw or suspend it even after it was in pay.\textsuperscript{153} Courts readily gave effect
to employer disclaimers of pension liability, despite the fact that in other contexts the
common law was developing tools designed to recognize and redress the inequality of
bargaining power inherent in contracts of adherence. In the consumer context, for example,
businesses relying on onerous disclaimer clauses in standard form contract documents were
required to demonstrate that they had taken reasonable steps to bring the disclaimer to the
attention of the other party prior to entering into the contract.\textsuperscript{154} Doctrines such as the \textit{contra
proferentum} rule (the rule that where a contract clause is ambiguous, it will be interpreted
against the drafter) and unconscionability (the rule that courts will relieve against bargains

\textsuperscript{150} This argument is developed in Comment, “Consideration for the Employer’s Promise of a Voluntary Pension

so far has been to say to industry that it may make its own law of pensions. The court will take the pension plan
as the statute in each case and decide in accordance with it”: 706.

\textsuperscript{152} After an extensive review of the case law, Murray Latimer concludes that courts took the same approach to
both types of plans. He notes that “[i]t appears that a contributory pension plan in itself offers no more
contractual safeguards to the employee in so far as the employer’s payments are concerned than does a
noncontributory plan”: \textit{ibid}, at 706.

\textsuperscript{153} \textit{ibid}, at 684. See also Hughes v. Encyclopaedia Britannica, Inc, 199 F. 2d 295 (C.A., 7\textsuperscript{th}) (1954).

\textsuperscript{154} Waddams, \textit{The Law of Contracts}, supra note 149 at ¶66-67. (“The ticket cases”).
that are “unfair, inequitable, unreasonable or oppressive”\textsuperscript{155} if they result from inequality of bargaining power) were part of a developing common law arsenal for protecting the weak against the strong in the process of contract formation.\textsuperscript{156} Such doctrines were rarely, if ever, applied to employee pension contracts, perhaps because despite the lip service paid to the contractual nature of employment, courts still saw the relationship as a master-servant relationship with inequality at its very root.\textsuperscript{157}

By the 1940s and 1950s, employment pension claimants were faring somewhat better in U.S. courts. Although there were still many cases in which plaintiffs’ claims to pension benefits were rejected, theories of rights were gaining some momentum.\textsuperscript{158} The author of a 1957 Note in the Harvard Law Review on the topic of “Legal Problems in Private Pension Plans” argued that “most courts find adequate consideration in the fact of continued employment, without a showing that the employee would not have remained at this job in the absence of a pension plan”,\textsuperscript{159} a broad claim considerably tempered by two acknowledgements in the same essay: first, that “most courts have given gratuity clauses [i.e. clauses spelling out that the pension is a gift and not a contractual right] full effect,”\textsuperscript{160} and second, that courts give clauses reserving the right to amend or terminate plans unilaterally the same effect as explicit gratuity clauses.\textsuperscript{161} These acknowledgements suggest that case law trends in favour of contractual liability reflected a change in the style of pension plan drafting, as the increasing bureaucratization of pensionable employment led to an abandonment of the old free-wheeling discretionary styles of management, and an increasing willingness to cement the

\textsuperscript{155} Ibid. at ¶542-556.
\textsuperscript{156} Ibid. at Chapter 14, “Unconscionability”, ¶ 442-556.
\textsuperscript{157} Simon Deakin and Frank Wilkinson argue that U.K. courts did not shed the master-servant paradigm until mid 20\textsuperscript{th} Century: see The Law of the Labour Market: Industrialization, Employment and Legal Evolution (Oxford: Oxford University Press, 2005) at 43.
\textsuperscript{158} See Comment, “Consideration for the Employer’s Promise of a Voluntary Pension Plan”, supra note147. The author noted that courts had recently been applying interpretive doctrines like the contra proferentum rule in favour of employees: 110.
\textsuperscript{159} Note, “Legal Problems of Private Pension Plans”, supra note 147. Among other cases, the author cited Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441(1934), a case subsequently relied on by a Canadian court in Sloan v. Union Oil Company of Canada Ltd., [1955] 4 D.L.R. 664 (B.C.S.C.). See also Somers & Schwartz, “Pension and Welfare Plans: Gratuities or Compensation?” supra note 147, who argue that the ‘gift theory’ was always controversial, and that “the decisions reflect a growing awareness that an employee’s services are rendered in contemplation of not only the weekly wage but the pension as well”(85): Comment, “Consideration for the Employer’s Promise of a Voluntary Pension Plan”, supra note 158 at 100.
\textsuperscript{160} Ibid. at 494.
\textsuperscript{161} Ibid. at 495. Unilateral “right to terminate” clauses were and are still ubiquitous.
loyalty of the workforce through binding commitments, rather than a change of heart or of perspective on the part of common law judges.

Canadian case law addressing the legal status of employee pension claims in the late 19\textsuperscript{th} and early 20\textsuperscript{th} Century is sparse both in quality and in quantity; the few cases that we do find often turn on the provisions of particular statutes or by-laws and contain very little conceptual analysis of the legal status of employee pension claims. Like courts in other common law jurisdictions on which they relied,\textsuperscript{162} Canadian courts were reluctant to second-guess pension plan drafters, and gave full scope to clauses allowing employers wide discretion to deny pensions. They were prepared to impose some procedural fetters on arbitrary and patently unfair employer administrative decisions. They were slower than U.S. courts, however, to recognize that pension plans were changing; as late as mid-Century, Canadian courts were still insisting, in the face of plan amendments which plainly recognized employee rights, that pensions are gratuitous and not contractual. I will examine these developments in more detail below.

3.3 The Canadian Case Law

3.3.1 Early Concepts of Vested Rights

Canada’s early pension cases contain some tantalizing hints that employment pension plans might give rise to enforceable claims at common law. In Dionne \textit{v. Québec},\textsuperscript{163} the earliest

\textsuperscript{162} Up until the mid-20\textsuperscript{th} Century, Canadian courts were much more likely to cite British precedent than American in pension cases: see, for example, \textit{Wright v. Huron (Diocese)}, [1881] O.J. No. 217, in which the Ontario Chancery Court cited British precedent to the effect that pensions were gratuities and could be withdrawn (subsequently reversed by the Supreme Court of Canada without reference to any British caselaw: (1885), 11 S.C.R.95). By mid-century American case law was explicitly cited in pension cases: see \textit{Sloan v. Union Oil Company of Canada Ltd.}, [1955] 4 D.L.R. 664 (B.C.S.C.) in which the court relies both on British and American authority in support of its conclusion that an employer’s termination allowance policy constituted a unilateral contract once the plaintiff put in sufficient service to qualify for the benefit. The court notes that it finds “these authorities, foreign of course, but not foreign to the common law, most convincing”: para. 47. See also \textit{Dinney v. Great-West Life Assurance Co.}, [2005] M.J. No. 69, 252 D.L.R. (4\textsuperscript{th}) 660 (C.A.), a case dealing with the extent and nature of vested rights in a unilateral (i.e. not collectively bargained) employment pension plan, in which the court notes that “[i]n contrast to the plethora of decisions in the United States dealing with the interpretation of … pension plans, this branch of the law up until very recently has been largely undeveloped in Canada”: para. 47. In its most recent pension decision, \textit{Nolan v Kerry (Canada) Inc.}, 2009 SCC 39, the Supreme Court of Canada relies on both British and American authority in addressing a variety of issues in connection with the legal status of pension trusts.

\textsuperscript{163} (1895), 24 S.C.R. 451 ("Dionne")
Canadian retirement pension case on record, Supreme Court of Canada was called upon to address the legal status of the pension entitlement of one Charles John Burroughs, who had been engaged as a clerk for the government of Quebec and took early retirement on account of ill health. Under Quebec legislation establishing a pension plan for civil servants, Burroughs was entitled to a monthly retirement pension. Shortly after his retirement, “without the knowledge of his said wife and in a moment of despondency,” he made an agreement with the government to commute his pension into a lump sum considerably less than its true value. Subsequently, he changed his mind about the prudence of this arrangement and sued the government, arguing that the commutation agreement was void because he was absolutely entitled to the pension by statute. He was joined in his lawsuit by his wife, Edmée Dionne, who claimed that she too had a legal interest in his pension since the statute provided for survivors’ pensions for widows and dependent children. The Supreme Court of Canada, reversing the judgments of the courts below, allowed the claim.

The court held that once a retired civil servant had been granted a pension, he had a right so “inalienable” that the government could not buy it back from him. Since this finding was one of statutory interpretation, this aspect of the case does not establish any precedent for the ‘inalienability’ of pension rights in general. The court’s obiter discussion of the claims of Mme Dionne, however, had potentially broader reach. She had sought standing on the basis that as a spouse and potential beneficiary, she had an interest in her husband’s pension worthy of legal protection. Two of the three judges who made up the majority would have granted her standing to pursue her claim on the grounds that she had acquired “a vested interest” in the pension. The two dissenting judges categorically refused to grant her standing, arguing that “[s]he has no vested interest, but merely a contingent right to a pension

164 The earliest Canadian pension case I have identified is The Rev. Joel Tombokson Wright v. the Incorporated Synod of the Diocese of Huron, [1881] O.J. No. 217, 29 Gr. 348 (Ontario Court of Chancery); rev’d sub nom Wright v. Huron, 9 O.A.R. 411; aff’d [1885] S.C.J. No. 11 (“Wright”). This case did not involve a retirement pension; the annuity in question was paid to clergy who were still working for the diocese, a factor deemed important by the Vice Chancellor at the lower court level who decided that because continued service was being rendered there was consideration for the annuity and it could therefore not be withdrawn. Reversing the Vice-Chancellor’s decision, the Supreme Court of Canada, in a 3-2 judgment, found that no vested rights had been created, and the trustees of the fund were free to revoke the annuities already granted.
165 Dionne, supra note 163 at 456 (per Gwynne J.)
166 Ibid. at 473 (per King J.).
167 Ibid. at 470 (per Gwynne J.). The third judge to make up the majority, King J., made no comment on the spousal claim.
in the event of surviving her husband...”

Accordingly, while the view that wives have vested rights in their husbands’ pensions did not attract majority support, the court’s comments did hold out the possibility that subsequent claims by employees to pension benefits not yet “in pay” (to use the current trade jargon) might receive legal recognition and protection from the courts.

When the Supreme Court of Canada returned some thirty years later to the issue, it again suggested that pension rights could vest and become enforceable prior to actual receipt of pension. In *Pension Fund Society of La Banque Nationale Trudel v. Lemoine et al.*, the court was called upon to sort out the legal entitlements of members of a Pension Fund Society for certain bank employees. The society’s membership consisted, with certain exceptions, of “all employees present and future, as long as they should remain in the bank’s employ.” The bank ceased to operate, triggering a distribution of the assets of the fund.

When a dispute arose as to the proper determination of member shares, the fund’s liquidator put forward a proposal for distribution based on his interpretation of the Society’s by-laws. Although this proposal was affirmed by the Superior Court, the decision was subsequently challenged by a group of pensioners, and the matter made its way through the Supreme Court of Canada and eventually to the Judicial Committee of the Privy Council.

In interpreting the society’s by-laws, the Supreme Court held that the wind up entitled all society members to a distribution from the fund:

During the life of the society only the rights of the pensioners are enforceable. The other members cannot claim anything until they have fulfilled the conditions entitling them to a pension. Nothing is due to them as long as they remain in the employ of the bank, but upon liquidation it is different. All rights become crystallized and liquidated.

All members were entitled to immediate payment. The amount of that payment, however, fell to be determined by other provisions of the by-laws, which drew a sharp line between members with “acquired rights” and those without “acquired rights”. The latter were to

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170 The fund had been established under the provisions of the *Pension Fund Societies Act*, R.S.C. 1906, the federal equivalent of the Ontario statute discussed at section 2.3, above.
171 *Trudel SCC*, supra note 169 at 97.
172 *Ibid.* at 100.
receive only a return of their contributions with four percent interest, while the former shared
*pro rata* in the distribution of remaining assets. The Supreme Court was prepared to accord
two groups of members “acquired rights”: those who were already in receipt of a pension, and
those who had established an immediate right to a pension under the by-laws of the
Society. The Judicial Committee of the Privy Council agreed.173

Both *Dionne* and *Trudel* suggested that pension plan members might acquire rights that
would be recognized and legally protected even though they had not yet been granted
pension. In both decisions, however, it was clear that the nature and extent of rights
identified depended not on any deeply-rooted principles of common law or equity, but solely
on the terms of the specific instrument establishing the pension benefit.174 The decisions
show no special solicitude to protect pension benefits, and in neither case do the courts refer
to the already-long line of U.K. cases emphasizing the gratuitous nature of pension benefits.
If these decisions were the early tendrils of an independent approach to pension rights, it was
not to last long.

Much more durable was the categoric rejection of any notion of pension rights in a series of
cases involving challenges by civil servants and military officers to the denial of pension
benefits, or to the quantum of those benefits. In *Balderson v. The Queen* the court, in
dismissing the claim of a retired civil servant complaining that his pension should have been
calculated on the basis of twenty-five rather than fifteen years service, stated bluntly: “The
courts of the country have no jurisdiction to review the exercise of the discretion vested by
the statute in the Governor-General-in-Council”.175 The Exchequer Court of Canada was
equally peremptory in dismissing the claims of a former military officer suing for a pension
payable pursuant to certain orders in council. The orders themselves referred to the pension

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173 The original French text of the plan used the phrase “droits acquis”. An editor’s note to the Supreme Court
report (100) advised that “’Droits acquis’ has been translated ‘acquired rights’ throughout the case though
‘vested rights’ is the more English form. As both phrases are somewhat technical it has been thought better not
to confuse them.” The Judicial Committee of the Privy Council disagreed with this merging of concepts,
finding an important conceptual distinction between “droits acquis” and vested rights; in their view, vested
rights could be conditional, whereas “droits acquis” could not.

174 In *Trudel*, this point is emphasized in the headnotes to the decision at both the Supreme Court of Canada and
the JCPC level, although it is only implicit in the court’s decisions.

175 (1898) 28 S.C.R. 261, 25 Hals. 89 (per Tashereau J.)
as a “gratuity”, and the court found as a matter of construction that any pension payment was absolutely discretionary.\textsuperscript{176} The court commented acerbically:\textsuperscript{177}

Does not the word “gratuity” contain in itself its very meaning and definition and primarily denote a grant of money \textit{ex gratia}? It implies an act of generosity, beneficent, munificence, a gift out of kindness, free from any valuable or legal consideration. It is a voluntary gift or \textit{beneficium}, - the donation of it being absolutely unilateral and depending entirely upon the inclination of will of the giver. It would seem of the very essence and character of a gratuity not to be bilateral; otherwise, it would cease to be a gratuity.

Citing U.K. authority to the effect that such payments “depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit”,\textsuperscript{178} the court concluded that the same rule applied in Canada.\textsuperscript{179}

While these cases can be distinguished on the basis that they involve Crown prerogative, retiring employees claiming pension benefits fared little better in the private sector. For example, in \textit{Armstrong v. Toronto Police Benefit Fund},\textsuperscript{180} the Ontario Court of Appeal rejected the claim of a retired police officer seeking a pension from the Toronto Police Benefit Fund.\textsuperscript{181} Under the eligibility rules in place when he joined the Fund, Armstrong would have qualified for pension. However, a change in the by-laws increasing the period of service required for eligibility meant that he failed to qualify at the time of his retirement. The court found “no question of vested interests involved;”\textsuperscript{182} eligibility was to be determined by the rules of the Benefit Fund, and the Benefit Fund was free to change those rules. The court hinted that the plaintiff’s rights might have vested prior to retirement if he had accumulated enough service to be eligible for pension prior to the rule change. But since he had not, “his rights continued to be the same as those of all other members of the

\textsuperscript{176} \textit{In the Matter of the Petition of Right of Lucien C.G.T. Bacon, Suppliant and His Majesty the King, Respondent} (1921), 21 Ex. C.R. 25 at 27, 31. The court also found that military officers could not sue the Crown even for salary to which they were entitled.\textsuperscript{177}

\textit{Ibid.} at 28.\textsuperscript{178}

\textit{Ibid.} at 30.\textsuperscript{179}

\textit{Ibid.} at 31. In \textit{Kidd v. Canada} [1924] Ex. C.R. 29 the same court, in dismissing another claim for a military pension, cites a long line of both U.K. cases and Canadian cases and concludes that unless expressly and unequivocally modified by statute, Crown prerogative to award or withhold pensions was entirely discretionary.\textsuperscript{180}


The Fund was a friendly society established in 1881 under the Ontario \textit{Insurance Corporations Act}.\textsuperscript{182}

\textit{Armstrong, supra} note 180 at para.5.
society”.\(^{183}\) Ontario courts similarly rejected a claim by an officer for disability pension under the same police plan, holding that the issue of whether he had been injured in the execution of his duties was “for the police commissioners to dispose of after a fair hearing of the complaint and the Court has no jurisdiction to anticipate or to dispense with the opinion or decision of the police commissioners.”\(^{184}\)

Canadian courts also applied gift theory to pension claims in the context of a company wind-up. *Colonial Investment and Loan Co. (Trustee of) v. Colonial Investment and Loan Co*\(^{185}\) involved the issue of whether or not the shareholders of the company would have access to a pension fund which had been established and deposited with a trust company in the name of the company. The employees claimed that the money was a trust fund which had been established for their benefit.\(^{186}\) The employees had made no contributions to the fund, and payments were entirely discretionary. In considering the employee claim, an Ontario High Court Referee held that since the employees could not have been successful in any action against the company for payment of pension, they could not now claim to have rights in the fund as against the shareholders.\(^{187}\) The Ontario Court of Appeal took the same approach in *Re Ontario Bank (Pension Fund)*,\(^{188}\) in a corporate wind-up context, holding that a fund that had been set aside for employee pensions did not meet the requirements of a trust in the absence of clear rules governing the disposition of the funds.

### 3.3.2 Procedural Pension Rights

Despite their adherence to gift theory, Canadian courts were not entirely unsympathetic to the pension claims of long-service employees. While courts showed little inclination to attach contractual liability to pensions, they were nevertheless alert to the unfairness which

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\(^{183}\) *Ibid* at para. 5: “The plaintiff had acquired no absolute right to a pension at the time of the amendment in 1984. His rights continued to be the same as those of all other members of the society until he acquired a vested right under the rules in force at the time....” The court does not spell out the conditions for vesting.


\(^{186}\) A key issue in this case was whether or not the fund met the legal requirements for a trust.

\(^{187}\) *Colonial Investments, supra* note 185at para. 5.

\(^{188}\) [1913] O.J. No. 740; 25 O.W.R. 99; 5 O.W.N. 134; aff’d (1914), 19 D.L.R.512 (Ont.C.A.),
might arise in situations in which employees who appeared to qualify for pensions were nevertheless denied them for arbitrary reasons. Accordingly, while they granted employers virtually unlimited discretion to make bona fide pension determinations, courts showed some sympathy for claims that employers had abused their discretionary powers in the administration of those plans. In addition, courts confronted with particularly compelling fact situations occasionally applied the doctrine of promissory estoppel; employees who had fulfilled all the qualifications for a pension and taken irrevocable steps on the basis of a pension promise might be entitled to a pension, regardless of whether a binding contractual obligation to pay such a pension could be found.  

The case law of the first half of the 20th Century clearly reflects an emerging ‘duty of procedural fairness’ in the administration of pension plans. While this duty of fairness bears more than a family resemblance to notions of fairness and natural justice evolving in the public law context, courts applied it fairly broadly, using language that did not always limit its application to public officials. Typical of these cases is the 1906 decision of the Judicial Committee of the Privy Council in Lapointe v. Montreal Police Benefit Society. The case involved a claim for pension by a police officer who had been a member of the Montreal Police Benevolent and Pension Society, an organization described by the court as “incorporated by statute and governed by rules...to which all members of the society are bound to conform.”

Any member entitled by length of service to a gratuity or pension who is dismissed from the force, or is obliged to resign, shall have his case considered by the board of directors, and his right to such gratuity or pension determined by a majority of the board.

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189 Occasionally, American courts also applied doctrines of estoppel, good faith and procedural fairness: see Latimer, Industrial Pension Systems, supra note 7 at 697; Aaron, Legal Status of Employee Benefit Rights under Private Pension Plans, supra note 147 at 8-9.
191 The benefit society appears to have been a species of “friendly society” or pension fund society established under Quebec legislation, although the case report does not cite the specific statute involved.
192 Lapointe, supra note 190 at 383
The plaintiff had been forced to resign from the police force, and the directors of the Benefit Society refused his subsequent claim for pension. The defendant argued that as a member of the Society, the plaintiff was bound by its by-laws, and therefore by this decision.\textsuperscript{193}

The Privy Council rejected that argument. After describing the board’s proceedings as “irregular, contrary to the rules of the society, and above all contrary to elementary principles of justice”,\textsuperscript{194} and reciting a litany of procedural irregularities which they described as “most extraordinary”,\textsuperscript{195} the court held the directors’ decision null and void, a conclusion so obvious, in their view that “[i]t is hardly necessary to cite any authority on a point so plain.”\textsuperscript{196} They did quote with approval the following passage from \textit{Russell v. Russell}\textsuperscript{197}, a U.K. case involving the proceedings a private club:\textsuperscript{198}

They are bound in the exercise of their functions by the rule expressed in the maxim “Audi alteram partem”, that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

By way of remedy, the court remitted the case to a differently constituted Pension Society board of directors for a decision, with the court retaining supervisory jurisdiction over the proceedings.

\textit{Lapointe} had involved allegations of misconduct. In \textit{Welsh v. Toronto Police Benefit Fund},\textsuperscript{199} the Ontario Supreme Court pushed the procedural fairness requirement one step further by holding that the plaintiff had a right to have his pension claim considered fairly and fully, in accordance with the benefit fund’s by-laws, even though no misconduct allegations were at issue. The terms of the plan’s by-laws made it clear that the plaintiff had no contractual right to a pension simply because he had completed the requisite period of

\begin{footnotes}
\footnotetext{193}{\textit{Ibid.} at 382.}
\footnotetext{194}{\textit{Ibid.} at 384.}
\footnotetext{195}{\textit{Ibid.} at 384. These included conducting a unilateral investigation of Lapointe’s entire history with the police force, failure to advise him of the allegations against him, and ultimately putting the decision to the whole membership for a vote instead of making a decision themselves on the basis of the evidence. The court admonished the directors that they “must bear in mind that they are judges, not inquisitors” (386).}
\footnotetext{196}{\textit{Ibid.} at 385}
\footnotetext{197}{(1880), 14 CH.D. 471.}
\footnotetext{198}{\textit{Lapointe}, (JCPC), supra at note 190 at 385.}
\footnotetext{199}{[1915] O.J. No. 715 : 9 O.W.N. 2 (H.C.) (“Welsh”). This Benefit Fund was also involved in \textit{Armstrong} (supra at note 180) as well as \textit{Gummerson} and \textit{Slemin} (supra at note 184).}
\end{footnotes}
service; the entitlement decision was to be made by a committee. In Welsh’s case, the committee had ruled him ineligible for pension because he had been dismissed from the police force. The court noted that the by-laws required the Committee to inquire fully into the circumstances of each case. In Welsh’s case, “[t]he Committee did not go into the circumstance of the case, did not hear, deliberate upon, or independently determine anything”; it simply adopted the determination of the Board of Police Commissioners. Since the pension decision had not been made in accordance with the terms of the by-laws, the court held that it did not bind the plaintiff. By way of remedy for this procedural violation, the court awarded him the pension, rejecting the Lapointe strategy of remitting the matter back to the committee for re-adjudication because on the facts of the case, it saw “no reason to believe that justice would be done.”

These cases draw a clear distinction between substantive and procedural review of pension entitlement decisions. The Supreme Court of Canada drew a similar distinction in Mantha v. Montreal (City) dealing with the pension claims of a member of the city’s fire brigade. The city’s pension plan, established by by-law, provided disability pensions for employees who were unable to perform their duties “by reason of a chronic or incurable disease or of permanent infirmity”. Under the by-laws, the Board of Commissioners determined eligibility in individual cases. On Mantha’s application to the Board for pension on medical grounds, he was examined by medical officers who determined that he was still fit for continuing duty. Mantha was not, however, advised of their findings, and in the meantime retired. Only many months later, after what the court describes as “repeated inquiries”, was he advised that he had been ruled ineligible for pension. He brought action against the city to claim his pension.

The Supreme Court made an express finding that the terms of the plan did not permit the decision of the Board of Commissioners to be judicially reviewed on the merits. It nevertheless held that such decisions were reviewable on procedural grounds. Explicitly invoking administrative law principles, it found the City’s decision null and void on the

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200 Welsh, ibid at para. 9.
201 While the merits of the plaintiff’s dismissal were not directly before the court, the court had doubts that he had been fairly treated by the Board of Police Commissioners in the matter of his dismissal: ibid. at para. 7.
grounds that it was flawed by unfair procedures: “the appellant had no knowledge of the report of the medical officers until long after the decision of the Committee had been given, and no opportunity to answer it”. The city could therefore not rely on it as a bar to the plaintiff’s claim for pension. The Supreme Court of Canada accepted the finding of the trial judge that Mantha was in fact medically unfit for duty, and held him entitled to his pension.

In holding that the City could not hold its flawed decision against Mantha, the decision fuses administrative law principles of procedural fairness with notions of estoppel. Where procedural unfairness could not be relied on at all to rectify a manifest injustice, courts have on occasion had recourse more directly to estoppel doctrine. Like Mantha, Tawny v. City of Winnipeg involved a pension plan established by city by-law, in this case for all permanent employees with a minimum of fifteen years service who become unfit for further employment. Tawny, a manual labourer, was enrolled in the plan when it was first established, and plan contributions were deducted from his pay. Fifteen years later, in failing health, he applied for a pension, believing on the basis of information supplied by city officials that he had accumulated sufficient service to qualify. His application was initially refused on the ground that he was short seventy-two days of service; he was offered light work to make up those days. After putting in the additional time, however, he was again denied pension, this time on three separate grounds: that he was not a ‘permanent employee’, that even with the additional seventy-two days he had worked, he was still short of the requisite fifteen years service, and that he did not meet the medical requirement because although he was unfit for his job, he had not technically been ruled by the medical examiners as unfit for any position with the city. The City was not, however, prepared to offer him any additional employment for which he was fit.

Under these highly sympathetic circumstances, the court was not prepared to see Tawny denied his pension. It held that he was in fact a permanent employee and a member of the plan. On the service issue, in the absence of reliable records that could establish whether he

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203 Ibid. at 467.
205 Tawney, ibid. at para. 4.
did or did not have the required years of service, the court accepted Tawney’s argument of estoppel: 206

The responsibility for preserving that data lies upon the city which kept the time sheets under its own system. The plaintiff himself kept no such record, and in all cases adopted those of the city. The plaintiff contends that the city should be bound by the first, or at least by the second computation upon which he relied, and worked out the shortage to complete the 15 years’ service on July 5. He takes the stand on that point in the nature of estoppel, claiming that while at work he might have continued to complete the 15 years, but he is now physically unable, and in any event, not permitted to render further service.

The court found it equally inequitable to allow the City to rely on the lack of a specific medical finding that Tawny was unfit for non-manual service: 207

The plaintiff has done only one kind of work, and that is manual labour in the water works department. He is now old and ill and cannot turn to other occupations. He has not applied to the city for other work, and it seems to be useless for him to do so. …it would be unfair now to assume that the city declines to re-engage the plaintiff for any reason other than that he is unfit for further service. I think, therefore, a finding of fact should be made in favour of the plaintiff on this point.

The court accordingly declared Tawny entitled to his pension, bolstering its declaration with an order of mandamus against the City.

### 3.4 The Legal Status of Pension Rights in Canada in the Mid-20th Century

Canadian courts showed loyal adherence to the gift theory, taking their lead from the language of the plans themselves. By mid-20th Century, however, plans were becoming more formalized and pension drafters began to abandon multiple boilerplate non-liability clauses, adopting a more employee-friendly language which recognized at least qualified pension entitlements. In response to these developments, U.S. courts were giving cautious assent to the unilateral contract theory of pensions, at least in the absence of plan language compelling a contrary result. 208 In Canada, however, although plan language was evolving on a track parallel to that in the U.S., courts showed no similar inclination to substitute contract theory for gift theory. Prior to the advent of collective bargaining, the gift theory of employment pensions remained entrenched in Canadian law.

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207 *Ibid.* at paras. 11-12.
208 See discussion at section 3.1, above.
This stubborn commitment to gift theory is reflected most prominently in a pair of cases spanning the 1940s and dealing with the pension plan of the Bell Telephone Company. The first of these cases is Williamson v. Ontario (Treasurer), a case involving the legal status of the death benefit paid to the widow of one Williamson, who had died in Bell’s employ. The government of Ontario sought to tax that benefit as part of his estate under the terms of the Succession Duty Act, arguing that the benefit was “part of the consideration for [Williamson’s] services”. Williamson’s family resisted taxation, arguing that the death benefit was purely voluntary under the terms of the plan.

The evidence before the court about the history of the Bell plan provided considerable support for the contract argument. The Bell plan, a “Plan for Pensions, Disability Benefits and Death Benefits”, was a unilaterally established, non-contributory plan providing for pensions and disability benefits for employees, as well as death benefits for employees’ surviving spouses and other dependents. The government placed before the court the original 1917 company pension plan which had explicitly disavowed any contractual liability:

Nothing in this by-law contained, and nothing which may be done in pursuance hereof shall create expressly or by implication or inference any contract or contractual relation or obligation between the company and any employee or the legal representatives or dependents of any employee.

In 1939, however, the company introduced a new plan, prefaced with a recital setting out clearly the company’s intention to replace its old discretionary plan with one in which it was prepared to make explicit commitments:

Whereas by-law No. 16 under which the Company’s Plan for employees’ pensions, disability benefits and death benefits was established, dates back to 1917 and needs revising in many details and more particularly in that the plan should no longer be

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209 [1941] O.J. No. 206 (H.C.) (“Williamson”)
210 1939, S.O., c.1940. Section 10 of the Act included in the taxable estate:

(b) any annuity, income or other interest purchased, or in any manner, provided by the deceased either by himself alone or in concert or by arrangement with any other person to the expense of the beneficial interest accruing or arising by survivorship, or otherwise, on the death of the deceased; and

(e) any property of which the person dying was at the time of his death competent to dispose, and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property as he thinks fit, whether the power is exercisable by instrument inter vivos or by will or both.

211 Williamson, supra note 209 at para. 12.
212 Ibid. at para. 9.
213 Ibid.
considered as tentative, also in that payments of pensions and benefits in the proper cases should be made an undertaking of the company.

Section 1 of the new plan equally clearly framed the benefits in contract language:\textsuperscript{214}

The Bell Telephone Company of Canada undertakes in accordance with this Plan, to provide for the payment of definite amounts to employees when they are disabled by accident or sickness or when they are retired from service or, in the event of death, to their dependent relatives.

Notwithstanding this new language, however, the court was not prepared to find any legal obligation on the part of the company to pay the benefits. It conceded that the plan on its face could fairly be characterized as “an offer or promise to the employees of the company to pay the benefits provided by the plan.” As such,\textsuperscript{215}

[If communicated to the employees and accepted by them expressly or impliedly, the prospective benefit might be looked upon as part of the consideration for their services, and, being a provision made by them, would come within section 19(b) of the Succession Duty Act.

But to become a contract, the court noted, an offer had to be accepted. The government had produced no evidence that Mr. Williamson was personally aware of the terms of the plan. He could therefore not be held to have accepted any offer found within it.

Furthermore, according to the court, even if there had been evidence that Mr. Williamson was aware of the terms of the plan, there would still have been no contractual commitment. The plan contained standard language providing that the plan administrators “may from time to time make changes in the Plan, and the Company may terminate the Plan, but such changes shall not affect the rights of any employee, without his consent, to any benefit of pension to which he may previously have become entitled thereunder.”\textsuperscript{216} In the court’s view, this language, which gave one party to the so-called contract a right to retract its promise at any time, was “repugnant to the idea that the award and payment of the benefit are anything else but voluntary.”\textsuperscript{217} Accordingly, the benefit was not taxable as part of the Williamson estate.

\begin{footnotes}
\item[214] Ibid.
\item[215] Ibid. at para. 12
\item[216] Ibid. at para. 15.
\item[217] Ibid..
\end{footnotes}
Williamson was a decision of the Ontario Supreme Court interpreting the provincial Succession Duties Act. The subsequent case, McDougall v. MNR218 was a decision of the Exchequer Court of Canada, addressing a similar issue under the provisions of the federal Succession Duty Act.219 McDougall dealt with the same plan as Williamson, and the taxing authorities had clearly learned some lessons from that case. It was accepted as a fact that McDougall was aware of the terms of the plan. To bolster the contractual nexus, the government led evidence that in 1939, at the time the company altered its pension plan to eliminate the gratuity clause, it had distributed a pamphlet to the employees spelling out in clear ‘lay’ language its intention to be bound by its pension and benefit promises.220 The government claim could therefore not be rejected, as it had been in Williamson, on the basis that McDougall had not “accepted” the company’s “offer” of a pension. Even in the face of this important distinction from Williamson, however, the Court rejected the proposition that the plan created a contractual obligation. The court emphasized the unilateral nature of the plan: “The employees as such have had no part in its initiation or administration, nor were they consulted at any time in regard thereto, and there is no evidence that its terms were at any time the subject of collective bargaining between the Company and its employees.”221 Like the Williamson court, the Exchequer Court was unable to reconcile a contractual obligation with the fact that the plan could be unilaterally amended or terminated; such a provision “negative[d] the suggestion that the Company’s undertaking in section 1 of the plan is part of the consideration for an employee’s services”.222

219 S.C.1940-41, c.14. The operative terms of the Act were not identical; it appears that the government had attempted to tighten up the language to prevent the Williamson outcome by spelling out that “superannuation or pension benefits or allowances” were taxable. The court held that a death benefit was not related to a “superannuation or pension fund”, and was therefore not taxable, even though it was an “allowance”.
220 McDougall, supra note 218 at 322-3. The booklet, in Q & A form, included the following:
Question: What important amendments have been made to the Plan?
Answer: a. The Plan, when first established in 1917, contained a stipulation that the Plan was tentative only. This stipulation has been removed from the revised Plan.
b. The Plan previously stipulated that there was no contract or contractual relation or obligation between the Company and any employee or the legal representatives or the dependents of any employee. This stipulation has been removed from the revised Plan and the payment of pensions and benefits subject to the provisions of the Plan, is now an obligation of the Company.
c. The Plan previously contained the provision that pensions or benefits could be suspended or terminated, in the discretion of the Employees’ Benefit Committee, in cases of misconduct or conduct prejudicial to the interests of the Company. This provision has been removed from the revised Plan.
221 Ibid. at 317.
222 Ibid. at 320.
The court made it clear that even if the language of the plan had been capable of contractual interpretation, it would have found a host of technical reasons why such a contract would not bind the company. First, there was no evidence that the 1939 plan changes had been authorized by the Bell board of directors. Second, even if they had been authorized by the directors, such action would have been *ultra vires*, since the company by-laws did not expressly permit the directors to enter into contractual arrangements with employees regarding such benefits. And as a final nail in the coffin of the government’s argument, the court held any contractual obligation would flow between the company and McDougall; it could not have been enforced by his surviving spouse and other dependents, since they would be merely third-party beneficiaries and not contracting parties. Accordingly, the Court found that Bell’s payment of the death benefit to McDougall’s widow was entirely voluntary.

The courts clearly saw no difference between the new and the old styles of pension drafting. The *Heirs of N.T. Cronk, represented by Barclays Trust Co. of Canada v. MNR* decided as a companion case to *McDougall* dealt with the pension plan of Northern Electric Limited, a Bell subsidiary. The Northern Electric Plan appears to have been similar to the old 1917 Bell plan, but importantly, without the 1939 amendments. The court treated the case as if it raised contract issues identical to *McDougall*. Two years later, the Exchequer Court again addressed the succession duties issue in *Flintoft Estate v Canada (Minister of National Revenue)* under the CPR plan. As we have seen, the CPR 1903 plan contained clear gratuity language. Like the Bell plan, the plan had been amended in the 1930s, but this time the amendments cut in the opposite direction, designed to make it even clearer than under the prior text that the plan did not establish contractual liability. Once again, the court simply

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223 *Ibid.* at 323.
224 This is the only Canadian case that I have been able to identify touching in any way upon the issue of whether companies have the corporate capacity to establish pension/benefit plans, an issue that was a matter of much serious debate in the U.S. courts: see O’Neal, *supra* note 119. The Exchequer Court makes no reference to the U.S. case law on this point.
225 *McDougall*, *supra* note 218 at 324.
226 [1949] 49 D.T.C. 612 (Ex. Ct.).
228 See discussion at section 2.2.4, above.
229 The plan was amended effective January 1, 1937 to make it contributory. Presumably out of concern that a contributory plan might be more likely than a non-contributory plan to be interpreted as establishing liability, the company added a clause spelling out that “All contributions of the Company are to remain voluntary and no
applied *McDougall* to find the benefits voluntary, without commenting on the significant

differences in the plan text.\(^{230}\)

None of these cases involves direct pension claims. They were all taxation cases, inviting a

strict constructionist approach to the government’s claims.\(^{231}\) They did not involve a

sympathetic retiree or widow claiming pension, arrayed against a hard-nosed employer who

had promised a pension but was now denying liability. Instead, it was the widows who were
taking the ‘no contract’ position; the employer who had drafted the plan was not represented

at all in the proceedings. These atypical factors may well have influenced the ‘no contract’
outcomes in all cases. Even accounting for this context, however, the approach taken in

*Williamson* and *McDougall* was doctrinaire: as long as the company retains for itself the

right to amend or terminate the plan, pension benefits are gifts, pure and simple.

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BARGAINING\(^{232}\)

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\(^{230}\) *Ibid.* at para. 19. The *Flintoft* case dealt with yet another amended version of the succession duties statute which attempted to close the *Williamson/McDougall* loophole by making benefits taxable even if they were provided gratuitously. Once again, the court found a loophole, holding that because the benefit was paid out of operating funds, it was not payable out of a pension “fund established for that purpose”; and therefore was not taxable: *ibid.* at para. 32.

\(^{231}\) The strict constructionist approach to the interpretation of taxing statutes is explicit in *Flintoft*.

4.1 Factors Influencing Change in the Canadian Pension Landscape

By the end of World War II in Canada, employment pension plans were increasingly widespread. Coverage rates, after stalling in the Depression, were once again on the rise, and this time significantly. In 1947 when the Dominion Bureau of Statistics conducted a survey, it found some major changes from the pension world examined by Latimer in 1932, and again by the Queen’s Survey in 1937. Almost one-third of the workers in the firms interviewed were covered by pension plans, compared to only about 15% coverage in the early 1930s.\(^{233}\) Not surprisingly, the 1947 survey found that the vast majority of plans were new plans; approximately 70 percent had been established in the nine preceding years.\(^{234}\)

Where do we find these increasingly ubiquitous pension plans? The primary growth area was in Steven Sass’s third category of employment pension types: plans in business enterprises which were increasingly adopting ‘internal labour markets’ and bureaucratic management techniques. By the mid-1930s, these modes of organization had taken firm hold in large U.S. manufacturing enterprises, followed only a few years later by medium and smaller enterprises.\(^{235}\) In *Pension Plans in Canadian Industry*, a study prepared by the Economics and Research Branch of the Department of Labour and published in the *Labour Gazette* in 1950,\(^{236}\) the authors identified 1939 as a new point of departure for pension plans in Canada, pointing to the growth of manufacturing during the period of the Second World War, and to the profitability of manufacturing firms during the war years as important factors in making plans increasingly attractive to Canadian business.

The 1947 Canadian survey of private sector pensions found a very significant majority of covered employees working in manufacturing industries, followed by the railways.\(^{237}\) If we factor in increasingly widespread public sector pension coverage, we find a clear emerging correlation between pension coverage and what is often called the “primary labour market”:

\(^{233}\) *Pension and Welfare Plans 1949*, supra note 232 at 694. It is difficult to assess how accurately this figure measured overall employment pension coverage, or how comparable it is to data from surveys taken before or after 1947, because definitions, survey methodology and the scope of the surveys vary so greatly.

\(^{234}\) *Ibid.* at 696.

\(^{235}\) Jacoby, supra note 47 at 205-235.

\(^{236}\) “Pension Plans in Canadian Industry”, supra note 232.

\(^{237}\) *1947 Survey*, supra note 232 at 697, Table 1.
that ‘elite’ segment of the labour market characterized by secure, full-time high wage jobs.\textsuperscript{238} Workers in “secondary labour markets” were much less likely to have pension coverage. If workers commonly found in secondary labour markets did, from time to time, find themselves in pensionable employment, it is extremely unlikely that they would ever have collected any pensions, since their chances of survival in any given job for long enough to retire on pension were, by definition, almost nil.\textsuperscript{239}

In addition to increasing coverage, employment plans of the immediate post-war period reflected a significant shift in employer attitudes to employee pension rights. In concluding his legal analysis of the state of employee pension rights in 1932, Murray Webb Latimer had commented cynically: “It seems clear…that it is possible for a company to frame a pension plan which will constitute no legal liability and which may be completely abolished at any time.”\textsuperscript{240} Even at that time, however, Latimer found plans prepared to guarantee payments to pensioners, and some few prepared to make a commitment to provide pensions to retiring employees who met the eligibility criteria. While Latimer stops short of identifying a positive “trend” towards guarantees, he does describe the guarantees he found as “a comparatively recent development”.\textsuperscript{241} A trend there certainly was, however. The new type

\begin{itemize}
\item In defining primary labour markets, William T. Dickins and Kevin Lang note that:
\begin{quote}
The primary sector consists of high-wage jobs with good working conditions, considerable opportunity for advancement within the firm and substantial rewards for obtaining education and training. Labor relations are generally formalized either by a union contract or in an employment relations handbook. Company policy sharply circumscribes supervisors’ authority. Because of the high wages, employees tend to stay on the job for a long time. Because of firms’ investment in screening and training, firms tend to hold onto workers.
\end{quote}
\item A 1927 issue of the Labour Gazette reports on studies of labour turnover conducted in the U.S. showing that “only 3.4 per cent of male workers and 2.4 per cent of female employees remain with the same concern over 20 years”: 1927 \textit{Labour Gazette} 1051.
\item Latimer, \textit{Industrial Pension Systems, supra} note 7 at 705.
\item See discussion at 2.2.3, above. Latimer commented:
\begin{quote}
…[c]lassification of the guarantees according to the date at which they were initiated shows that not only have a large proportion of them been effected in the past few years but also that well over half the employees at present protected by guaranteed plans have obtained such protection since the end of 1925. What is perhaps even more significant is that eleven of the sixty-five guarantees in their present form were made by companies which had previously operated formal plans without an adequate guarantee…. An appreciable number of companies with experience in the operation of pension plans have…found it desirable to change to a guaranteed form (745).
\end{quote}
Latimer, an actuary by profession, was concerned about the ability of companies to make good even on such minimal guarantees as they were prepared to offer. His general conclusion was that many employers who had established pension plans had seriously underestimated their probable future costs, and were in serious financial
of business enterprise not only found pension plans useful; increasingly it eschewed the older plan model in which gratuities were doled out to elite categories of old and faithful servants on an *ad hoc* and selective basis, in favour of plans that structured and systematized both their funding and their pension promises. By the late 1930s and 1940s, plans were moving increasingly towards a concept known as “vesting”, meaning that employees accumulated pension credits through continuing service and could claim the value of those credits even if they left employment prior to retirement.\(^{242}\) A 1954 Department of Labour study, *Vesting Provisions in Canadian Industrial Pension Plans*, found that at least 80% of plans surveyed contained some vesting rights, with more than half providing for full vesting after twenty years of service once an employee reached the age of 50, and “a substantial proportion” providing even more favourable vesting standards.\(^{243}\) New models in pension plan design were clearly emerging, models which acknowledged that employees accrued a right to benefits through service.

In addition to ‘market’ factors, the authors of the 1950 *Canadian Pension Plans in Canadian Industry* study point to the impact of wartime public policy as a catalyst of growth and change in the Canadian pension landscape.\(^{244}\) In the early 1940s, the federal government, concerned about the impact of war profiteering on both the economy and the morale of the populace, imposed an Excess Profits Tax on 100 percent of corporate profits that exceeded a pre-war base. A desire to avoid this confiscatory tax was a compelling incentive to reduce profits. At the same time, the deployment of a significant number of young, able-bodied men overseas meant that the country was suffering severe labour shortages. Employers with excess profits to squander were willing to meet high wage demands. They were not, however, able to do so directly for very long. By 1942 the federal government, concerned

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\(^{242}\) ‘Vesting’, as the term is used in the pension industry, is difficult to define. Prior to regulation, ‘vesting rights’ were entirely an artifact of individual pension plans, and varied widely in their nature and meaning. They are colloquially understood as enforceable rights which accumulate on an on-going basis not just to the employee’s own contributions, but also to the employer’s contributions. While this definition captures the notion of the continued accrual of pension rights (as opposed to pension rights that crystallize only on retirement), it is not entirely accurate, since in defined benefit plans employers may be making no contribution in fact, and what may be accruing is an actuarial value rather than a concrete sum.


\(^{244}\) See also Edwards, *supra* note 1 56-60.
about inflation, had passed wage stabilization legislation and created a National War Labour Board, an agency of the War Prices and Trade Board, to monitor and regulate wage adjustments. Direct wage increases were tied to a cost-of-living formula. Employers seeking to establish ‘competitive’ compensation packages and willing to spend money that would otherwise simply be taxed away turned to employee benefit plans.\textsuperscript{245} Pension plans, which had fallen into disuse and some disrepute during the Great Depression suddenly acquired a new lease on life.\textsuperscript{246}

Wartime government policies contributed to the spread of employment pension plans; other policies had the effect of improving their quality. The proliferation of pension plans in the 1940s focused the attention of the federal revenue officials on the potential for abuse lurking in the discretionary model. In 1942 the Ministry of National Revenue introduced a requirement that plans had to be “approved” by the Minister of National Revenue before they could take advantage of the deductions and exemptions provided by the \textit{Income Tax Act}.\textsuperscript{247} During the war years, these approval requirements were simply ‘back room’ Ministry policy. In 1946 they were published by the Ministry of National Revenue as a thin volume between blue covers, which became known as the \textit{Blue Book}.\textsuperscript{248} \textit{Blue Book} administrative rules and regulations governed Canadian pension plans seeking tax relief from 1942 to 1957.

The \textit{1946 Blue Book} established a number of very important rules for pension plans. Only plans that were “definite, continuing undertakings”\textsuperscript{249} qualified for approval; this prerequisite was aimed at \textit{ad hoc} plans which came and went at the discretion of the employer. Plans

\begin{flushright}
\textsuperscript{245} \textit{Ibid.} at 56.
\textsuperscript{246} Similar wartime wage controls gave employment pension plans a very effective shot of adrenaline in the U.S. as well: see Klein, \textit{ supra} note 64 at 163-83 for a nuanced discussion of this issue. The decisions of the Canadian National War Labour Board make it clear that pension and benefit plans fell within the definition of wages and were subject to controls: see 1942 Labour Gazette 282; 1944 Labour Gazette 39 and 466. The Board was lenient, however, in allowing the inauguration of benefit plans, especially if they were contributory, since such plans were “not inconsistent with the prime purpose of PC 9384 (the Wage Control Order), namely the stabilization of wages”: 1944 Labour Gazette at 466. The Ontario Hospital Association Pension Plan (now “HOOPP”), may have got its start as a result of an order of the National War Labour Board (See \textit{Re J. Walter Thompson Company, Limited} 1944 Labour Gazette 472). HOOPP is discussed in Chapter 6 at section 3.5.
\textsuperscript{247} No specific amendment to the \textit{Income Tax Act} authorized the Minister’s 1942 declaration.
\textsuperscript{248} The 1946 version of the Blue Book is entitled \textit{Statement of Principles and Rules respecting Pension Plans for the Purposes of The Income Tax Act: Tax Ruling No. 2 (1946-47)} (Taxation Division, Ministry of National Revenue, no date) (“\textit{1946 Blue Book}”). It was subsequently revised and reissued as \textit{Statement of Principles and Rules respecting Pension Plans for the Purposes of The Income Tax Act} (Taxation Division, Ministry of National Revenue, no date) (“\textit{1950 Blue Book}”).
\textsuperscript{249} \textit{1946 Blue Book}, \textit{ibid} at ¶4
\end{flushright}
could be partly funded by employee contributions, but employers were also required to contribute.250 A number of Blue Book rules targeted pension plans designed for the exclusive benefit of highly paid executives, directors and shareholders. First, approved plans must be employee pension plans; there were explicit exclusions for partners, proprietors, and the wives of partners and proprietors.251 Second, while plans could be established for a particular “class” of employees only, all employees within the class must be eligible to join.252 The rules further provided that classes of employees could not be established on the basis of pay levels, and must not “favour those receiving higher salaries.”253 In addition, pension formulae were required to be “equitable” and “not excessive” (neither term was defined).254 Certain kinds of discrimination were permissible; a plan which limited eligibility to full-time employees would be acceptable, and the Blue Book carefully spelled out that “[d]ifferent terms of eligibility will be permitted as between male and female employees”.255

Importantly, the Blue Book took aim at pension plans which promised pension benefits without giving employees any rights to those benefits. As a mandatory minimum, the 1946 Book established a requirement that pension benefits vest upon retirement, including early retirement.256 It encouraged an even higher standard by requiring that any plan providing for vesting at later than fifty years of age with twenty years of service “must be substantiated by adequate reasons” before it would be approved.257 Where a plan was contributory, the right to a return of contributions must vest immediately, ensuring that no departing employee who had contributed to the pension plan would leave with nothing.258 All plans were required to

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250 Ibid. at ¶¶ 7-8. The rules do not spell out how significant the employer’s contribution must be to qualify.
251 Ibid. at ¶5.
252 Ibid.
253 Ibid. at ¶4.
254 Ibid. at ¶5. The rules were clear, however, that pensions payable under the plans may not exceed 70 percent of average salary for the employee’s last 5 years of service. 1946 Blue Book at ¶ 6.
255 Ibid. at ¶5.
256 Ibid. at ¶12. Interestingly, while other Blue Book standards applied to all pension plans seeking ‘approved’ status, the Department did not impose its vesting requirements on collectively bargained plans, which were becoming prevalent in the 1950s. No rationale for this exception was ever officially articulated, but contemporary commentators speculated both that income tax officials saw the negotiation of a plan as evidence that its terms were satisfactory to the workers, even if they did not meet government standards, and that since the government was seeking to promote employment pension plans, it would be reluctant to require the parties to reopen a negotiated plan: see Robert M. Clark, supra note 232 at 50-51. Clark is critical of this distinction.
257 Ibid.
258 The employee’s estate also had a right to return of the employee’s contributions if the employee died before retirement. There was no right to interest on the contributions in either case: ibid. at ¶12-13.
make some provision against discontinuance as a result of bankruptcy or winding-up: if such events took place, pension rights must vest immediately. Plans were also required to provide that if they were discontinued, “all monies paid under the plan must vest absolutely in the employees concerned and any surplus not apportioned must be distributed by an equitable formula to provide increased benefits for those employees then covered.” The *Blue Book* also attacked the issue of plan solvency with a general requirement that funded pension trusts be actuarially sound. Investments for pension trusts were restricted to those available under the *Canadian and British Insurance Companies Act*.

The 1950 revision of the *Blue Book* imposed even more onerous requirements, in addition to those already imposed by the 1946 version. There was now explicit regulation of eligibility for pension plan membership. Plans could not impose a minimum age of entry of more than thirty-five years, or a service requirement of more than ten years. The exclusion of female employees was no longer permitted, although plans could continue to impose different minimum age or service requirements for membership eligibility on men and on women.

The *1950 Blue Book* also tightened up vesting requirements, now making mandatory the requirement that employer contributions vest, at a minimum, at age fifty with twenty years of service. It also placed limits on the right to commute pensions to lump sums, providing for this possibility “only in such unusual or exceptional circumstances that otherwise would, in the opinion of the employer, cause probable substantial loss to the employee”.

The *Blue Book* standards were relatively short-lived. By 1957, the *Blue Books* had vanished, apparently victims of doubts about their constitutional validity in Canada’s federal system. When we look in the next section at what Canadian pension plans looked like in the immediate post-War period, however, their influence is clear.

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262 *1950 Blue Book* at ¶8.
266 They were replaced by Information Bulletin No. 14, a much less directive document which had itself been withdrawn by 1961: see William R. Latimer, *supra* note 129 at 103-6; Robert M. Clark, *supra* note 232 at 46-51.
4.2 What Did Post-War Canadian Pension Plans Look Like?

By the late 1940s, both governments and the private pension industry were beginning systematically to generate statistical studies of pensions. These early studies are not comprehensive, and their terminology and research methods are far from uniform; consequently the data must be approached with some caution. Nevertheless, we can get a sufficiently reliable picture of prevailing trends in the structure of employment pension plans to gain a rough benchmark both for evaluating how far plans had come since the late 19th Century, and for measuring the later impact of collective bargaining and regulation in the decades to follow.

Within firms which offered pension plans, membership was now more comprehensive than it had been in the old discretionary days. Certain types of employees were still almost universally excluded; temporary and casual workers were not covered, and part-time workers were rarely eligible for plan membership. But blue-collar workers were now typically included as long as they were regular, full-time employees. In addition, eligibility requirements for plan membership, such as minimum and maximum ages, and years of service, while not disappearing entirely, were becoming more lenient, permitting both younger and older employees, as well as employees with a shorter attachment to the workplace, to participate in pension plans.

On the issue of benefit type, the predominant post-war model was unquestionably the defined benefit plan, although benefit formulae varied greatly both in structure and in generosity. Typically, plans used ‘unit benefit’ formulae, in which benefits were calculated by multiplying ‘years of service’ (or of plan membership) by a percentage of earnings. Some unit benefit plans averaged earnings over an entire career; the most typical formula paid out on salary averaged over the last ten years of service, an approach which the 1950

267 1947 Survey, supra note 232; Pension and Welfare Plans in Canadian Industry, supra note 232; Contribution, Benefit Formulas, supra note 232; Types of Retirement Policy, supra note 232; Vesting Provisions, supra note 232; Number of Workers Covered, supra note 232.
268 See Edwards, supra note 1 at 129-30, Tables 6 & 7 (1960 data).
269 Economics and Research Branch of the Department of Labour, “Contribution, Benefit Formulas in Canadian Industrial Pension Plans”, 1954 Labour Gazette 519: “[m]ost pension plans state definitely the benefits rates that are to be provided: 521.
270 Ibid. at 523.
Department of Labour study argued was “… likely to be favourable to the employee, since his earnings are normally higher towards the end of his employment and his average earnings over the last ten years are higher than the average over his entire period of credited service.”\textsuperscript{271} The percentage of earnings usually ranged between one and two percent, with one-and-a-half percent being the most common.\textsuperscript{272} An alternative to the ‘unit benefit’ formula was a ‘flat benefit’, in which a fixed amount was multiplied by years of credited service.\textsuperscript{273} It was not uncommon for either type of benefit formula to provide retroactive credit for past service, a potentially expensive feature, but useful for employers who wanted to ensure that pension benefits would be high enough to make plans attractive to employees, allowing them to fulfill the functions for which they were designed.\textsuperscript{274}

By the post-war period, Canadian plans were much more likely to be contributory than non-contributory.\textsuperscript{275} Such plans almost invariably recognized the right of employees to a return of their own contributions if they left the plan prior to retirement; in many cases, those contributions would be returned with interest.\textsuperscript{276} Contributory plans were also more likely than non-contributory plans to recognize some form of vesting rights prior to retirement for employer contributions.\textsuperscript{277}

As we have seen, there had been a major shift from earlier models in how plans treated the vesting of employer contributions. While the\textit{Blue Book} standard was full vesting by age 50 after 20 years of service, The Department of Labour’s 1954 study noted that “a substantial

\textsuperscript{271} Ibid. at 524
\textsuperscript{272} Ibid. at 525 (40 percent of plans).
\textsuperscript{273} Ibid., at 524. Flat rate benefits were described as commonly associated with negotiated plans: see ibid. and 1954 Labour Gazette 1243..
\textsuperscript{274} Since 1938, Canadian tax laws permitted employers to deduct contributions for the past service credit: see Edwards,\textit{ supra} note 1 at 281-2.
\textsuperscript{275} Where plans were contributory, employees were normally required to contribute between four and five percent, although the Department of Labour study points out that the same level of contribution bought different benefit levels, depending on the generosity of the plan:\textit{ Contribution, Benefit Formulas, supra} note 232 at 523. The article contrasts the Canadian experience with the U.S experience, where plans are much more likely to be non-contributory. It attributes the difference to two factors. First of all, non-contributory plans are more likely to be found in very large firms, and U.S. firms tend to be larger than Canadian firms. Second, and at least equally important, both employer and employee contributions to pension plans are tax deductible in Canada, whereas in the U.S. only employer contributions are tax deductible.
\textsuperscript{276}\textit{Vesting Provisions, supra} note 232 at 36.
\textsuperscript{277} The study notes that two-thirds of non-contributory plans contained no vesting provisions. It comments on the fact that many of the non-contributory plans are also negotiated plans, and suggests that benefit levels are regarded as more important at the bargaining table than vesting rights: ibid at 35.
proportion of the pension plans studied…contain vesting provisions more liberal than the income tax standard.”

More than half the plans surveyed, however, met only the 20 year minimum, and despite the tax rules, almost 20 percent of plans surveyed still contained no vesting rights whatsoever.

Mandatory retirement was a commonplace feature of post-war pension plans. From quite early, plans had provided for a ‘normal’ age of retirement, without making retirement compulsory at that age. By the late 1940s, however, fixed and mandatory retirement ages had become the norm. In most plans, the ‘normal’ age of retirement for men was 65, while for women it was now often 60, forcing women to retire five years earlier than men.

5.0 CONCLUSION

The history of employment pension plans in Canada prior to the advent of collective bargaining clearly demonstrates that employment pension plans evolved to play an important role for employers as labour force management tools. Plans gained momentum because employers saw them as a tool for binding their workers to the enterprise, and promoting long-term, stable employment relationships. While pension plans played an important role in worker recruitment and retention, they also played a complementary and equally important role in facilitating the ability of enterprises to rid themselves of older and less productive workers, sometimes simply by providing pension benefits which were generous enough to offer an incentive to older workers to retire, but increasingly through mandatory retirement policies linked to pension benefits. As the needs of employers evolved, plans changed to meet those needs. When administrative discretion became less useful to employers as a control mechanism, it was abandoned, to be replaced by plan rules and benefit formulae equally consistent with the employer business objective of ensuring that pension benefits were directed to well-paid, full-time long-service employees. Despite changes to pension

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278 Ibid. at 31.
279 Ibid.. These may have been unionized plans, which were not subject to the Blue Book vesting requirement: see supra note 256.
280 Edwards, supra note 1 at 152.
281 In Industrial Pension Systems, supra note 7, Latimer notes that while the majority of railway plans had compulsory retirement features, it was not the norm to make retirement compulsory in pension plans: 73, 101
282 Most plans still allowed the employer to waive mandatory retirement on a case-by-case basis: see Types of Retirement Policy, supra note 232 at 1238-39.
283 Ibid. at 1239-40.
plans reflecting the willingness of employers to take on at least limited forms of pension liability, up to the mid-20th Century Canadian courts still rejected arguments that pension plans established contractual liability, and characterized pensions as voluntary payments – gifts – from employers to employees.

For individual workers who were fortunate enough to work in enterprises that had pension plans, the plans of the post-war period were undoubtedly an improvement over earlier models: employees were more likely to be eligible for membership, they now had some measure of entitlement to their benefits, and their benefits were more securely funded. But from the broader perspective of retirement income security for workers in general, these improvements had limited impact. The vast majority of Canadian workplaces still did not have pension plans. Those that did have plans offered plan membership only to regular, full-time employees. Age and service requirements for membership eligibility had become more lenient, but they still operated to exclude younger workers and newly hired older workers, and workers with shorter service. Casual, temporary and part-time workers were excluded. In addition, typical plan vesting rules guaranteed that workers with short service – less than ten to twenty years – received no pension at all.

These labour market factors and exclusionary membership rules operated to ensure that only employees with a permanent attachment to the primary labour market had access to good pensions. In most cases, this category did not include women. The structure of both pre-war and post-war labour markets for women ensured that the exclusion of temporary, casual and part-time employees effectively excluded most women workers from eligibility for plan membership, without any need for explicit gender exclusions. Some pension plans nevertheless went the second mile and provided that women workers were not eligible for membership. Others provided inferior benefits for female plan members. Even when benefits for women and men were formally equal, the effect of shorter service, lack of

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284 Pension Plans in Canadian Industry, supra note 232 at 448-9 (Chart).
285 The AT&T Pension Plan, established in 1909, was restricted to male employees (Labour Gazette, 1912, 488-9). The Armour and Company pension plan, established in 1911, was obligatory for male employees and voluntary for female employees. To be eligible for pension, female employees had to be unmarried: Labour Gazette, 1912, 488-9. Many plans established a mandatory retirement age for women between 5 and 10 year younger than for men. A 1929 Survey of Industrial Welfare in Ontario found that in firms that offered pensions, the usual retirement age for women was 65, and for women 55: Labour Gazette, 1929, 300.
benefit portability and benefit formulae based on average earnings ensured that women got less in retirement benefits from their plan membership than did their male counterparts.

Throughout the period covered in this chapter, there is little evidence that employees or their unions had any input into the shaping of pension plans. The 1950 study, *Pension Plans in Canadian Industry*, argues that in the tight labour markets of the 1940s, employees took “advantage of their stronger bargaining position, resulting both from labour shortages and from larger union membership to press for welfare plans”.\(^{286}\) There is no evidence, however, that any such pressure bore direct fruit at the bargaining table prior to the advent of formal collective bargaining structures in the late 1940s. While U.S. pension historians identify the influence of collective bargaining as an important force behind pension growth in the U.S. in the 1940s,\(^{287}\) we should recall that while formal collective bargaining was introduced in the U.S. in the mid-1930s; Canada did not get its first modern collective bargaining statute until 1948.\(^{288}\) The first negotiated pension plan on record in Canada did not appear until 1950, the result of collective bargaining between Local 200, United Automobile Workers of America and the Ford Motor Company of Canada.\(^{289}\)

Although the market and government policy had certainly effected some improvements to employment pension plans, as the 1940s drew to a close such plans were clearly not delivering good pensions to most Canadian workers. The stage was set both for the collective bargaining initiatives which followed upon the advent of formal collective bargaining legislation in the late 1940s and 1950s, and for the regulatory legislation which became a feature of the pension landscape beginning in the mid-1960s. In the next chapter, I will

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\(^{288}\) In *Labour Before the Law* (Don Mills: Oxford University Press, 2001) Judy Fudge and Eric Tucker identify 1948 as the commencement of the era of industrial pluralism in Canada, pointing to the federal *Industrial Relations and Disputes Investigation Act*, S.C. 11-12 Geo. VI, c. 54 as the model for subsequent provincial labour legislation establishing the now-current Canadian collective bargaining framework: 295.

\(^{289}\) The Labour Gazette reported in 1949 that “[s]everal CIO unions, both in Canada and the United States, notably the United Automobile Workers, have publicly announced their intention of seeking pension plans through collective bargaining.”: (1949), 49 Labour Gazette 697. The Report of the Conciliation Board appointed in connection with the UAW-Ford negotiations is reprinted in (1950), 50 Labour Gazette 454. At 455, the majority report notes that “this is the first time the question of non-contributory pensions has been made the subject of collective bargaining in Canada”: 455.
explore the record of collective bargaining in re-shaping employment pension plans to deliver pension benefits that would meet the needs of Canadian workers.
CHAPTER 3

EMPLOYMENT PENSION PLANS AND COLLECTIVE BARGAINING

1.0  INTRODUCTION

By the mid-20th Century, individual employment relationships had been superseded in many Canadian workplaces by collective bargaining, facilitated by statutes explicitly designed to give employees, through their unions, more effective bargaining power when dealing with employers. By the late 1940s, Canadian unions were seeking to bargain over pensions. A 1949 article in the Labour Gazette, “Pension and Welfare Plans in Canadian Industry”, reported that “[a]t its annual convention in October, 1948, the Canadian Congress of Labour adopted a resolution encouraging affiliated unions to press for a system of industrial pensions.” The article also noted that “[s]everal CIO unions, both in Canada and the United States, notably the United Auto Workers, have publicly announced their intention of seeking pension plans through collective bargaining.”¹ A year later, the same publication reported that “[t]he establishment of pension plans was listed as an issue in a number of strikes which took place in Canada during 1949”.² In early 1950, a conciliation board dealing with a dispute between the United Auto Workers and the Ford Motor Company of Canada recommended a non-contributory pension plan, and the subsequent collective agreement was settled on that basis.³ The era of collective bargaining over pensions in Canada had begun.

In this Chapter, I will examine the role of collective bargaining in the shaping of the employment pension plan system in Canada. The advent of collective bargaining gave workers a platform for asserting legal rights to pensions, and held out the promise that pension plans could be re-treed to better address the retirement income needs of employees. I will argue that while collective bargaining changed the legal construction of employment pensions, compelling legal recognition that pension benefits were “deferred compensation”,

¹ 1949 Labour Gazette 694 at 697.
² “Pension Plans in Canada Industry” 1950 Labour Gazette 452.
³ The conciliation board’s report was published in full at 1951 Labour Gazette 454.
and part of the consideration employers paid for current labour, unions were not able to make significant capital out of this new concept of pensions as contractual rights. Management fought hard to maintain the same hegemony over pension plans it had achieved in pre-collective bargaining days. An early legal victory for labour in the U.S., the *Inland Steel* case, had significant spill-over effects in Canada, locating pensions squarely within the scope of collective bargaining. The practical impact of this victory was significantly undermined in Canada, however, by arbitral jurisprudence which bolstered employer power over pensions and related retirement issues by encasing them within the realm of reserved management rights, permitting employers to introduce, amend and terminate pension plans without bargaining with unions, and placing key pension rights issues outside the scope of arbitration. Arbitral reluctance to engage with pension issues has been stubbornly consistent, persisting even in the face of recent Supreme Court of Canada decisions serving unequivocal notice that arbitration is the preferred forum for the resolution of pension disputes in unionized workplaces.

Placing pension and related retirement issues in the category of reserved management rights does not, of course, preclude collective bargaining on such issues; unions have a clear legal right to use their bargaining power to bargain over all terms and conditions of employment. While they could have spent bargaining coin on attempting to reshape employment pension plans, unions by and large did not do so to any significant extent in Canada. The question of why unions did not challenge employer hegemony on pension issues more vigorously is a difficult one. As I will argue, the answer lies in part in the legal structure of collective bargaining in Canada, which confines bargaining not only to the workplaces where unions have exclusive bargaining rights, but also within the boundaries of specific bargaining units, while pension plans themselves frequently cover broad all-employee units and affect a range of interests beyond the boundaries of the workforce. Explanatory factors are also located, however, in the institutional nature of collective bargaining within an exclusive representation system. As we have seen in Chapter 2, pension plans protected and advanced hierarchical Fordist management practices in individual workplaces. In most cases, unions did not see it as in their institutional interests to challenge those practices; indeed, in some cases they benefitted from them.
The result was that collective bargaining had limited effect in addressing critical problems of post-war employment pensions. While the spread of unionism certainly played a role in the spread of pension plans, collective bargaining had only limited impact in expanding coverage beyond the boundaries of those workplaces where employers had found them useful prior to collective bargaining. In addition, collective bargaining did little to reshape pension benefits to better meet the retirement income needs of a broader range of workers, or to address practices such as delayed vesting that undermined pension adequacy and security even for plan members.

2.0 THE EVOLVING LEGAL CHARACTERIZATION OF PENSIONS

In the early 1930s when Murray Latimer was preparing his pioneering work, the law did not view employment pension plans as a source of contractual obligations. Latimer argued in favour of a concept of pension benefits as deferred wages, but was forced to acknowledge that such an idea had at that time failed to attract judicial support. As we have seen, Canadian courts of the late 1940s and early 1950s were still firmly committed to the gift theory: benefits under employment pensions were voluntary payments, not entitlements.

With the advent of collective bargaining, that conception of pensions began to change. The process was an incremental one. There is no moment of epiphany in Canadian law, in which gift theory was displaced by a clear understanding that pensions were part of the wage package. Cases like Williamson and McDougall simply disappeared from view. By 1960, when the Ontario High Court of Justice decided Bardal v. Globe & Mail, still the leading case in Canada on the issue of the factors relevant to the calculation of wrongful dismissal damages, it was self-evident to Mr. Justice McRuer, who decided the point without any discussion or analysis, that the damages to which the wrongfully-dismissed plaintiff was

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4 The term ‘deferred wages’ is conventional shorthand for the concept that pensions are part of the wage package, and therefore a matter of contractual rights. The term is not itself particularly helpful in spelling out the nature of those rights, an issue which had not been well-explored in the Canadian case law but which lurks behind much of the legal controversy about surplus ownership which emerged in the 1980s and 90s: see Chapter 5.

5 Murray Webb Latimer, Industrial Pension Systems in the United States and Canada (New York: Industrial Relations Counselors, 1932) at 698 (“Industrial Pension Plans”).


7 Bardal was cited with approval by the Supreme Court of Canada in Honda Canada v. Keays, 2008 SCC 39 at paras. 25-32.
entitled included the value of an additional year’s membership in his employment pension plan, even though similar claims related to the inclusion of a Christmas bonus and a profit-sharing plan were rejected on the basis that these claims had no “contractual basis”. Explicit recognition of the contractual status of pension rights was still exceptional, however; it is not until the 1970s that we begin to find the language of “deferred wages” expressly making its way into the decisions of Canadian courts and tribunals dealing with pensions. It was yet another decade before courts attempted any serious analysis of pension plans as creating enforceable contractual rights. By 1991, however, Madame Justice Corbett could state with confidence in *Otis Canada Inc. v. Ontario (Superintendent of Pensions)* that “[c]learly the promise of a pension is a contractual matter”.

While the case law does not explicitly credit collective bargaining with changing the legal status of pensions, there is no doubt that the mechanics of collective bargaining, in which wage and benefit improvements are individually ‘costed’ as part of negotiating an agreement, brought into focus a concept of the ‘wage package’ that had been much less visible in a world in which individual employees simply took what they were offered. In *Drohan v. Sangamo*, possibly the first Canadian case on record to use the language of “deferred compensation”, Justice Morden described in detail, as part of the background to the dispute before him, a process of negotiation between the union and the company in which the union made explicit and well considered trade-offs between wage increases and pension benefit

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8 *Bardal, supra* note 6 at para. 28.
11 *Otis Canada Inc. v. Ontario (Superintendent of Pensions)*, [1991] O.J. No. 251; 2 O.R. (3d) 737 (Ontario Court, General Division) at para. 44 (“Otis”). Justice Marie Corbett was a pioneering pension law practitioner prior to her elevation to the bench. See also *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449 (Gen Div.), in which Justice George Adams, a former chair of the Ontario Labour Relations Board, held that players’ pension entitlements were “irrevocably earned upon the expenditure of their efforts” and the employer pension contributions could be “reasonably characterized as deferred wages”. (49) Both these cases involved employees represented by unions, although neither judge grounds the contractual nature of the obligation within the framework of collective bargaining.
12 (1976), 11 O.R. (2d) 65 (H.C.J.). Justice Morden reluctantly dismissed the pension claim against the company, accepting the company’s argument that the pension plan was part of the collective agreement and therefore the court had no jurisdiction pursuant to s.3(1) of Ontario’s *Rights of Labour Act* [now R.S.O. 1990, c.R.33]. See discussion at Section 5, below.
increases. The Ontario Court of Appeal connected the dots between the costing process and the contractual nature of pensions in *Metropolitan Toronto Police Services Board v. Ontario Municipal Employees Retirement Board*. Krever J.A., speaking for the court, observed that the pension benefit at issue was provided almost entirely through collective bargaining: “…as a result, it should be assumed that the cost of those benefits was considered in the overall compensation package at the time of implementation. The benefits may reasonably be thought of as present wages postponed or deferred.”  

The role of collective bargaining in garnering recognition for pensions as deferred wages has been explicitly acknowledged by policy-makers: for example, Ontario’s Ministry of Financial Institutions, commenting in a 1989 pension reform document, noted that “[i]n recent years, pensions have become an integral part of the collective bargaining process. This factor, in particular, has contributed to the recognition of pensions as part of the compensation package.”

The shift away from the language of ‘gift’ and ‘gratuity’ was of enormous conceptual significance. As we shall see, however, the emerging recognition of pensions as contractual rights did not dislodge the entrenched notion that the establishment and administration of pension plans was a core management function. Even in unionized workplaces, employees continued to participate in plans largely on the terms offered by the employer. In *Otis*, despite her assertion that pension rights are contractual, Corbett J. placed no qualifications on her assertion that “[a]bsent union negotiation, an employer ha[s] the legal right to determine the terms of a pension plan”, including the right to amend the plan unilaterally even after the union had become certified as bargaining agent for plan members. As she saw it, the company “continues in law to have this right subject to applicable legislative standards respecting pensions.” In the next sections, we will explore how Canadian labour law dealt with the issue of employer control over pension plans.

**3.0 BARGAINING FOR PENSIONS**

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15 *Otis, supra* note 11 at para. 27. The right to determine the terms of the plan also included the right to amend it.
3.1 The Legal Battle over Pension Bargaining in the United States: The Inland Steel Case

As we saw in Chapter 2, prior to the advent of collective bargaining legislation, employers worked very hard to sustain the proposition that pensions were not “part of the consideration for employee’s services”. Most employers in both the United States and Canada saw no reason why the advent of collective bargaining should change the legal nature of pension plans. In the period immediately after the Second World War when unions began to bring pension issues to the bargaining table, employers vigorously resisted. When unions pressed the point, U.S. employers sought legislative amendments to exclude all benefit plans from the scope of collective bargaining. When their lobbying efforts were defeated, they continued the battle in the courts. By the late 1940s, the issue of whether employers were required to bargain about pension issues was before the National Labour Relations Board (“NLRB”), the administrative tribunal established to administer collective bargaining legislation, in the case of Inland Steel Company and Local Union Nos. 1010 and 64, United Steelworkers of America, (CIO). The dispute focused on whether or not pension plans, including mandatory retirement provisions, were “wages and conditions of employment” and therefore fell within the scope of mandatory collective bargaining under the National Labor Relations Act.

The Inland Steel dispute had crystallized over the company’s unilateral changes to its retirement plan, and its subsequent refusal to submit to arbitration over a grievance challenging the mandatory retirement of a number of employees. As the NLRB described it, when faced with pension demands at the bargaining table:

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17 See Harry A. Millis & Emily Clark Brown, From the Wagner Act to Taft-Hartley (Chicago: University of Chicago Press, 1950) at 568; Sanford M. Jacoby, Employing Bureaucracy: Managers, Union and the Transformation of Work in the 20th Century, rev.ed.. (Mahwah, N.J.: Lawrence Erlbaum Associations, 2004) at 267. The legislative history of employer efforts to amend the statute is also discussed in Inland Steel Company and Local Union Nos. 1010 and 64, United Steelworkers of America, (CIO),77 NLRB No. 1 (1948)
18 77 NLRB No. 1 (1948) (“Inland Steel, NLRB Decision”).
19 The pension plan was first implemented in 1936, prior to the certification of the union. The union was certified as bargaining agent in 1941: ibid. at 15-16.
20 It appears that a mandatory retirement policy had been in place for some time, but Inland Steel had suspended its operation, as had many other industries, because of wartime labour shortages: ibid. at 16.
21 Ibid. at 6-7. The NLRB decision had also made it clear that the related issue of mandatory retirement fell within the scope of bargaining as a “condition of employment” affecting an employee’s tenure.
…[the employer] failed and refused to bargain with the Union respecting the interpretation of the contract and the substantive matters of the pension program, and it continues to fail and refuse to do so, because of its fixed view that the establishment and operation of such a program is a management function outside the scope of the collective bargaining rights granted employees under the Act.

In support of its position that pension matters did not fall within the scope of bargaining, Inland Steel argued that pension matters are too complex and technical to be addressed through collective bargaining and collective agreements. In large and complex workplaces, it pointed out, pension plans cut across bargaining unit lines, and therefore could not be realistically and practically addressed at single bargaining tables. It argued that the efficacy of pension plans is intimately linked to mandatory retirement, and establishing a retirement age is inherently a management prerogative. Finally, it argued that pensions are gifts, not entitlements.

The NLRB rejected these arguments on the ground that pensions were “wages” and therefore clearly bargainable:

There is indeed an inseparable nexus between an employee’s current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer’s financial contribution thereto, in whole or in part, on behalf of the employees provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market. In substance, therefore, the respondent’s monetary contribution to the pension plan constitutes an economic enhancement of the employee’s money wages. Their actual total current compensation is reflected by both types of items.

Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative’s interest in it, and the terms of its grant, is not different than in any other case where a change in the wage structure is effected.

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22 Inland Steel, NLRB decision at 3-7; Inland Steel Co. v. National Labour Relations Board (1948), 170 F. 2d 247 (U.S. Court of Appeals, Seventh Circuit) (“Inland Steel, Court of Appeal Decision”) at 3
23 Inland Steel, NLRB Decision, supra note 18 at 4; Court of Appeal Decision, supra note 22 at 6.
24 Court of Appeal Decision, supra note 22 at 9. Inland Steel also argued before the NLRB that the management rights clause in the collective agreement gave the company carte blanche to deal with pension matters: NLRB Decision, supra note 18 at 6.
25 Inland Steel, Court of Appeal Decision, supra note 22 at 20. This argument is not discussed in the NLRB Decision.
26 Ibid. at 2-3.
The U.S. Court of Appeals, Seventh Circuit concurred with the NLRB. The court agreed that the “better view” was that pensions were “wages”; in any event, it held that pensions were “conditions of employment” and therefore fell within the scope of bargaining.\(^{27}\)

When the U.S. Supreme Court denied certiorari in *Inland Steel*,\(^{28}\) employers were forced to recognize that unions had a legal right to bring pension issues to the bargaining table. Having lost the legislative lobby and the court battle, however, U.S. employers continued to fight on undeterred; the battleground simply shifted now to the bargaining table and the arbitration chamber, and in some high profile cases to the picket line.\(^{29}\) Employers who were prepared to hold the line could and did use their bargaining power to keep employee pensions within the realm of management rights, with considerable success.

### 3.2 The Scope of Pension Bargaining in the Canadian Private Sector

The scenario that unfolded in Canada was not dissimilar. Canadian law has historically taken a more expansive and flexible approach to the scope of collective bargaining than American law; as the Supreme Court of Canada has noted, “[t]he dichotomy between mandatory and permissive subjects for bargaining has not been adopted in Canada, which requires good faith bargaining on all issues”.\(^{30}\) Cases did not emerge early in which employers directly challenged the right of unions to put the issue of pensions and mandatory retirement on the bargaining table. When the issue did surface in the 1970s in *British Columbia Hydro and Power Authority et. al. v. British Columbia Labour Relations Board*,\(^{31}\) the Supreme Court of Canada upheld the decision of the B.C. Labour Relations Board requiring B.C. Hydro to bargain about pension issues, notwithstanding the fact that the Hydro plan was a statutory plan giving the employer only limited legal authority to make plan amendments. The proposition that pension matters fall within the scope of collective bargaining is now so

\(^{27}\) *Ibid.* at 12. The employer’s attempt to revive ‘gift theory’ by analogizing pension payments to the type of “voluntary payment that might be made to each employee on his marriage, or on the birth of a child…” was peremptorily dismissed as “far-fetched”: 20.

\(^{28}\) 336 U.S. 960 (1949).

\(^{29}\) See discussion at Section 6.3, below.


firmly entrenched in Canadian law that in his *Royal Oak Mines* decision, Cory J. includes “a refusal to negotiate about pensions” on his very short list of employment issues so mainstream that a refusal to entertain them at the bargaining table would constitute a *per se* violation of the duty to bargain in good faith.32

The right to bring an issue to the bargaining table, however, does not automatically generate meaningful bargaining on that issue. While Canadian law takes a generous view of the scope of bargaining, it takes an equally generous view of the right of bargaining parties to maintain hard-nosed positions on particular issues. The law is clear that the duty to bargain does not entail a duty to agree. Thus, in what it described as a “precedent-setting case in Canadian labour law”, *Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union*,33 the British Columbia Labour Relations Board dismissed a union complaint that the employer had failed to bargain in good faith by refusing to discuss improvements to retirees’ pension benefits. The Board unequivocally rejected the employer’s claim that retiree pension benefits were not a “mandatory” subject of bargaining.34 But it likewise rejected the union’s argument that refusal to discuss a legitimate subject of collective bargaining was unlawful: “[e]ither a union or an employer is entitled to insist, as a matter of principle, that certain of its affairs will not be subject to the restraints of the contract.”35 In the result, unions are free to take pension issues to impasse, including issues related to benefits for retirees as well as employees. But the law will not boost their bargaining power over these issues by forcing employers to cede at the bargaining table their traditional management prerogatives with respect to pension plans.36 As we examine how Canadian collective agreements and arbitrators interpreting those collective agreements actually deal with pension issues, we will

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32 *Royal Oak Mines Inc. v. Canada Labour Relations Board and Canadian Association of Smelter and Allied Workers (CASAW), Local No. 4*, [1996] 1 S.C.R. 369 at para. 44. Only two other issues make the list: a refusal to include a just cause clause in an agreement, and a refusal “to consider a grievance arbitration clause”.


35 *Pulp and Paper Industrial Relations Bureau v. Canadian Paperworkers Union*, supra note 9 at 79.

36 Deaton argues that the absence of a Canadian equivalent to the *Inland Steel* case means that “whether pensions in the private sector are a mandatory subject for negotiations is a grey area of the labour law”: supra note 36 at 144. As the above discussion makes clear, I disagree with this conclusion. I do not, however, disagree with his related conclusion that “unions in Canada must rely on their bargaining strength – power – to deal with pension matters”: ibid.
find compelling evidence that employers have used their bargaining power quite effectively to limit the reach of collective bargaining into employer pension prerogatives.

3.3 The Scope of Pension Bargaining in the Canadian Public Sector

The scope of bargaining in Canada has traditionally been more limited in the public sector than in the private sector. Public servants were often completely excluded from the provincial and federal collective bargaining acts passed in the late 1940s and 1950s. While laws granting collective bargaining rights to public servants began to make their way into the statute books in the late 1960s and early 1970s, they typically granted more limited rights than the labour statutes of general application. A common limitation was a restriction on the scope of bargaining; one topic frequently on the list of issues outside the scope of public sector bargaining was pensions. According to Fryer, “Provincial Public Sector Labour Relations” in Gene Swimmer & Mark Thompson, eds., Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning (Kingston, Ont.: Industrial Relations Centre, Queen’s University, 1995) 341 at 341-5. Saskatchewan, where public sector employees were covered by general labour statutes from the outset, was the exception to the rule.

In the broader public sector, including such sub-sectors as police services and crown agencies, governments often placed fewer limits on the scope of bargaining. Even in this context, however, unions often still had to work within the constraints of special bargaining rules. Legal arguments continued to arise on such issues as whether employers could be forced to bargain about pension rights for spouses and dependents of employees, or retirees. Courts came to differing conclusions on the scope of broader public sector pension bargaining. In Town of Dryden and Dryden Police Association, one Ontario High Court justice held that statutory language permitting bargaining over pensions for “members of the police force” did not permit bargaining over pension benefits for widows and orphans of police officers. A few years later, the Divisional Court, interpreting the same language, disagreed and ruled that bargaining over widows and orphans pensions was permissible. In

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37 John L. Fryer, “Provincial Public Sector Labour Relations” in Gene Swimmer & Mark Thompson, eds., Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning (Kingston, Ont.: Industrial Relations Centre, Queen’s University, 1995) 341 at 341-5. Saskatchewan, where public sector employees were covered by general labour statutes from the outset, was the exception to the rule.

that same decision, however, the court upheld other limitations, ruling that bargaining about inflation protection for the pensions of retired officers was not permissible.\textsuperscript{39}

### 4.0 PENSION RIGHTS WITHIN THE CONTEXT OF COLLECTIVE AGREEMENTS: THE ARBITRAL JURISPRUDENCE

#### 4.1 Introduction

Unions won the battle over the issue of whether pensions and related retirement issues fell within the scope of collective bargaining; after \textit{Inland Steel}, it was clear that unions had the right to bring these issues to the bargaining table. In the arbitration forum, however, they lost the real war: the war to wrest unilateral control over pension plans from employers. Ironically, arguments that had been unpersuasive when employers deployed them to persuade labour boards and courts that pensions fell outside the scope of bargaining were now recycled more successfully as reasons why pension plans and pension decisions should not be subject to arbitral review. Arbitrators were ultimately persuaded that pension issues were too complex, too technical, too multi-lateral and too intimately meshed with core management functions to be readily encompassed within collective agreements.

In this section, I will examine the application to the pension context of three important strands of Canadian arbitral jurisprudence, all of which have played a role in ensuring that pension plans stay securely within the unilateral control of management. These three strands serve a common function: to limit the extent to which collective bargaining, collective agreements and grievance arbitration can be permitted to encroach on the employer’s ability to pursue its own interests in the management of its business affairs. The first and most fundamental strand is the reserved or ‘residual’ rights theory of management rights.\textsuperscript{40}

\textsuperscript{39} Metropolitan Toronto Police Association and Board of Commissioners of Police for Metropolitan Toronto (1980), 111 D.L.R. (3d) 658 (Ont.H.C.J., Div.Ct.); but see Liquor Control Board of Ontario and Ontario Liquor Board Employees Union et al. (1980), 114 D.L.R. (3d) 715 (Ont. H.C.J., Div. Ct.). These two cases, as well as the earlier \textit{Dryden} case, came before the court as challenges to the jurisdiction of interest arbitrators rather than as bargaining complaints.

\textsuperscript{40} David Beatty & Brian Langille provide the following definition of “reserved rights” theory in their article, “Bora Laskin and Labour Law: From Vision to Legacy” (1985) 35 U.T.L.J. 672 at 699:

According to the method of interpretation which was implicit in this principle of law, where a collective agreement did not expressly deal with a particular matter, whether management was entitled to take some initiative with respect to it would be determined by reference to ‘rights’ which management enjoyed at common law prior to the legislative approval and adoption of free collective bargaining.
Pension litigation emerged early as an important *situs* of conflict over the extent to which pre-existing management powers and prerogatives survived union certification, and pension cases forced arbitrators to confront fundamental questions about the scope of management powers within the context of negotiated collective agreements. In the early pension cases, we see reserved rights theory competing directly with theories of ‘joint sovereignty’ or ‘equal partnership’. Unions argued that mandatory retirement was not permissible under collective agreements that did not permit the practice, while employers countered with arguments that management practices which were not expressly fettered by collective agreements remained permissible under common law. By the early 1960s, the reserved rights theory had become thoroughly entrenched, prompting arbitrators, and courts reviewing their decisions, to interpret collective agreement language in favour of broad employer discretion on a wide variety of pension-related issues.

Very closely related to the doctrine of reserved rights is the second jurisprudential strand: the doctrine of ‘arbitrability’. In support of management rights doctrine, Canadian arbitrators have traditionally taken a relatively narrow view of their jurisdiction to address terms and conditions of employment not spelled out in the collective agreement. I will argue that many arbitrators have taken a particularly narrow approach to the arbitrability of pension issues, invoking what has come to be known as the ‘four category test’, a jurisdictional filter which permits them to avoid arbitrating most pension issues except where pension plans fall into the narrow category of those expressly incorporated by reference into collective agreements. One result of a narrow interpretation of arbitral jurisdiction is that despite recognition that pension plans establish contractual rights, unionized employees have had difficulty finding an appropriate forum for their interpretation and enforcement.

The third strand relates to the union recognition issue, and the narrow interpretation given by many arbitrators to the statutory obligation on employers to recognize the union as bargaining agent. One of the basic principles at the heart of the Canadian collective bargaining system is the principle that once a union is certified, employers are required both by collective bargaining statutes and collective agreements to recognize the union’s
bargaining authority.\footnote{Langille, “Equal Partnership”, \textit{supra} note 30 at 534. Most Canadian collective agreements contain explicit clauses recognizing the union as the exclusive bargaining agent; in addition, collective bargaining statutes deem such clauses into collective agreements. See, for example, s.45(1) of the \textit{Labour Relations Act, 1995}, R.S.O. 1995, c. 1, Sched A: “Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.”} While some arbitrators have found that unilateral employer changes to pension rights violate recognition clauses, others have not, leaving employers free within their sphere of ‘reserved rights’ to operate pension plans as they had done before their employees became unionized.

The contradictions posed for labour law by these three jurisprudential ‘stands’ are not, of course, limited to the pension sphere. The questions they raise are part of the larger theoretical question that preoccupied Canadian arbitrators in the 1950s and 60s: to what extent did the certification of a bargaining agent and the negotiation of a collective agreement fetter plenary management rights held under the pre-collective bargaining regime? Theories of reserved management rights, narrow readings of arbitral jurisdiction, and a limited conception of the employer obligation to recognize the union have all played an important role in what critical legal scholars interpreting U.S. labour law have described as the process of “deradicalization” of collective bargaining frameworks: a process by which judicial and arbitral interpretation and application of collective bargaining laws operates to ensure that these laws do not seriously disturb the pre-existing distribution of power in the workplace.\footnote{See Katherine Stone, “The Post-War Paradigm in American Labor Law” (1981) 90 Yale L.J. 1509; Karl Klare, “The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941” (1978) 62 Minn. Law Rev. 265; Karl Klare. “Labor Law as Ideology: Towards a New Historiography of Collective Bargaining Law” (1981) 4 Indus. Rel. L.J. 450.} While these issues are not unique to pensions, I would argue that because of the historic role played by pension plans in the strategic management of the work force, the “long shadow” of “pre-collective bargaining \textit{de facto} employer control”\footnote{Langille, “Equal Partnership”, \textit{supra} note 30 at 534.} is particularly obvious in the evolution of arbitration law concerning employment pension plans.

\section*{4.2 Reserved Management Rights and Mandatory Retirement}

No issue lies closer to the core of management’s need to control pension plans than the issue of mandatory retirement. It is therefore no coincidence that many of the early arbitration decisions which were the seed-bed of reserved management rights doctrine in Canada arose
in mandatory retirement cases, which tested both the broad issue of the extent to which pre-collective bargaining management powers still prevailed in unionized workplaces, and the narrower but very important issue of the extent to which such commonplace collective agreement provisions as just cause clauses and seniority clauses protected older employees against unilateral management fiat.

The first reported arbitration case addressing pension issues, *International Chemical Workers Union, Local 279, in re Rexall Drug Co. Ltd.*,44 dealt with a union challenge to the employer’s mandatory retirement policy. The *Rexall* mandatory retirement policy was part of a pension plan introduced in 1940, pre-dating the advent of collective bargaining in the plant by some six years. Membership in the plan was a condition of employment for all eligible employees, although age and service requirements meant that many employees did not qualify for benefits. The union had attempted to “draw [the pension plan] into the orbit of collective relations through suggested improvements in benefits”,45 but the company had consistently and successfully resisted those efforts, and the pension plan was not referred to in the collective agreement, although the agreement was described as containing the “traditional protective clauses respecting security of employment” – seniority and just cause provisions – and “the usual provisions respecting Management rights”.46 When the company applied the mandatory retirement policy to four employees over the age of sixty-five, the union grieved that the employees had been discharged without just cause and contrary to the seniority provisions of the agreement. Two of the employees in question were entitled to retirement pensions; the other two had not been employed for long enough to establish eligibility for pension coverage.47

The case was decided by an arbitration board chaired by Bora Laskin, law professor, experienced labour arbitrator, subsequently Chief Justice of the Supreme Court of Canada and Canada’s most prominent opponent of reserved rights theory.48 Laskin’s general

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44 (1953), 4 L.A.C.1468(Laskin) (“Rexall”).
46 *Ibid.*.
47 While the plan made coverage mandatory for all “eligible” employees, at least five years service was required to establish eligibility: *ibid.* at 1469.
48 See Beatty & Langille, *supra* note 40 at 698-711. The “reserved rights” controversy and Laskin’s role in it is discussed at 699-711. Laskin’s treatment of the *Rexall* case is discussed at 708-9.
approach to issues on which a collective agreement was ‘silent’ sought a middle ground between reserved right theory and the more radical ‘equal partnership’ theory. In his view, where a collective agreement did not directly address an issue, the arbitrator was obliged, taking a purposive, functional and contextual approach, to tease out the intention of the parties in accordance with an evolving “common law of the shop” which took account of the interests of all parties.\(^{49}\) This approach is very evident in the *Rexall* decision, which is vintage Laskin: a crisp, three-page decision touching upon almost all important themes which were to arise in subsequent pension arbitration litigation.

The *Rexall* arbitration board first addressed the fact that the pension plan in question pre-dated the collective agreement. The board held that collective bargaining did not wipe the slate clear when it came to terms and conditions of employment; a collective agreement should be construed to make allowances for a pre-existing pension plan “in a situation where the plan was known to the employees and to the Union prior to the execution of the first Collective Agreement between the Union and the Company”\(^{50}\). However, pre-collective bargaining terms and conditions of employment can prevail *only* if they are consistent with the terms of a collective agreement.\(^{51}\) Furthermore, the board made it clear that although a collective agreement could accommodate a *pre-existing* compulsory retirement policy as part of a pension plan, a plan introduced *after* a union was certified would get different treatment; it was unequivocal that “[i]f the company had sought to introduce a compulsory retirement policy unilaterally after the advent of the Union, then clearly no force could be given to it.”\(^{52}\)

Having framed the issue thus, the board then engaged in a flexible interpretive exercise to determine whether or not the company’s retirement policy was in fact inconsistent with the collective agreement. On this question, the board came to a different conclusion for those employees ineligible for pensions than for those who did receive pensions. For ineligible employees, the board held that the plan had no application to their situation: a pension plan can only be a condition of employment and “cognizable under the Collective Agreement” for

\(^{49}\) *Ibid.* at 693-5.

\(^{50}\) *Ibid.* at 1468.


\(^{52}\) *Ibid.* at 1470.
employees who come under the plan. Ineligible employees were therefore entitled to be reinstated with full compensation. For employees eligible for pension, however, the board was not prepared to characterize their retirements as a ‘discharge’: “[i]t is straining well-known industrial usage of the term “discharge” to have it include compulsory retirement because of age” under the terms of the pension plan. The terms of the plan were well known to the employees and the union, and “the employment security provisions of the collective agreement [i.e. the seniority and ‘just cause’ clauses] should be interpreted to make allowance for the pension plan”. In the absence of any evidence of an arbitrary, discriminatory or unreasonable application of employer discretion in applying its mandatory retirement policy, the arbitration board dismissed their grievances.

The Laskin approach to reserved management rights, and more specifically to the mandatory retirement issue, was not without its adherents. Very quickly, however, it became a minority view, and the reserved rights approach attracted increasing support in pension and retirement cases. Reserved rights theory got an early boost from the Supreme Court of Canada in a 1959 decision in Canadian Car & Foundry Company Limited v. Dinham and Brotherhood of Railway Carmen of America. In 1954, the company had unilaterally implemented a pension plan containing mandatory retirement provisions, and applied it to force a large number of employees to retire. The collective agreement in force at the time contained no reference to pensions or retirement. The union grieved, but was unsuccessful at arbitration. Rather than seeking judicial review, the retired employees filed suit against the employer for wrongful dismissal. When the matter reached the Supreme Court of Canada,

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53 Ibid. at 1469.
54 Ibid. at 1470.
55 Ibid. at 1469.
56 See, for example, Re United Steelworkers, Local 3998, and Dunham-Bush (Canada Ltd.) (1964), 15L.A.C. 270 (Lang); Re United Steelworkers, Local 2469 and William Kennedy & Sons Ltd. (1959), 10 L.A.C. 121 (Hanrahan).
57 Among reported decisions see, for example, United Automobile Workers, Local 127 v. Libbey, McNeil & Libbey (1954), 5 L.A.C. 2120; Re Sudbury Mine, Mill & Smelter Workers’ Union & Falconbridge Nickel Mines Ltd. (1958), 9 L.A.C. 105 (Little); Re International Woodworkers, Local I-71 and Canadian Forest Products Ltd. (1961), 12 L.A.C. 25 (Wilson). Many arbitration cases in this era were, of course, not reported.
58 Canadian Car & Foundry Company Limited v. Dinham and Brotherhood of Railway Carmen of America, [1960] S.C.R. 3 (“Canadian Car & Foundry”). Some of the facts in this account are taken from Re United Automobile Workers, Local 1075 & Canadian Car and Foundry Co. Ltd. (1955), 6 LAC 161 (Curtis) (“Canadian Car & Foundry II”), the union’s second attempt to challenge the mandatory retirement policy at arbitration after an unsuccessful strike over the issue. The second arbitration had the same result as the first.
that court ultimately held that the employees were bound by the arbitration decision. In *obiter*, however, the court put on the record its complete agreement with the arbitration decision on the merits:59

The determination of a mandatory retirement age, applicable to all employees, is clearly a function of management. While it may well be that the age at which such compulsory retirement should become effective could be made the subject of a collective agreement, the agreement under consideration here does not touch upon it.

With respect to the argument that mandatory retirement clashed with the seniority protections contained in the agreement, the court agreed with the arbitrator’s reasoning that because age does not necessarily correlate with seniority, there was no clash between a policy of compulsory retirement at age sixty-five and the existence of seniority rights in the collective agreement. The court appeared untroubled by the obvious consequence that application of the mandatory retirement policy would result in putting senior employees out on the street while junior employees remained at work.

The decision of the Supreme Court of Canada in *Canadian Car & Foundry* does not refer to a ‘just cause’ clause in the collective agreement at issue.60 Accordingly, the case could be distinguished on the basis that it dealt with an atypical collective agreement.61 The Supreme Court of Canada’s next foray into mandatory retirement territory, *Bell Canada v. Office and Professional Employees’ International Union, Local 131*,62 could not be so easily side-stepped. The *Bell Canada* case dealt with the grievance of an employee who had been retired at age sixty-one pursuant to the company pension plan under which retirement was at the discretion of the company. The collective agreement provided that “[t]he Company may dismiss or suspend an employee for sufficient and reasonable cause”. The company launched a preliminary objection to the jurisdiction of the arbitrator to deal with the grievance, arguing, based on *Canadian Car & Foundry*, that retirement decisions were not governed by the collective agreement. The arbitrator, the very experienced labour board chair and labour

59 *Canadian Car & Foundry*, ibid. at 9.

60 The collective agreement did in fact contain a just cause clause, as is clear from *Canadian Car & Foundry II*, supra at note 58.

61 The decision is distinguished on this basis in *Re United Steelworkers, Local 3998, and Dunham-Bush (Canada Ltd.)* (1964)15 L.A.C. 270 (Lang).

law professor Paul Weiler, dismissed the objection, holding that retirement was a form of dismissal reviewable by an arbitrator against the ‘just cause’ standard. Weiler commented:  

The typical collective agreement clearly shows why compulsory retirement should be considered, *prima facie*, to be a form of discharge. An employee’s security of tenure in an on-going firm is ordinarily protected against temporary interruption by limitations on lay-off or recall or by a suspension. It is ordinarily protected against permanent interruption by limitations on discharge. From the employee’s point of view, the significance of compulsory retirement appears to be exactly the same as an admitted discharge. He has lost his job, his seniority rights, and earning opportunities, permanently, against his will, and because of a Company decision in its own interests and discretion.

The majority of the Supreme Court of Canada quashed the carefully reasoned arbitration decision with brief reasons that completely beg the question before the court:  

Article 8 of the collective agreement reading, "The Company may dismiss or suspend an employee for sufficient and reasonable cause", cannot possibly be read as "dismiss, or suspend, or retire on pension". Until the words "retire on pension" appear in art. 8 of the collective agreement, there can be no basis for the arbitrator's decision. Dismissal, suspension and retirement on pension are three different and distinct concepts.

Bora Laskin, by then a justice of the Supreme Court, dissented, in what Adams describes as “the first thoroughly reasoned judicial opinion outlining the appropriate standards of judicial review of arbitration matters”.  

Arbitrators and courts dealing with subsequent mandatory retirement grievances have made rulings which accord with the spirit of these Supreme Court of Canada decisions even where a careful reading of those decisions would have sustained a more employee-friendly approach.  

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63 Weiler’s arbitration decision is not reported. Adams’ article quotes extensively from Weiler’s reasons, from which this quotation is taken: *ibid.* at 408.

64 The lower courts dismissed the company’s application for judicial review on the narrow technical ground that the parties had remitted a ‘specific question of law’ to the arbitrator, and his decision was therefore not reviewable. The legal background to this technicality is discussed by Adams: *ibid.* at 395-99.

65 *Ibid.* at 395-6. In doing so, Laskin upheld as reasonable Weiler’s conclusion that mandatory retirement was the legal equivalent of dismissal, despite his own view, expressed as arbitrator in the *Rexall* case, that in the absence of conduct that was arbitrary, unreasonable or in bad faith, mandatory retirement on pension could not be grieved as a discharge.

66 In addition to cases discussed in this paragraph, see *Re Sandwich, Windsor and Amherstburg Railway Co. et al.*, [1961] O.R. 185, a decision in which the failure to find a clash between the unilateral policy and the language of the collective agreement is inexplicable.
Products Ltd., the arbitrator described himself as simply following the existing case law when he held that compulsory retirement constitutes a special species of “cause” justifying termination without notice or compensation. Neither Bell Canada nor Canadian Car & Foundry provides any warrant for this extraordinary proposition; indeed, the Supreme Court in the later case expressly stated (albeit obiter) that an employee subject to compulsory retirement is entitled to notice of termination. Arbitrators have also read into these court decisions a license for management to impose compulsory retirement even outside the context of pensionable employment, despite the fact that both Canadian Car and Foundry and Bell Canada involved policies imbedded in pension plans and the Bell case arguably limits its ruling to “retirement on pension”. In Re British Columbia Packers Ltd and United Fisherman and Allied Workers’ Union, for example, an arbitration board pronounced it “settled law” that the right of management to promulgate unilateral compulsory retirement policy exists independent of membership in a pension plan and/or entitlement to pension benefits. The board in this case also concluded that there is no inherent limitation on the age at which such a policy can be imposed: “[o]n the judicial authorities considered it seems that the right to fix a compulsory retirement age is not fettered by any concept of reasonableness or social acceptability.” Nevertheless, the arbitrators were prepared to find in the B.C. Human Rights Act a requirement that employers must apply retirement policies reasonably. On the facts before them, they found that the employer’s conduct unreasonable because it had failed to take into account the fact that the employee would receive no pension and had continuing financial needs. Accordingly, they allowed the grievance and reinstated the employee with full compensation.

68 Ibid. at 28.
69 The court said: “it is clear that unless the respondent had acquired some special right under the collective agreement, the appellant was entitled to terminate the contract of hire of the respondent’s services at any time, for any reason, upon giving him the notice of termination required under the Civil Code” [emphasis added]: Canadian Car & Foundry, supra note 58 at 9.
70 [1979] B.C.C.A.A.A. No. 20; 24 L.A.C. (2d) 44 (Hope).
71 Ibid. at para 16.
72 Ibid. at para. 22. Despite its doctrinaire interpretation of the Supreme Court of Canada jurisprudence, the arbitration board in this case makes its distaste for compulsory retirement as a social institution very clear: see para. 80.
4.3  Arbitrability and the Evolution of the ‘Four-Category Test’

As early as the 1960s, the arbitral debate about the relationship between collective agreements and pension plans had begun to crystallize around the issue of “arbitrability”. Employers opposing grievances on a wide range of pension-related issues argued that grievances on such issues should not be dealt with at all on their merits – i.e. were ‘in arbitrable’ – because they did not raise issues that fell within the scope of the collective agreement. While this strategy could fairly be characterized as simply a ‘reserved management rights’ argument by another name, it had the merit of apparent neutrality, converting the power issue clearly imbedded in the management rights doctrine to an abstract proposition of ‘jurisdiction’. Typical of how arbitrators approached preliminary objections to arbitrability is *Re Canadian Union of Public Employees, Local 1000 and Hydro-Electric Power Commission of Ontario*. The grievance in this case raised the issue of whether the employer could unilaterally ‘integrate’ an existing employment pension plan with the newly-established public Canada Pension Plan (“CPP”), cutting the benefits provided by employment pension plans to ensure that the employer’s over-all pension costs (and the employees’ pension benefits) would not go up. In the reported decision on the company’s preliminary objection to arbitrability, none of the details of the grievance are provided, nor do we see the actual language of the provisions of the collective agreement referred to *en passant* in the board’s reasons. The arbitration board observed with complete confidence, but citing no authority:

Obviously where a pension plan is entirely separate from a collective agreement and the union has no connection with it, a board of arbitration, which derives its authority from the collective bargaining agreement and which can deal only with disputes under that agreement, *lacks jurisdiction*, unless the agreement draws the plan into it in some way. In such cases, it matters not that the company and union enter into discussions with respect to the provisions of the plan and that these discussions

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73 Interestingly, the *Rexall* case is indexed by the reporters of the Labour Arbitration Cases under the key word “arbitrability”, although the term is not used anywhere in the decision.

74 (1966), 17 L.A.C. 244 (Thomas) (“Hydro-Electric”).

75 The issue of whether CPP benefits should be integrated with employment pension benefits was hotly debated at the time the CPP was enacted, with employers arguing for mandatory integration and unions opposing any integration at all; see discussion in Chapter 4 at 3.4. By no means all arbitrators allowed employers to impose integration unilaterally: see, for example, *International Assn. of Machinists and Aerospace Workers, Flin Flon Lodge No. 1948 v. Hudson Bay Mining and Smelting Co.*, [1968] S.C.R. 113.

76 *Hydro Electric*, supra note 74 at 245 (Ian Scott, sitting as union nominee, dissenting).
coincide with negotiations for successive collective bargaining agreement [emphasis added].

Since the pension plan was not “drawn into” the collective agreement in question, the arbitration board simply dismissed the grievance.

*Hydro-Electric* set the bar very high for unions seeking to address pension issues at arbitration, holding that “[h]ad the parties intended the plan to be incorporated into the collective agreement they would have *expressly* stated this to be the case” [emphasis added].

This bright-line approach was irresistible to arbitrators; unions with pension-related grievances rarely made it past the preliminary objection unless the pension plan was expressly incorporated by reference into the pension plan. Citing lack of jurisdiction, arbitrators declined to hear grievances on a wide range of pension issues, including calculation of pension benefits, calculation of CPP offsets of pension benefits, crediting of pensionable service, calculation of employer pension contributions, deployment of pension surplus, denial of pension benefits to individual retired employees, unilateral implementation of an early retirement incentive plan, denial of same-sex benefits, and the right to buy pension credits for past service.

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77 *Ibid.* at 246. Ironically, *Hydro-Electric* purports to draw heavily on Laskin’s decision in *Rexall*. Given Laskin’s by then very well-known views on the reserved rights theory of management rights, the extensive references to *Rexall* can only be mischievous.


80 *Progistix-Solutions Inc. v. Communications, Energy and Paperworkers Union of Canada (Connolly Grievance)*, [2002] C.L.A.D. No. 188 (Keller); *Beachville Lime Ltd v. Communications, Energy, and Paper Workers Union, Local 3264 (Wenzel Grievance)*, [2002] O.L.A.A. No. 512 (Williamson). But see *Canada Post Corp. v. Canadian Union of Postal Workers (Lee-Campeau Grievance)*, [2003] C.L.A.D. No. 105 (M. Picher), in which the arbitrator took the view that the employer’s preliminary objection to arbitrability “should be dealt with as part of the merits”, and allowed a grievance alleging that the employer had failed to credit a part-time employee with the appropriate number of working hours for purposes of credit under the pension plan.


82 *Dawn Foods*, supra note 81.

83 *U.M.W.A., District No. 26 v. Cape Breton Development Corp.*, supra note 80.

The reluctance of arbitrators to deal with issues relating to pension plans is now so entrenched that many arbitrators no longer bother to reason their way through the predictable preliminary objections; they simply invoke, by way of shorthand, what has become known as the ‘four category test’. This test takes its name from the influential labour law text, *Canadian Labour Arbitration*, in which authors Donald Brown and David Beatty summarize the current state of the jurisprudence on the arbitrability of issues arising in connection with what the text describes as ancillary documents “commonly found physically separate from collective agreements”, including pension plans. Brown and Beatty classify arbitration decisions addressing the relationship between collective agreements and such ancillary document by placing them in four categories. Category One encompasses situations in which the plan or policy is not mentioned in the agreement. In Category Two cases, the collective agreement specifically provides only for the payment of certain benefits, whereas in Category Three cases the collective agreement provides only for the payment of benefit premiums. Category Four encompasses cases in which the ancillary document (for our purposes, the pension plan) is incorporated by reference into the collective agreement. Where the relationship between the pension plan and the collective agreement falls into Categories One or Three, the authors point out that pension issues have typically been found inarbitrable. Where that relationship falls into Categories Two or Four, however, grievances have generated arbitrable issues. The ‘gold standard’, of course, is Category Four; where the plans is incorporated by reference, it may be enforced as part of the collective agreement. The authors note that before making a finding that a case falls into Category Four, arbitrators normally require “clear language” expressing a mutual intent to incorporate by reference.

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86 *Ontario Public Service Employees Union v. Ontario (Ministry of Community, Family and Childrens’ Services) (Ashley Grievance)*, [2003] O.G.S.B.A. No. 128 (Abramsky). Although the plan at issue in this case had previously been described as incorporated by reference into the collective agreement by the Divisional Court (see OPSEU, Local 439 and Royal Ottawa Health Care Group [2001] O.J. No. 446), the arbitrator disagreed.
88 It is, of course, open to the parties to provide specifically for arbitration of pension disputes without incorporating the plan into the collective agreement: see, for example, *International Nickel of Canada, Ltd. v. United Steelworkers of America*, [1977] O. R. No. 29 (H.C.J., Div.Ct).
89 *Brown & Beatty*, supra note 87 at 4.1440 (4-18).
Brown and Beatty themselves do not label their four-category matrix a ‘test’. They make no normative claims for their analysis. They are careful to point out that the case law is replete with examples of collective agreement language which cannot be slotted comfortably into any of these categories. Nevertheless many arbitrators now routinely apply the ‘four category test’ to pension grievances, so frequently that it has been described by one experienced Canadian arbitrator as “part of the climate against which parties negotiate their collective agreements”.  

4.4 Individual Bargaining and the Recognition Issue

The doctrine of reserved management rights has always co-existed very uneasily in Canadian labour law with the doctrine of union recognition: the rule that within the statutory collective bargaining framework, the union is the exclusive bargaining agent for all employees within the bargaining unit with respect to all terms and conditions of employment. As Judson J. famously pronounced in the 1959 decision of the Supreme Court of Canada in Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, once there is a union as bargaining agent:

> [t]here is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.

While the Compagnie Paquet case left open the possibility that employers might bargain directly with employees about matters not covered by the collective agreement, Laskin C.J.C. closed that loophole in McGavin Toastmaster Ltd. v. Ainscough et al:

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring

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90 The conceptual difficulties inherent in the ‘four category test’ are discussed in a number of arbitration decisions, including Coca-Cola Bottling Ltd. v. United Food and Commercial Workers Union (Boud Grievance), [1994] O.L.A.A. No 31 (Swan) and Local 1015 v. Scotsburn Dairy Group (Pension Funds Grievance), [2008] N.S..L.A.A. No. 1(Christie).


stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement.

This framework requires that all terms and conditions of employment be negotiated with the union. The recognition doctrine, on its face, would appear not only to preclude the unilateral imposition or alteration of terms of the employment contract which are not encompassed within the collective agreement, but to make the very notion of such extra-collective terms legally incoherent. Once pensions were clearly recognized as falling within the category of terms and conditions of employment, the recognition doctrine would appear to place very significant fetters on an employer’s ability to deal with pensions in pre-collective bargaining style. It was presumably the recognition doctrine on which Laskin based the distinction he made in the Rexall case between unilateral employer policies pre-dating collective bargaining, for which room could be made in the collective agreement, and unilateral policies post-dating union bargaining rights, for which employers had no such free rein.

As we have seen, on the issue of mandatory retirement policies, most arbitrators have not made the Laskin distinction; they have been quite willing to live with the contradiction between reserved management rights and the principle of union recognition, consistently rejecting union arguments that employers who have not bargained for a right to force employees to retire cannot find that power outside the collective agreement. Where employers have imposed or fundamentally changed pension plans themselves, however, unions have had some success in persuading arbitrators that union recognition principles bar unilateral action. The rationale behind fettering unilateral management authority to impose or significantly change a pension plan without negotiating with the union is carefully explained by an arbitration board chaired by George Adams in Re Steinberg Inc., Miracle Food Mart Division and Teamsters Union, Local 419.⁹⁴ The Steinberg case involved critical changes to two existing plans, the earliest of which dated back to 1954. Both plans were contributory. Up to January 1, 1974, however, plan membership had been voluntary. When the company changed the plans to require that all new employees participate as a condition of employment, the union grieved, claiming that compulsory membership and compulsory

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contributions violated the wage rate provisions of the collective agreement. The agreement was silent on pension issues, and the company argued that the grievance was inarbitrable. On the merits, it argued that a requirement that new employees join the pension plans was a condition of hiring, rather than a condition of employment, and therefore outside the range of the union’s exclusive bargaining authority. The Adams board had little difficulty finding the grievance arbitrable, concluding that a compulsory wage deduction had clear impact on negotiated wage rates. On the merits, it rejected a distinction between conditions of hiring and conditions of employment: “there can be no term or condition of employment, by contract of hiring or otherwise, existing outside the collective agreement to which the union has not agreed”. The fact that individual new hires had signed up individually for pension plan membership did not constitute lawful waiver of their rights: “an individual employee cannot, without the consent of his trade union, waive a benefit bargained on his behalf or agree to terms or conditions of employment not contained within the collective agreement without the trade union's consent.” In the absence of statutory authority, only an agreement with a union can confer on an employer the right to impose benefit plans requiring deductions from wages. The grievance therefore succeeded.

Other arbitrators, however, have not taken this approach. Re Palm Dairies Ltd. and Retail, Wholesale & Department Store Union, Local 580 addressed the unilateral imposition of an obligation both to join and to contribute to an employer pension plan. The arbitration board found a solid and long-standing history of employer refusal to bargain over pension issues, which had successfully kept any reference to pension issues out of the collective agreement. Accordingly, to impose any fetters on the employer’s right to impose a unilateral pension

95 Ibid. at para. 45.
96 Ibid. at para. 51.
97 The union failed to grieve the unilateral imposition of the compulsory plan until 1980. While the arbitration board granted a declaration that the compulsory pension contributions violated the collective agreement, it also held that the union was estopped from enforcing the declaration until the expiry of the then-current collective agreement: ibid. at para. 53.
98 See also Re Globe & Mail Ltd. and Toronto Newspaper Guild, (1978), 21 L.A.C. (2d) 112 (Fox); application for judicial review dismissed 23 L.A.C. (2d), 144n) and Re Consolidated-Bathurst Packaging Ltd. (Hamilton Plant) and Int'l Woodworkers of America, Local 6-29 (1980) 28 L.A.C. (2d) 230 (Brunner); in the latter case, the arbitrator found that the unilateral imposition of a contributory pension plan violated the collective agreement based on the recognition theory, but observed obiter that the impact of unilaterally imposed employee pension contributions on negotiated wage rates would not independently violate the collective agreement, since such contributions would not actually reduce an employee’s wages.
plan would amount to giving the union something “it has failed to achieve in collective bargaining”. As the arbitration board saw it, the ban on individual negotiations within the collective bargaining framework applied only to the narrow range of matters which the union had already succeeded, through collective bargaining, in bringing within the scope of the collective agreement. Matters which the union had not succeeded in bringing within the scope of the agreement continue to fall naturally within the realm of unilateral management power, “[q]uite apart from the concept of the residual rights of management.”

It is clear that the arbitration board finds this result “troublesome;” it argues that the right of an employer to compel participation in a pension plan and to impose unilateral deductions from wages does not accord with “the modern perception of industrial relations”. Nevertheless, in its view, the law leaves no room for any other result: “the Supreme Court of Canada has decreed that employers retain certain residual rights that can be lost or compromised only through collective bargaining itself”.

5.0 ENFORCEMENT OF PENSIONS RIGHTS FOR UNIONIZED EMPLOYEES

The cumulative effect of these three jurisprudential strands – the reserved management rights doctrine, and application and interpretation of related doctrines of arbitrability and union recognition – is that the pension rights of unionized employees, now clearly recognized as contractual legal rights, are rarely enforceable at arbitration. What are the practical implications for unionized employees of the refusal by arbitrators to adjudicate pension disputes? In theory, a decision by an arbitrator that a matter is not covered by a collective agreement or that a grievance is not arbitrable does not resolve the questions of whether the claimed rights exist in law, or whether those rights have been breached. It is simply a decision that arbitration is not the proper forum for dealing with those questions. If an arbitrator has no jurisdiction to adjudicate the dispute, presumably a court does.

Once pension plans began to be recognized as conferring legal rights, courts frequently assumed jurisdiction, without comment or controversy, in cases involving pension issues and

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100 Ibid. at paras.85, 91.
101 Ibid. at para 88.
102 Ibid. at para. 107-8.
103 Ibid. at para. 109.
104 Ibid. at para. 113. The decisions of the Supreme Court of Canada on which the arbitration board relies are Canadian Car & Foundry, and Bell Canada.
unionized employees. Courts saw most pension issues as involving principles of trust and contract law,\textsuperscript{105} and were confident of their own expertise. Occasionally, employers would find it in their interests to challenge the jurisdiction of the courts to hear pension issues, calling on standard precedent to the effect that labour disputes for unionized workers do not belong in the courts. When they did so, they were usually successful.\textsuperscript{106} Most employers, however, motivated by a desire to maintain as much control as possible over pension plans, were not anxious to characterize pension disputes as matters of collective bargaining, and the jurisdictional issue was rarely raised in civil actions.\textsuperscript{107}

More recently, however, since the decision of the Supreme Court of Canada in \textit{Weber v. Ontario Hydro},\textsuperscript{108} the doors to the court house have been closing on unions and unionized employees seeking enforcement of pension rights. The \textit{Weber} case, decided in 1995 with its companion case \textit{New Brunswick v. O’Leary},\textsuperscript{109} addressed the jurisdiction of grievance arbitrators to deal with non-labour law issues such as tort law and constitutional law. These decisions created a new and ostensibly more flexible framework for arbitrators in

\textsuperscript{105} See discussion in Chapter 5.
\textsuperscript{106} In both \textit{Cummings v. Hydro-Electric Power Commission of Ontario}, [1966] 1 O.R. 605 [integration of the employment pension plan with the CPP] and \textit{Drohan v. Sangamo} (1976), 11 O.R. (2d) 65 (H.C.J.) [reduction in pension benefits] Ontario courts applied the \textit{Rights of Labour Act} to hold that unions could not bring claims arising out of collective bargaining relationships before the civil courts. The \textit{Rights of Labour Act}, R.S.O. c.R-33 provides that “[a] collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of this Act or of the \textit{Labour Relations Act}.” In \textit{Drohan}, the court dismissed the union’s action with great reluctance; the matter had been before the courts for a number of years prior to the employer raising this jurisdictional objection; see the earlier case of \textit{Drohan v. Sangamo}, [1972] 3 O.R. 399 (H.C.J.), in which the court made a representation order and no jurisdictional issue was raised.
\textsuperscript{108} [1995] 2 S.C.R. 929 (“\textit{Weber}”).
\textsuperscript{109} [1995] 2 S.C.R. 967.
determining whether or not disputes between parties to a collective agreement fall within their jurisdiction. According to Weber, “The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement”. To make that determination, arbitrators must determine the “essential character of the dispute”, an exercise that involves looking at the facts giving rise to the dispute, and then at the provisions of the collective agreement, to determine whether the agreement contemplates that type of factual situation: in other words, whether the dispute arises expressly or inferentially from the agreement. If it does, the dispute belongs before an arbitrator and not a court. In holding that both Charter and tort issues could be dealt with at arbitration, the Weber and O’Leary cases clearly contemplate a liberal approach to determinations of arbitral jurisdiction.

To date, however, there is little evidence that Weber et al. has made arbitrators any more willing to address pension disputes on their merits. In fact, the opposite may be the case. The fate of the union grievances in Dawn Foods provides some early reason to fear that the Weber case may encourage an even more restrictive approach to arbitral jurisdiction. That case involved a pension plan with a significant accumulated surplus. Its joint union-management board of trustees could not agree on how that surplus should be disposed of. The employer therefore took the unilateral step of ceasing to make its own contributions and likewise ceasing to deduct and remit the employee contributions. The union filed a grievance.

Both relevant collective agreements reflected key provisions of the pension plan, including clear and unequivocal commitments on the part of the company to contribute specific percentages of pensionable earnings to the pension plan, with similar employee contributions to be made by payroll deduction. It was common ground between the parties that such contributions and deductions had ceased. Nevertheless, the arbitrator found the dispute inarbitrable. Applying the Weber analysis, he held that “the essential character of the

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113 The pension plan’s actuary had advised that the plan was in surplus in excess of the amount allowed under the federal Income Tax Act: ibid. at para. 8.
dispute” did not involve the issue of contributions, but instead was a dispute about the deployment of the plan surplus: “The factual context of the dispute arises from the breakdown of negotiations between the Company and the Union concerning enhancements to the Pension Plan and contribution holidays.”114 Ironically, part of the basis for his conclusion was the company’s admission that it had ceased to make and remit pension contributions; accordingly, he found, its failure to do so was “not in dispute”.115 In the arbitrator’s view, the matter could more properly be resolved in the courts.116 Prior to the Weber line of cases, a result like this would have been improbable where the collective agreement clearly addressed pension obligations of which the union was alleging a breach. By remitting the matter to the court, the Dawn Foods case sent a clear message that under Weber, arbitrators may now have even more scope to avoid dealing with pension issues on their merits.117

In its 2006 decision in Bisaillon v. Concordia University,118 however, the Supreme Court of Canada sent back an even clearer message: that arbitrators, not courts, should deal with pension issues in unionized workplaces. Bisaillon involved an attempt by unionized employees to use the class action mechanism to challenge a variety of unilateral employer actions in connection with their pension plan, including the taking of contribution holidays, financing early retirement packages out of pension funds and paying administrative costs from the assets of the plan.119 The Concordia University pension plan covered the members of nine separate bargaining units, as well as a number of non-unionized employees. Bisaillon, a Concordia employee, sought representative status, with the support of eight of the nine unions involved, to challenge the university’s actions. The ninth union, the faculty

114 Ibid. at paras. 29-32.
115 Ibid. at para. 30.
116 The union had in fact filed a parallel statement of claim: see ibid. at para. 10.
117 While the arbitration board had been unable to resist a reference to the ‘4 category’ test (it found it a category 3 case), the arbitration decision did not turn on that test. In upholding the arbitrator’s decision on judicial review, however, the Queen’s Bench completely conflated the Weber test with the ‘4 category test’: Having determined the essential nature of the dispute the Board then turned its mind to determining whether the essential character of the dispute arises either explicitly or implicitly from the interpretation, application, administration or violation of the collective agreements. In this regard, the Board concluded that the parties had chosen not to incorporate the terms of the pension plan into their collective agreement

119 Ibid. at para. 1.
association, supported the university on the merits and challenged the jurisdiction of the court to entertain a class action, arguing that the matter was within the exclusive jurisdiction of a grievance arbitrator. In a 3-4 decision, a majority of the Supreme Court agreed, holding that a court action was “incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions.”

In determining arbitrability, arbitrators and courts have tended to focus on narrow issues involving the wording of specific collective agreements. In Bisailon Lebel J., speaking for the majority, characterized the issue much more broadly: “This appeal raises the issue of the compatibility of the class action with collective representation mechanisms in labour law, with the system for applying collective agreements and with the procedure for resolving labour disputes through grievance arbitration”. In a decision that placed as much emphasis on the union’s “monopoly on representation” as it did on the exclusive jurisdiction of grievance arbitrators to resolve disputes under collective agreements, Lebel J. observed that the union’s ‘monopoly’ is “not limited to the context of the collective agreement but extends to all aspects of the employee-employer relationship”. He flirted briefly with the possibility that all pension disputes are arbitrable irrespective of the language of the agreement, noting that the Quebec Court of Appeal had on more than one occasion found in favour of an arbitrator’s jurisdiction simply on the basis that pension plans were part of the “employee’s remuneration and conditions of employment”; “[s]ince practically all collective agreements address employee remuneration, grievance arbitrators would, under this, approach, almost automatically have jurisdiction in such cases”. While he was clearly attracted to this Occam’s Razor, he stopped short of endorsing it, finding it unnecessary since “the collective agreements in question make express reference to the Pension Plan.”

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120 Ibid..
121 Ibid. at para. 13. While the case dealt expressly only with Quebec law, it is important to note that the basic structure of collective bargaining law in Quebec on which the court relies, including the principles of exclusive representation and the exclusive jurisdiction of a grievance arbitrator, are common across Canada.
122 Ibid. at paras. 23-28.
123 Ibid.
124 Ibid. at para. 28.
125 Ibid. at para. 38.
However, his summary of the relevant language of the nine collective agreements before him makes it clear that his threshold for arbitrability is not an onerous one:  

Each of these collective agreements refers in one way or another to the Pension Plan. Seven of them specifically provide that the employees they cover are entitled to participate in Concordia's pension plan in accordance with the terms set out in the plan. In the collective agreement between Concordia and one union, CUPFA, Concordia agrees to maintain the existing Pension Plan for employees in its bargaining unit. Finally, the collective agreement applicable to another union, CULEU-Vanier, refers indirectly to the Pension Plan by specifying the ages at which employees become eligible for full retirement benefits or for early retirement.

At best, the formulations in these nine agreements would be characterized as ‘maintenance of benefits’ clauses. Numerous examples can readily be found in prior cases of arbitrators and courts ruling that similar provisions of collective agreements do not give rise to arbitrable pension issues. Despite the absence of the kind of “express language” required under the ‘four category test’, Lebel J. nevertheless found that “[i]n effect, the parties decided to incorporate the conditions for applying the Pension Plan into the collective agreement.” While he was not prepared to go the whole distance and find the specific language of the agreement irrelevant, he was clearly willing to ground arbitrability on a much more attenuated connection between the plan and the collective agreement than most arbitrators and courts have required to date.

Lebel spoke for the majority. The court was split, however. Bastarache J., in a lengthy and thoughtful dissent expressed serious reservations about the consequences for pension rights of assigning complex, multilateral pension problems to a grievance arbitrator under a collective agreement:  

The essential character of the dispute transcends any collective agreement based on which the labour arbitrator could assert exclusive jurisdiction. Any attempt by a labour arbitrator to decide the respondent's claim would call upon the arbitrator to determine issues and bind parties that reach far beyond the individual collective agreement properly in front of him/her. This unique characteristic of the respondent's claim was not present in any of the jurisprudence canvassed by my colleague.

Bastarache was equally concerned about the impact of any decision on third parties.

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126 Ibid. at para.5.  
127 Ibid. at para. 50-51.  
128 Ibid. at para. 88. Bastarache spoke also for McLachlin C.J. and Binnie J.  
129 Ibid. at para. 89.
The labour arbitrator does not have jurisdiction over the parties to this dispute either. While LeBel J. restricts the scope of the claim to the respondent and the appellant university…with respect, I cannot accede to this reasoning. One cannot simply declare that the labour arbitrator has jurisdiction over the relevant parties by artificially restricting who qualifies as a party. In this pension dispute, all Fund beneficiaries share in this claim and should be involved. The labour arbitrator’s jurisdiction does not extend that far.

For the dissenters, at least where the pension plan implicates many different collective agreements and affects the rights of non-unionized plan members, a court, and not arbitration, is the appropriate forum for ensuring that all the relevant interests are protected.

The majority judgment in *Bisaillon* ratifies the legal status of pension plans as part of the terms and conditions of employment of unionized employees, and expresses an unequivocal preference for arbitration as the appropriate forum for resolving pension disputes for unionized employees. Despite this direction from Canada’s highest court, however, the ‘arbitrability’ controversy continues unabated. The extent to which *Bisaillon* has re-shaped the legal principles governing the jurisdiction of arbitrators to deal with pension issues has now been considered in a number of arbitration decisions. In *Atlas Copco Exploration Products v. International Association of Machinists and Aerospace Workers*, Arbitrator Richard Brown canvassed the post-*Bisaillon* case law to date and identified with approval what he characterized as an emerging consensus that *Bisaillon* “does nothing to change the settled law”. In a 2008 decision dealing with a long term disability plan, Arbitrator Sims interpreted *Bisaillon* as simply a special application of the ‘four category test’. Indeed, he took the *status quo* argument one audacious step further by arguing that the *Bisaillon* case, actually “reinforces the analysis” imbedded in the ‘four category test’ by focusing on the

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131 In including Innis Christie in his list of arbitrators who view *Bisaillon* as supporting a ‘four category’ consensus, Brown has misread *National Automobile, Aerospace and Agricultural Implements Workers Union of Canada, Local 1015 v. Scotsburn Dairy Group (Pension Funds Grievance)*, [2008] N.S.L.A.A..1 (“Scotsburn Dairy”): see discussion of *Scotsburn*, below. Christie rejected the hyperbolic argument that *Bisaillon* has “overwritten decades of relatively certain arbitral jurisprudence in common law jurisdictions” [para. 56]. It is clear, however, that he did so at least in part because he took a broader view than counsel (and many mainstream arbitrators) of the scope of pre-*Bisaillon* jurisdiction. He expressed considerable scepticism about the utility of the ‘four category test’, and refused to apply it in the case before him [paras. 57-58, 70-72].

language of the collective agreements and finding the plans incorporated by reference. Decisions like these signal the durability of arbitral resistance to taking on the task of interpreting and applying pension plans.

As the *Bisaillon* case itself shows only too clearly, however, courts are now equally reluctant to perform that task themselves for unionized employees. Courts are predictably interpreting *Bisaillon* as a generous license to dismiss pension and benefit claims involving unionized employees on the grounds that their issues should be dealt with at arbitration. What we see reflected in these cases is not just a dispute about a procedural issue, but a fundamental philosophical difference about the nature and scope of the arbitration process. Decisions like *Weber* and *Bisaillon* are part of a fundamental shift in public policy towards expanding the role of arbitration in resolving workplace disputes affecting unionized employees. This shift is reflected not just in the jurisprudence, but also in legislative initiatives over the past twenty years to move the enforcement of a range of employment rights created by public statutes into the arbitration forum. This policy direction is reflected most clearly in the now ubiquitous provisions in collective bargaining statutes conferring on grievance arbitrators the power to “interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.”

The Nova Scotia equivalent of this provision was considered and applied by Innis Christie in the *Scotsburn Dairy* case. The case dealt with a grievance against a unilateral employer amendment to the pension plan which eliminated the plan members’ right to any surplus in the defined benefit pension plan, and provided that surplus would revert to the employer when the plan terminated. The union also grieved the employer’s conduct in drawing on that

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133 Ibid. at para. 73.
135 *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, s.48(12)(j). Similar provision with slightly different wording are also found in other Canadian collective bargaining statutes.
136 *Scotsburn Dairy*, supra note 131. Christie commented with approval on a decision of Arbitrator Munroe in *City of Vancouver v. Canadian Union of Public Employees, Local 15*, [2006] B.C.C.A.A.A. No. 128, in which he found that the Act governing municipal pension plans in British Columbia was a statute "regulating the employment relationship of persons bound by a collective agreement" within the meaning of s.89(g) of the B.C. *Labour Code*, and that accordingly he had jurisdiction to deal with it.
surplus to make the employer contributions to a newly-created defined contribution plan. The language in the collective agreement provided as follows: “The Company agrees that the employees shall be covered by a suitable pension plan on a contributory basis of wages from the employee and a likeable amount from the employer”. The collective agreement also contained an old-fashioned broad ‘maintenance of privileges’ clause, providing that “[e]xisting customs and practices, rights and privileges, benefits and working conditions shall be continued unless modified by mutual agreement of the employer and the union”. The union argued that the employer’s conduct violated the collective agreement, and also the provisions of the Nova Scotia pension regulatory statute which required that plans be administered in accordance with their terms. In dealing with the employer’s objection to arbitrability, Christie considered Bisaillon and determined that it directed a “liberal” approach to arbitral jurisdiction. More importantly, however, he found that he had “jurisdiction to apply the Nova Scotia Pension Benefits Act insofar as it determines the rights and obligations of the parties to this Collective Agreement by virtue of Section 43(1)(e) of the Trade Union Act and the decision of the Supreme Court of Canada in Parry Sound.”

On the merits, he allowed important aspects of the union’s grievance regarding the employer’s use of surplus to fund contribution holidays, and its unilateral amendment of the pension plan to authorize the return of surplus to the employer.

Scotsburn Dairy is, however, the exception. The jurisdictional game of ‘pass the parcel’ between arbitrators and courts continues, with serious implications for the substantive pension rights of unionized employees. The controversy over appropriate forum creates confusion and additional expense for unions seeking to enforce the pension rights of the employees they represent. More fundamentally, it creates the grave risk that the pension

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137 Ibid. at para. 3.
138 Ibid. at para. 14.
139 Ibid. at paras. 23-24, 27,41.58; see also para. 51.
140 Ibid. at para. 71. The Parry Sound reference is to Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, 2003 SCC 42, in which the Supreme Court of Canada upheld an arbitrator’s decision, against a “correctness” standard of review, of an arbitrator’s decision that the effect of s.48(12) of the Labour Relations Act, 1995 was to incorporate the “substantive rights and obligations of the Human Rights Code” into the collective agreement: para. 23. The court read s.48(12)(j) as conferring not just the power but also the responsibility on arbitrators to enforce statutory rights: para. 40.
141 Scotsburn Dairy, supra note 131 at para. 339-341. Christie dismissed a portion of the grievance dealing with employer contributions.
claims of unionized employees may fall into the dreaded ‘Weber Gap’, that indeterminate limbo-land in which unionized employees have rights but no remedies because they have no access to a forum which will accept jurisdiction to enforce those rights. This is clearly what occurred in the Dawn Foods case. As characterized by the arbitrator, Dawn Foods is simply a decision about whether the case should be heard by an arbitrator or by a court. The answer provided by the arbitrator was that it should be heard by a court. But a court willing to hear the contract and trust issues raised by the case would be very unlikely to concern itself with whether the employer violated its commitment to make and remit regular pension contributions, the issue squarely addressed by the collective agreement and squarely raised before the arbitrator. The effect of the arbitrator’s decision declining jurisdiction in Dawn Foods is to bar any adjudication of that issue, robbing the union of a significant bargaining chip, for which it paid at the bargaining table, in its on-going dispute with the company over whether and how plan surplus should be used for the improvement of pension benefits.

The loss of specific collectively bargained rights of the Dawn Foods type is not the worst possible consequence of the failure of arbitrators to take a view as comprehensive as that of the courts of their jurisdiction to address pension issues. Reserved management rights theory, combined with narrow views of arbitral jurisdiction and the scope for recognition rights, runs the risk of placing broad pension rights in a sui generis category in which they simply cannot be enforced anywhere. Many arbitrators recognize the right of management to create and withdraw pension rights unilaterally, but will not enforce those rights unless they are reflected in the collective agreement. Courts will not enforce those rights as contract rights because of their nexus with collective agreements. If the result of this standoff is that pension claims formerly cognizable before the courts under theories of contract and trust law are no longer enforceable, decisions like Bisaillon, intended to bolster the institution of collective bargaining, may instead return employment pensions to a legal status in which employees get only what their employer chooses to give them.  

142 Brian Etherington has defined the “Weber Gap” as “the gap between the existence of individual rights at common law and under the Charter on the one hand, and access to a forum for the effective pursuit of such rights on the other”: see “OPSEU v. Seneca College: Deference as a Two-Edged Sword – A Missed Opportunity to Address the “Weber Gap”” (2006-7) 13 C.L.E.L.J. 301.

143 In Chapter 5, I will argue that the common law has effectively reverted to this state.
6.0  PENSIONS AND THE CONSTRAINTS OF COLLECTIVE BARGAINING

6.1  Introduction

The advent of collective bargaining in Canada brought with it a fundamental reconceptualization of employee pensions as rights earned by employees through services rendered, rather than gifts from employers. As we have seen, however, this formal conceptual shift did not bring with it a corresponding shift in the power dynamic shaping employment pension plans. Important aspects of employment pension plans still remained largely outside the reach of collective labour law. In the earlier sections in this Chapter I looked at some of the ways in which arbitrators shaped labour law to constrain union choices challenging the pension status quo. I would argue that the arbitrator-created doctrine of reserved management rights, bolstered by arbitral jurisprudence on the closely related issues of union recognition and arbitrability, has made a powerful contribution to keeping pensions safely walled off from union efforts to control them, transform them or even to enforce them.

Powerful as it has been, however, the management rights doctrine did not achieve its work unaided. Under Canadian law, the fact that pension rights fall within the scope of reserved management rights does not remove them from the bargaining table. In legal theory, it does no more than place the ball squarely within the union’s court. The union has the right to bargain over pension issues, and the right to take them to impasse if the employer resists bargaining or is not prepared to accede to the union’s demands. In legal theory, a collective agreement that is silent on pension rights is silent because the parties to the agreement have chosen that result, in the full understanding that silence gives the employer the right to (continue to) exert control. The reserved management rights doctrine raises the cost of bargaining for unions; as Brian Langille has argued, it “weighs the scales in favour of employers…grant[ing them] a head start in negotiations by guaranteeing that employers [are] given certain rights for free”.144 But a union that is prepared to pay the cost – to assign sufficient priority to the pension issue and then to muster sufficient membership support to overcome employer resistance – is free to do so, or at least to make the attempt. With few exceptions, Canadian unions have not exercised their legal power to demand radical changes

144 Langille, “Equal Partnership”, supra note 30 at 534-5.
to employment pension plans. They did not seek to abolish such plans. They did not refuse to acknowledge their existence. Instead, they signed the collective agreements that sanctioned the pension status quo. Why they did so remains an important question.

In this section, I will examine two factors which contribute to an answer to that question. First, I examine the extent to which the legal collective bargaining framework itself placed impediments in the way of more radical pension bargaining. I will argue that the structure of collective bargaining in Canada creates a mismatch between collective bargaining structures and employment pension structures; our bargaining unit-based system makes collective bargaining an ineffective instrument for distributing pension coverage more broadly. Furthermore, by confining union bargaining rights to specific groups of employees within specific enterprise-based bargaining units, Canada’s system of exclusive representation leaves important pension interests unrepresented at the collective bargaining table, most obviously the interest of retirees, a representation gap which undermines effective pension bargaining. Second, I will explore some issues relating to the functioning of unions themselves within an exclusive-representation model, and the extent to which the political dynamics fostered by such a model have aligned the interests of unions with those of employers on key pension issues, including benefit design and mandatory retirement. I will argue that one reason unions have not been prepared to pay the price required to change the pre-collective bargaining pension power dynamic is because it has not been in their institutional interest to do so within the current collective bargaining framework.

6.2 The Canadian Collective Bargaining Structure

6.2.1 Bargaining Units and Pension Units

The Canadian approach to the assignment of collective bargaining rights and the designation of bargaining agents mirrors the U.S. model of exclusive representation adopted in the mid-1930s under the Wagner Act. Under the Wagner Act model, unions who can demonstrate sufficient levels of majority support are awarded the exclusive right to bargain for very specific and well-defined groups of employees, normally on an employer-by-employer and
workplace-by-workplace basis. This model contrasts sharply with European models in which unions bargain on a much more centralized basis.\textsuperscript{145}

This bargaining unit-based structure is ill-adapted to pension bargaining. First and most obviously, the model limits the utility of collective bargaining as a tool for the expansion of pension coverage into workplaces and sectors of the economy where pension plans have not traditionally been found. In many European countries, collective agreements have industry-wide, regional or even national impact, and may be extended broadly to employees who are not directly represented by trade unions. In the minority of European countries that depend on employment pension plans to make any significant contribution to national retirement income, centralized bargaining models have been very effective at distributing pension plan membership widely.\textsuperscript{146} In the Netherlands, for example, 91\% of the working population belongs to employment pension plans, as compared to Canada’s 33\%.\textsuperscript{147} In Canada, by contrast, collective bargaining is effective to broaden pension coverage only where unions have bargaining rights.

Even in workplaces where unions hold bargaining rights, they can bargain only for the employees within the particular bargaining unit for which they hold those rights. The rules traditionally applied by Canadian labour boards for establishing the boundaries of bargaining units have misaligned collective bargaining structures and pension plans, undermining union pension bargaining power. Despite the general philosophy of modern labour boards in favour of large bargaining units and against fragmentation, bargaining units in Canada tend

\textsuperscript{145} For a detailed discussion of the differences between Canadian and European models of collective bargaining, see Roy Adams, \textit{Industrial Relations under Liberal Democracy: North America in Comparative Perspective} (Columbia S.C.: University of South Carolina Press, 1995) at Chapter 4.

\textsuperscript{146} See generally Martin Rein & John Turner, “How societies mix public and private spheres in their pension systems” in Martin Rein & Winfried Schmahl, \textit{Rethinking the Welfare State: The Political Economy of Pension Reform} (Cheltenham, U.K.: Edward Elgar, 2004) 251-293. Rein and Turner identify Denmark, Sweden and the Netherlands as countries in which collective bargaining plays or has played a significant role in achieving broad pension coverage. They also cite Australia and France as countries where powerful trade unions negotiated pension plans which were subsequently incorporated into mandatory state systems: 283. The relationship between collective bargaining frameworks and national pension systems is a complex one, meriting considerably more comparative study from a labour law perspective.

\textsuperscript{147} \textit{Ibid.} at 283. Rein and Turner attribute the success of the Dutch pension system to the power of the trade unions. While nine percent of Dutch workers remain outside the system (mainly part-time, seasonal and other low wage workers, many of them female: 281), Rein and Turner argue that employers are highly motivated to attempt to eliminate remaining coverage gaps because they wish to avoid legislation mandating pension coverage.
to be small.\textsuperscript{148} Even in workplaces where most of the employees are unionized, they are often represented by different unions in different bargaining units. Most large unionized industrial enterprises have separate clerical and ‘plant’ bargaining units, and often a number of smaller ‘craft’ bargaining units as well. In complex institutions like universities, even more fragmentation is likely.\textsuperscript{149} By contrast, three-quarters of Canadian pension plan members belong to all-employee plans, and only a small fraction of plans are established exclusively for unionized employees.\textsuperscript{150} This means that in large, complex workplaces – in other words, in those workplaces in which employment pension plans are most likely to be found – it is almost inevitable that there will be mismatches between the scope of any one bargaining unit and the scope of the pension plan.

In a 1964 brief presented by the Joint Railway Unions to the Joint Senate-House of Commons Committee dealing with the bill which ultimately established the Canada Pension Plan, the unions explained the problems posed by these misaligned structures. They noted that the railway pension plans governed a broad range of employee groups, all represented by different bargaining agents.\textsuperscript{151} The railways refused to bargain over pensions. As the union representatives saw it and explained it in their testimony, the \textit{Canada Labour Code} supported the employers’ position, requiring them to bargain only about the terms and conditions of members of the bargaining unit, while the pension plan was a program covering all employees. In legal theory, the unions were probably wrong; the fact that pension plans are

\begin{footnotesize}
\begin{enumerate}
\item In 1980, Ontario’s Royal Commission on Pensions noted that the pension plans of the universities, while theoretically bargainable, are impervious to collective bargaining for all practical purposes “because unionized employees constitute a minority of the plan’s members”; Royal Commission on the Status of Pensions in Ontario, \textit{Report} (Government of Ontario, 1981) at 193. The complexity of current university collective bargaining and pension structures is clearly reflected in the decision of the Supreme Court of Canada in \textit{Bisaillon v Concordia University}: see discussion at Section 5, above.
\item See Bob Baldwin, \textit{Determinants of the Evolution of Workplace Pension Plans in Canada} (Caledon Institute of Social Policy, March 2007), \url{http://www.caledoninst.org/Publications/PDF/625ENG.pdf}, last accessed September 23, 2010. Baldwin reports that in 2004, 48.1 percent of all plans covering 72.0 percent of plan members were all-employee plans. Plans confined only to bargaining unit members (union members) encompassed 6.4 percent of plans and 14.4 percent of plan members. Baldwin noted that the data reported has “changed very little over the period since the mid 1970s”:\textsuperscript{4}.
\item See Special Joint Committee of the Senate and of the House of Commons appointed to consider and report on Bill C-136 An Act to establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors [the Canada Pension Plan], \textit{Minutes of Proceedings and Evidence}, 26\textsuperscript{th} Parliament, 2d Sess., 1964-65, 2 Vols. (Ottawa: Queen’s Printer, 1965) at 1465-1495.
\end{enumerate}
\end{footnotesize}
not co-extensive with bargaining units is not a legal impediment to unions placing pension issues on the table. In practice, however, the gap between bargaining units and pension units makes a very significant difference to what can be achieved in bargaining. As already noted, there is a wide gulf between the right to place an issue on the bargaining table and the right to insist that an employer agree to it. Where a union represents only a relatively small percentage of the employees covered by the pension plan, not only is its clout more limited, but its motivation to ‘go to the wall’ for pension improvements is undermined by the reality that resources expended on pension bargaining are likely to benefit large numbers of pension plan members who have made no contribution to the cost.

One obvious answer to multiple union representation within a single pension plan is coalition or coordinated bargaining. Strategies of coordination may be impeded, however, by the conflicting interests of different bargaining units. Unions representing white-collar units may seek final average unit benefit formulae, while those representing blue-collar units may prefer a flat benefit approach. Unions representing predominantly female bargaining units may seek earlier vesting and service “bridges” over periods of pregnancy and parenting leave, plan features which might well be resisted by unions representing predominantly male bargaining units who would benefit more from higher maximum benefit levels. The damaging impact of conflicts of interest on the efficacy of collective bargaining for pensions is well illustrated in *Bisaillon v. Concordia University*; in that case, differences of opinion about the appropriate use of plan surplus among the nine different bargaining agents representing members of the university’s pension plan pitted union against union, contributing to the dismissal of a court challenge to the employer’s appropriation of plan surplus to pay plan expenses and take contribution holidays.

In addition, conventional approaches to bargaining unit design may replicate and buttress the patterns of exclusion we have already seen in pension coverage. Part-time, short-term and casual employees, many of them women, have always been less likely to be members of pension plans than full-time, longer-term, and permanent employees. For many years, most Canadian labour boards excluded such employees from bargaining units of full-time and permanent employees, applying principles that Judy Fudge argues are gendered and

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152 See discussion at section 5, above.
reinforce women’s labour market inequality. Such approaches to setting unit boundaries have undermined collective bargaining as an effective tool to extend plan coverage to these types of workers. In theory, part-time and casual workers could seek union representation for their own bargaining units (and presumably bargain their own pension coverage) but they have had limited success in doing so; such units are expensive and difficult to organize and consequently unattractive to unions. While many Canadian labour boards changed their policies in the 1980s and now construct more inclusive bargaining units, these changes post-dated the creation of most pension plans in unionized workplaces, which has limited their impact in expanding plan coverage through collective bargaining.

6.2.2 Non-Employee Interests

Collective bargaining statutes also limit the impact of unions in another obvious way; they confer bargaining rights only for units of employees. Pension plans affect the interests not just of employees in the bargaining unit, but also of groups such as retirees, deferred plan members and spouses for whom the union has no formal authority to speak. There is considerable legal controversy over the question of whether unions have either the right or the responsibility to represent non-employee pension interests at the bargaining table or in enforcement proceedings. To the extent that unions do not represent the full range of beneficiary interests, the legitimacy of their claim to act as a countervailing force to the power of employer plan sponsors is weakened, and with it, their power at the pension bargaining table.

Earlier in this chapter, I discussed Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union, the B.C. Labour Relations Board decision holding that pensions fall within the scope of collective bargaining. That case dealt with an attempt by the union to bargain benefit improvements for retirees. Accordingly it raised not simply the broad question of whether unions had the right to bargain over pension issues, but also the

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155 See discussion at section 3.2, above.
narrower and more difficult question of whether unions had the right to bargain such issues on behalf of retirees. In answering the broad question in the affirmative, the Board emphasized the legitimate interest current members of the bargaining unit have in retiree benefits, and in fostering a union practice of negotiating *ad hoc* improvements to retirees’ benefits. The Board saw no obstacle to the union, acting in the interests of the current employees for whom it held bargaining rights, negotiating benefits which affect non-members of the bargaining unit. However, it expressly left open the question of whether unions could represent retirees *per se*: “[i]n our view, it would not be fruitful to pursue the ambivalent legal question of whether retired workers are “employees” within the unit and thus entitled to full union representation and collective bargaining with the employer”.  

Shortly afterwards, however, the B.C. Board was directly confronted with this “ambivalent legal question” in *Cominco Pensioners Union, sub-local of the United Steelworkers of America, Local 651 v. Cominco*,  where a case dealing with an application for certification as bargaining agent for Cominco retirees filed by a ‘sub-local’ of the United Steelworkers. The union argued that retirees were ‘employees’ within the meaning of the B.C. Labour Code because they continued to “receive deferred wages and fringe benefits from an employer”. While the Board accepted that pension payments were properly characterized as deferred wages, it was not persuaded that retirees could properly be characterized as employees. Important to the Board’s conclusion was the finding that “once an employee has retired, all obligations to the employer come to an end.” As the Board saw it, although retirees still possess rights that may require enforcement, those rights could be enforced by the union through grievance and arbitration mechanisms under the collective agreement, even if they could not be enforced directly by the retirees affected.

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156 *Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union, supra* at 9, 71. The Board’s analysis of the legal status of retired workers is cited with approval by the Supreme Court of Canada in *Dayco, supra* note 30. It praised the B.C. Board for “analyzing this issue in an admirably comprehensive fashion”, and noted that with the exception of this decision, “there is almost no case law on the status of retired workers under Canadian collective bargaining regimes”: *Dayco* at para. 75


The certainty of the B.C. Board that the interests of retired employees could be protected under collective agreements was not shared by the Supreme Court of Canada, which expressed considerable doubt on that point in Dayco (Canada) ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada). Dayco involved a union grievance challenging the termination of retiree welfare benefits following a permanent plant shutdown. The arbitrator dismissed the company’s preliminary objection that the grievance was inarbitrable because the right to benefits had expired along with the collective agreement; he ruled that retirement benefits were capable of vesting (i.e. surviving the expiry of the collective agreement under which they were negotiated) and could continue to be enforced through grievance arbitration. The company applied for judicial review.

The Supreme Court of Canada agreed with the arbitrator, finding that “retirement benefits are capable, depending on the wording of the collective agreement, of vesting in a collective sense for the benefit of retired workers, and any reduction in those benefits would be grievable at the instance of the union” [emphasis added]. The court had reservations, however, about the extent to which rights could be said to vest in retirees in any individual sense, and “whether this vesting also creates a personal right actionable by individual retirees”. La Forest J., speaking for the full court on this issue, worried about the conflict of interest that would face unions asked to enforce retiree pension claims:

…the union may be unwilling to grieve the issue on behalf of the retirees. This may arise because of an inevitable conflict of interest facing the union. If it were successful in grieving under an old collective agreement on behalf of retired workers, the employer would face increased overall labour costs, perhaps leading to harder bargaining over current employees’ compensation. The union may well be reluctant to carry forward a grievance on behalf of retirees, as success on that front might well be contrary to the interests of current members of the bargaining unit.

Canadian law does not provide any obvious recourse for this conflict of interest; retirees certainly have no clear statutory right to bring unfair representation complaints against a

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161 [1993] S.C.J. 53; [1993] 2 S.C.R. 230. The case is most frequently cited for the proposition that collectively bargained benefits may vest and be enforceable through grievance arbitration even after the expiry of the collective agreement. For our purposes, the case is more interesting for its discussion of the rights of retirees under collective bargaining frameworks.

162 Per La Forest J., with whom all judges concurred on the merits: ibid at, para. 44.

163 La Forest expressly noted that the latter question was one “that need not be decided in this appeal”: ibid. at para. 44.

164 Ibid. at para. 85.
union which refused to file a grievance on their behalf. Accordingly, “Canadian retirees may well find themselves in possession of a right without a remedy.” Under these circumstances, La Forest suggested, it might be necessary to allow retirees direct access to the courts, contrary to the usual rule with respect to the enforcement of rights arising under collective agreements. Courts subsequent to Dayco have indeed allowed retirees access to the courts to enforce post-retirement benefits, including those which have arisen under collective agreements.

In the face of the Supreme Court’s decision in Dayco, retirees may not face procedural difficulties in bringing pension claims before a court without the support of the union. They may, however, face considerable substantive difficulties making out claims for rights which do not enjoy the support of the union. In Association provincial des retraités d’Hydro-Québec v. Hydro-Québec, the Quebec Court of Appeal dismissed a class action filed on behalf of Hydro-Québec retirees. The claim challenged certain pension plan amendments permitting the use of plan surplus for contribution holidays and benefit enhancements for active employees. The challenged amendments had been negotiated with the union. The retirees argued that they were individual parties to the pension contract, and the plan could...

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165 Ibid. at para. 48.
166 Ibid. at para. 86.
167 Ibid. at para. 86-87.
168 See, for example, Bohemier v. Centra Gas Manitoba (1999), 170 DLR (4th) 310 (Man. C.A.), in which the Court of Appeal reversed a decision of the lower court dismissing a retiree challenge to a surplus-sharing agreement on the ground that the dispute was governed by the collective agreement. The court held that retirees were not parties to the collective agreement and did not have any practical avenue for pursuing a remedy through the grievance procedure, which was controlled by the union. See also Bennett v. British Columbia, [2007] B.C.J. No. 4 (C.A.) [leave to appeal to the SCC dismissed, June 21, 2007], in which the court allowed both contract and fiduciary claims of retirees to proceed by way of class action; see also Ormrod et al v. Etobicoke (Hydro-Electric Commission) (2001), 53 O.R. (3d) 285 (S.C.J.); Kranjcec v. Ontario, [2004] O.J. No. 19, in which the Alberta Court of Queen’s Bench struck out a statement of claim filed by seven trade unions claiming a share of demutualization proceeds, holding that the issues fell within the exclusive jurisdiction of a labour arbitrator despite the fact that part of the claim was on behalf of former employees who were no longer in the bargaining unit. The court stated: “any question about employee entitlements to the surpluses and refunds arises out of the fact of the collective agreement and can be said to have crystallized upon retirement”: para. 31.
170 Section 6 of the Supplemental Pension Plans Act, R.S.Q., c.R-17 specifically provides that “A pension plan is a contract under which retirement benefits are provided to the member…”. 
not be amended without their consent. The court held that this argument misconceived the nature of a pension contract arising out of a collective agreement:\(^\text{171}\)

I am unable to accept the appellant's claim that under the *Civil Code*, the consent of retirees, as soon as there are any, was required for every amendment to the pension plan because the plan is a contract to which they are parties. In actual fact, since the contracts of employment of former union members, including their pension benefits, are collective in nature, they do not become individual contracts between the former employer and each individual ex-employee upon retirement.

...The collective agreement, which continues with respect to the retirees, may be amended only by the parties to it, namely the employer and the union.

While the case law to date suggests that the parties to the collective agreement cannot use their bargaining authority to divest retirees of already vested pension rights,\(^\text{172}\) under the theory of representation which is foundational to the *Hydro-Québec* case it is clear that retirees are in the hands of the union that holds bargaining rights for active employees with respect to such issues as the negotiation of benefit increases, despite the fact that as retirees, they may have no on-going legal or practical relationship with that union.

### 6.3 Unions and Pension Bargaining

#### 6.3.1 A Brief History of Unions and Retirement Income Issues

In this chapter, I have explored the impact of management rights doctrine on the efficacy of collective bargaining to make inroads on employer control of pension plans. I have also looked at how some of the structural features of the Canadian legal framework place impediments in the way of unions seeking to bargain for radical pension change. I now turn to the equivocal role played by unions themselves in sustaining the employer-controlled pension model as the norm within collective bargaining relationships, and at some of the consequences of that role for the welfare of unionized workers.

As we have seen in Chapter 2, employment pension plans had their genesis in human resource management practices designed to control the workforce: to recruit superior employees, fetter their mobility in the labour market, discipline them in the workplace, keep them out of unions, and force them to retire on a timetable that maximized profit for the

\(^{171}\) *Hydro-Québec*, supra note 169 at paras. 48-50.

\(^{172}\) See *Dayco*, supra note 30; see also *Hydro-Québec*, supra note 169 at paras. 50-53; paras. 57-73
employer. In the struggle between capital and labour for power and control in the workplace, employment pension plans were potent weapons in the management arsenal. It was predictable that unions would oppose these plans, and initially they did so. One early alternative with which unions sought to meet the needs of workers for old age/disability income was the union-sponsored welfare plan. In addition to his study of employer pension plans, Murray Webb Latimer has also left us a thorough study of these late 19th Century and early 20th Century union plans, most of which were craft or trade-based. While they bore some resemblance to the modern multi-employer pension plan (“MEPP”), they were built on a model unrelated to individual workplaces and employment relationships; they were funded entirely by members’ dues or voluntary subscriptions, and employers made no contribution. In Latimer’s view, this model was simply not economic: “[t]he level of wages in the early nineteen-hundreds in most trades was undoubtedly too low to permit the accumulation by wage earners, individually or collectively, of funds sufficient to pay adequate old age benefits on sound actuarial principles”. The plans built up no reserve funds, and in hard times, their inability to meet member claims for benefits became starkly apparent. Most of them had brief lives and many never paid out any benefits at all. Those few plans that survived into the 1930s succumbed to the Great Depression. Unions and their members were badly burned by this experiment; once the good times returned, they were in no hurry to revive the unilateral union-sponsored model.

Another alternative to employer plans was a public old age pension. Some U.S. unions, particularly those associated with the American Federation of Labour led by the legendary

173 Murray W. Latimer, Trade Union Pension Systems and Other Superannuation and Permanent and Total Disability Benefits in the United States and Canada (New York: Industrial Relations Counselors, 1932) (“Trade Union Pension Systems”). This study was completed in cooperation with the American Federation of Labour.

174 The modern MEPP model will be discussed in Chapter 6 at section 3.0.

175 Latimer, Trade Union Pension Systems, supra note 173 at 125.

176 Ibid., at 20-21. It is interesting that Canadian courts dealing with early pension cases clearly applied a double standard when dealing with benefit claims brought by members against union “provident societies. As we have seen in Chapter 2, courts generally took the view that employer promises to pay benefits were gratuitous and unenforceable. Union provident societies, however, were held liable by the courts with a fair degree of consistency: see, for example, Bishop v. Journeyman Barbers’ International Union, Mr. Justice Monck, February 1904, Hamilton Ont.; Welsh v. Toronto Police Benefit Fund, [1915] O.J. No. 715 ; 9 O.W.N. 2 (H.C.). See also Reid v. International Union of Mine, Mill and Smelter Workers, Local 598, [1960] O.J. No. 39 (H.C.), in which a union as employer was held liable for pension on an estoppel-type theory.

Samuel Gompers, were initially as suspicious of government-sponsored welfare plans as they were of employer-sponsored welfare plans, regarding them as equally likely to undermine the self-reliance of workers.\textsuperscript{178} By the 1930s and 1940s, partly as a result of the Depression experience, unions had become friendlier towards public pensions. The labour movement was not in the vanguard of the lobby for social security legislation, but most U.S. unions applauded the ultimate passage of the \textit{Social Security Act} in 1935 as a first step towards retirement income security for workers.\textsuperscript{179} While the history of the role played by Canadian unions with respect to public pensions has not been as thoroughly studied as that of their U.S. counterparts, the general contours are similar, not surprising in view of the close organizational and fraternal ties between U.S. and Canadian labour movements.\textsuperscript{180} Historically, Canadian unions were probably less wary than U.S. unions of government welfare programs; certainly Canadian unions were on the record as early as 1905 as supporters of public old age pensions for the needy, and continued to work towards universal benefits and public social insurance for the elderly throughout the period leading up to World War II and after.\textsuperscript{181}

By the immediate post-War period, however, unions were deeply involved in bargaining over employer-sponsored pension plans. The AFL-CIO, in a handbook for pension bargainers issued first in the early 1950s,\textsuperscript{182} highlights the importance of employment pensions for working people. The handbook takes up the cudgel against those aspects of conventional employment pension plans that operated most egregiously against the interests of workers:

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\begin{itemize}
  \item \textsuperscript{179} For detailed accounts of the evolution of the attitude of U.S. unions to public pensions, see Theda Skocpol, \textit{Protecting Mothers and Soldiers: The Political Origins of Social Policy in the United States} (Cambridge, Mass.: Harvard University Press, 1992) at 212-247 and Quadagno, \textit{supra} note 177 at 6075, 116-123153-177.
\end{itemize}
discretionary payments, delayed vesting and lack of portability. The handbook identifies as current pension bargaining priorities the reduction of qualifying periods for plan membership and benefit entitlement, the removal of age-based requirements for vesting, the provision of survivors (“widow’s”) benefits, and cost-of-living (COLA) adjustments on pension benefits.\footnote{Ibid. at 55-56.} It also claims important bargaining victories already on expanding coverage to blue collar workers. It advises that unions favour full funding of benefits.\footnote{Ibid. at 51. See also Teresa Ghilarducci, \textit{Labor's Capital: The Economics and Politics of Private Pensions} (Cambridge, Mass.: MIT Press, 1992) at 29-30, 39} It favours flexible retirement policies.\footnote{Ibid. at 24.}

In general, however, collective bargaining did not seriously disturb the pre-collective bargaining right of employers to make and manipulate plan membership rules, to structure benefit formulae to favour the interest of highly-valued workers at the expense of less valued workers or to tie benefits to mandatory retirement. As U.S. labour economist Teresa Ghilarducci argues, “the bones of the pension plans in each industry were … drawn from the skeletons of preexisting employer plans”.\footnote{Ghilarducci, supra note 184 at 39.} It is true that there were some major bargaining confrontations in both the U.S. and Canada over pension plans. Pension and insurance issues accounted for more than one-quarter of all U.S. strikes in 1949, and several of the more famous and long-lasting strikes of the immediate post-War period were over pensions.\footnote{Ibid. at 29-41. Notable strikes included a 147-day United Mine Workers of America strike in the U.S. bituminous coal industry in 1947, ultimately settled after the personal intervention of President Truman (38), a major strike in the steel industry in 1949, a 104-day United Auto Workers strike at Chrysler in 1952 over full funding (30). There has been very little scholarly work done on the history of employment pension bargaining by the Canadian labour movement. Bargaining trends in general in Canada in this period were greatly influenced by bargaining trends in the United States; just as many of the large companies offering pension plans in Canada were branch plants of American companies, importing U.S. personnel policies into the Canadian operations, many of the unions involved in the early bargaining of pensions in Canada were so-called ‘international’ unions, U.S.-based unions such as the United Steelworkers of America, the United AutoWorkers and the United Mineworkers. These unions frequently adopted highly centralized approaches to collective bargaining. In 1987, there was a lengthy Canadian Auto Workers strike in Canada against Chrysler in order to achieve indexed pensions: see Charlotte A.B. Yates, \textit{From Plant to Politics: The Autoworkers Union in Postwar Canada} (Philadelphia: Temple University Press, 1993) at 245.} But by the early 1950s, an acceptable equilibrium had been reached, and pensions had become a relatively uncontroversial issue in collective bargaining. As Steven Sass puts it, “by 1952, CIO single-employer plans had thus become largely standardized affairs. They were funded, non-
contributory, defined benefit plans paying modest benefits and granting full credit for past service.”

6.3.2 Some Institutional Issues

There is no clear consensus among labour scholars on whether and how hard unions fought against the status quo represented by the existing employer-controlled pension plans. The “conventional narrative”, as summarized by historian Jennifer Klein in her book on the emergence of the U.S. welfare state, *For All These Rights: Business, Labor and the Shaping of America’s Public-Private Welfare System*, is that unions did not fight the model at all; on the contrary, they embraced with enthusiasm the opportunity to use collective bargaining to improve a valuable employment benefit. This account sees employment pension plans first making their way into collective agreements during World War II with the help of government policy in the form of income tax and wage control policy and the orders of the National War Labour Board, and with the full support of unions. When employers resisted bargaining with unions over benefits after the war, unions took the issue before the labour board and the courts in the *Inland Steel* case, and won the ‘great victory’ on the scope of bargaining we have already discussed in section 3.1. Important pattern contracts were signed in the auto and steel industries shortly after the *Inland Steel* decision, and “[o]ther unions marched onward and upward from there.”

Klein challenges this “conventional narrative”. She identifies continuing controversy within the labour movement about ‘privatized’ models of social welfare provision throughout the 1940s through to the 1960s. She argues that significant and powerful segments of the U.S. labour movement fought hard against the welfare capitalist model of employer-controlled pensions and welfare programs, and documents the continued struggle during the important

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period of industrial and union expansion just after World War II to displace employer health care and pension programs with expanded public programs supplemented by union-run and community-based welfare models. Klein argues that unions opted for collective bargaining only after it became clear in the aftermath of World War II that it was the only viable option within the broader political climate to supplement inadequate public pensions. She further argues that unions accepted employer-controlled models only in the face of overwhelming opposition from employers, egged on by an insurance industry eager to reap the profits from private social insurance.

Klein’s account of union political action in opposition to welfare capitalism is convincing. Less convincing is her argument that once unions opted for collective bargaining, they seriously struggled against employer-controlled models. While there is no doubt about the strength of employer resistance to change – a pattern we have already observed earlier in this chapter in our examination of the litigation history of pensions within the collective bargaining arena, with employers prepared to fight hard in the legislatures, in the courts and in the collective bargaining process to keep pensions off the bargaining table – the Klein account fails to account satisfactorily for the speed with which unions such as the UAW and the USWA backed away from bargaining positions in support of co-management. Despite stances taken at union conventions that pension monies should rightfully be recognized as the property of the workers, and their unions should have a voice in pension management, unions in neither the U.S. or Canada were prepared to back up these rhetorical positions at the bargaining table. Ghilarducci argues that the UAW initially attempted to bargain for co-administration and co-management of pension funds in the auto industry. The record shows, however, that a union prepared to mount a 104-day strike in support of full funding was not prepared to take similar action in support of co-management; “in the end, unions dropped demands for joint control and focused on negotiating higher benefits and on employer contributions that were sufficient to keep the fund well-funded”. Based on the record, Steven Sass concludes that unions bargaining in industrial workplaces were “essentially interested in assuring adequate benefits and chose not to bear investment risks and

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190 Harbrecht, supra note 188 at 93-97.
191 Ghilarducci, supra note 184 at 48.
 responsibilities”. By the mid-1950s, he argues, “in exchange for negotiated benefit levels, the CIO unions retired from the world of active pension fund management”.192

Most scholars who have examined the issue agree that unions operating within the political framework created by the Wagner Act-type exclusive representation model have derived substantial institutional benefits from their failure to challenge a pension status quo which leaves control of pension plans in the hands of employers while allowing unions to focus solely on benefit improvements. As Teresa Ghilarducci puts it, the story of the role played by unions in pension bargaining is at least in part a story of “how unions nourished their own survival by acceding to and helping to shape employer-based pensions”.193 She and other scholars194 point out that within North American-style collective bargaining frameworks, unions function essentially as political institutions, constantly required to seek support in order to maintain their bargaining rights.195 Pensions are complex financial instruments; it is often difficult to quantify the true value of benefit increases. The nature of pension benefits allows unions to take credit for achieving victories at the bargaining table which may be largely chimerical. Both unions and employers benefit ‘politically’ from this complexity, permitting unions to claim credit for ‘tough’ bargaining and employers to claim credit for generosity at what may often be very little real cost, assisting both parties to ‘sell’ collective agreements to what might otherwise be reluctant constituencies.196 Ghilarducci cites union officials who acknowledge that pensions are “a convenient and valuable bargaining tool” because “[a] negotiated increase in pension benefits can affect a relatively small number of people, cost the employer relatively little, and still garner significant and widespread support among the membership”.197 More transparent terms and conditions of employment benefits

192 Steven Sass, “Pension Bargains”, supra note 188 at 103.
193 Ghilarducci, supra note 184 at 25, 43; see also Teresa Ghilarducci, Garth Magnum, Jeffrey S. Petersen & Peter Philips, Portable Pension Plans for Casual Labor Markets (Westport. Conn.; Quorum: 1995) at 7.
197 Ghilarducci, supra note 184 at 44.
such as wage increases cannot be so easily marketed as bargaining “breakthroughs”. Klein argues that unions effectively “became partners in employers’ strategies to keep the valuation of pension promises vague, using the ambiguity of private pensions to imply that collective bargaining had won a greater degree of old-age security for members than the system really offered.”

*Status quo* pension benefit structures, and in particular those under defined benefit plans, also suited unions politically; indeed, unions actively promoted benefit structures which favoured elite workers. As we have seen in Chapter 2, the conventional employer-sponsored defined benefit, with its long vesting period, lack of portability and formula leveraged by both high earnings and long service, was carefully designed to provide the best benefits to employees whose lifetime work patterns fit a very particular model: the long-service, full-time “career” employee. I have already discussed why this model serves the interests of employers. Among employees, however, its advantages are unevenly distributed. Employees with shorter service would benefit much more from earlier vesting and increased portability. The conflict of interest between long- and short-service employees on vesting issues is further compounded by the effect of a phenomenon known as “breakage” or “wastage”, defined by Ghilarducci as “the amount of money contributed on behalf of people who are covered in a plan but never become eligible for pensions”. Unions were well aware that this ‘breakage’ left behind in pension plans by departing employees whose work patterns did *not* fit that ideal model helped pay for the pensions of elite workers: “those who get pensions are subsidized by those who do not”. Like employers, unions understood that conventional defined benefit plans penalize employees who do not conform to the model of “career employee”, rewarding ‘stayers’ at the expense of ‘leavers’, and redistributing pension value from short-service, precarious workers to more senior employees whose work patterns and work history most closely resemble the old male breadwinner model. Many unions found

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198 Klein, *supra* note 178 at 240.
199 Freeman, “The Effect of Unionism on Fringe Benefits”, *supra* note 195. While Freeman’s study was on fringe benefits generally, he notes that certain types of fringe benefits are more positively associated with unionism, and singles out pensions as having the highest association (502, 504, see also 509).
200 Ghilarducci, Magnum, Petersen & Philips, *supra* note 193 at 99. The ‘breakage’ issue is discussed in this thesis more fully in Chapters 4 and 6.
that outcome as satisfactory as employers did. Flat-benefit benefit structures, popular in defined plans restricted to union members, also disproportionately benefit more senior workers, since in these plans too, negotiated increases are leveraged by years of service.

Faced with a clear choice between the pension interests of two opposing groups, unions chose the interests of long-service workers, a group which Richard Freeman argues is the most powerful political constituency in any union. Unions put pre-retirement vesting on their list of early pension bargaining goals, and expressed strong support for earlier vesting. Judging by their bargaining outcomes, however, they did not seek vesting periods short enough to benefit short-service employees; they were content with achieving vesting periods of ten to twenty years, long enough to protect the pension benefits of the long service employee who might otherwise be vulnerable to lay-off or termination in his last few years of employment, but far too long to deliver meaningful benefits to the typical worker, whose turnover rate would ensure that he would never qualify.

6.3.3 Mandatory Retirement

The equivocal role unions have played in collective bargaining over pension issues has had negative consequences for the welfare of younger, short-service workers. It has also had negative consequence for older workers, as revealed in the history of mandatory retirement litigation in Canada. As we saw in Chapter 2, an important motivating factor for employers in establishing employment pension plans was the control such plans gave them over the timing of the departure of older workers from the workforce. Mandatory retirement policies

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202 Ibid. See Slichter, Healy & Livernash, supra note 188 at 393, where the authors note that “many important plans designed in major part by unions do not vest. Cost is not the reason. The reason is that the interest in protecting the union as an institution is placed ahead of the interest of the individual employee”.


204 Ibid. at 491. Teresa Ghilarducci points out that long-time union members are more likely to be union activists and power brokers, able to exert control over the bargaining agenda, at the expense, if necessary, of more vulnerable members of bargaining units.

205 See AFL-CIO Pension Plans, supra note 182 at 20-1; see also Milling, supra note 181 at 189.

206 In The Employment Retirement Income Security Act of 1974 (Berkeley: University of California Press, 2004), James A. Wooten documents the division within the labour movement about whether regulatory statutes should mandate vesting periods. He argues that many unions saw mandatory vesting as a reduction in benefit levels because more people would be entitled to pensions. This was a concern particularly for unions involved in multi-employer plans where increased costs were not so likely to fall on employers as in employer-sponsored plans: 101-141.
clearly operated to limit the freedom of older workers to make this important choice for themselves, and we might well have expected the labour movement to oppose them.

Initially, it would appear that they did; the *Inland Steel* case itself was a union challenge to the employer’s mandatory retirement policy, and the case law examined in section 4.2 of this chapter bears witness to the fact that Canadian unions regularly contested the unilateral application of these policies within unionized workplaces in the early days of labour arbitration. After initial skirmishes in court, at the bargaining table and at arbitration, however, many unions ceased to oppose compulsory retirement policies;\(^{207}\) indeed, bargaining on the retirement age issue was more often directed towards achieving early retirement incentives and benefits which would have the effect of lowering rather than raising the retirement age. Steven Sass, exploring similar shifts in union policy on mandatory retirement in the United States, argues that a major contributor to the withdrawal of union opposition to mandatory retirement policies was the difficult labour market after 1960, when jobs became scarcer, and it was apparent that mandatory retirement served the important function of helping to clear the labour market of older workers, resulting in higher wages and more job and promotional opportunities for younger workers.\(^{208}\) The labour movement strongly backed these goals, seeing an important opening for the promotion of better pensions in a bargaining climate in which employers were willing to pay more for retirement in return for the right to replace expensive older workers with cheaper, younger substitutes. Union-friendly supporters of mandatory retirement also argued that such policies shielded older workers from intrusive monitoring that might threaten their job security in their last few years of employment, and operated as a bulwark against attacks by

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\(^{207}\) The labour movement has never been united on this issue. See Ewan Clague, Balra Palli & Leo Kramer, *The Aging Worker and the Union: Employment and Retirement of Middle-Aged and Older Workers* (New York: Praeger Publishers, 1971), which reviews union-by-union the policies of various North American unions and concludes that: … there is no uniformity among unions with respect either to their attitudes, as reflected in their policies, or to their accomplishments, as embodied in contracts. Some unions put great emphasis on keeping their older members on the job as long as possible and have negotiated for various kinds of protections designed to assure that end. Other unions tend in the other direction, negotiating for early retirement and encouraging their members to take advantage of it” (113).


\(^{208}\) Sass, “Pension Bargains”, *supra* note 188 at 92-107.
governments and employers on hard-won social benefits and private pension plans. 209 Canadian proponents of mandatory retirement offered similar rationales for labour movement support of mandatory retirement. 210 According to the Supreme Court of Canada, in 1990 “about two-thirds of collective agreements in Canada contain mandatory retirement provisions at the age of 65.” 211

The 1970s brought an increasing focus in Canadian society and Canadian law on individual rights and protection from discrimination in the workplace on grounds of such personal characteristics as sex, race, religion and age. Human rights codes were revamped to accord more closely with modern sensibilities. The new codes were careful, however, not to infringe on entrenched human resource practices. While no law imposed compulsory retirement at age sixty-five, typical Canadian human rights codes limited protection against age discrimination to employees under the age of sixty-five, leaving it open to employers to adopt age-based retirement policies for older employees at least to the extent that compulsory retirement ages coincided with what had become accepted by that time as the ‘normal’ age of retirement: age sixty-five. 212 When s. 15 of the Charter of Rights and Freedoms came into effect in 1983, however, it put a significant new weapon in the hands of employees and advocacy groups challenging mandatory retirement; they could now argue that such policies, and the human rights codes that protected them, denied equal benefit and protection of the law on the basis of age.

The labour movement was not in the vanguard of the challengers. Instead, when the issue surfaced in the courts and in the broad Canadian pension policy debates of the 1980s, 213

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209 Ibid. at 78.
212 Employers who imposed compulsory retirement ages younger than age 65 were from time to time required to defend those policies under human rights code provisions which permitted such discrimination only if it could be demonstrated that such policies were bona fide occupational requirements. Employers rarely lost such challenges: see cases reviewed in Espey and the Ontario Human Rights Commission v. The Corporation of the City of London and London Professional Firefighters Association, [2008] HRTO 412 at para. 4.
213 Canada’s Great Pension Debate of the late 1970s and early 1980s will be discussed in more detail in Chapter 4.
human rights activists championing the abolition of mandatory retirement found themselves opposed by a labour movement on the formal record as favouring mandatory retirement. In 1980, the Canadian Labour Congress passed a pro-mandatory retirement resolution in which it made the extraordinary statement that “the organized labour movement ha[d] fought hard and long legislative battles to establish the mandatory retirement age of sixty-five (65) years”\textsuperscript{214} There is little evidence to back up this sweeping claim; indeed, many individual unions had never budged from their historical opposition to such policies.\textsuperscript{215} Furthermore, the Congress’s 1980 position was a nuanced one; it supported “the current permissive legal framework with regard to mandatory retirement” on the basis that it facilitated choice: “unions that wish to accept mandatory retirement are free to do so and those that wish to eliminate it can do so through collective bargaining”.\textsuperscript{216} Nevertheless, when the first mandatory retirement challenge reached the Supreme Court of Canada, the support for mandatory retirement flowing from Canada’s central body proved to be a potent weapon in the parties who sought to uphold mandatory retirement.

The first of the mandatory retirement Charter challenges reached the Supreme Court of Canada in 1989 in McKinney v. University of Guelph.\textsuperscript{217} The Supreme Court of Canada had no difficulty concluding that mandatory retirement was prima facie discriminatory within the meaning of s.15 of the Charter. The real question for the court was whether such policies could be justified as ‘reasonable limits’ on equality rights under s. 1 of the Charter.\textsuperscript{218} La Forest, speaking for a majority on this point, readily concluded that in the specialized context of the universities, mandatory retirement was justified. He then moved to the broader question of whether human rights code limitations on protection from age discrimination could likewise be justified. He identified as among the key legislative objectives “the desirability of those in the workplace to bargain for and organize their own terms of

\textsuperscript{214} This resolution if quoted in McKinney, supra note 211 at para. 120.
\textsuperscript{215} See Klassen & Forgione, supra note 207 at 81-83.
\textsuperscript{216} McKinney, supra note 211 at para. 210.
\textsuperscript{217} Supra, note 211. The court’s main judgment was issued in McKinney v. University of Guelph (“McKinney”). McKinney involved a challenge to the mandatory retirement policies of four Ontario universities, and likewise to the Ontario Human Rights Code’s definition of “age”, which excluded those over 65. The other three cases were from British Columbia: Harrison v. University of British Columbia, [1990] 3 S.C.R. 451 (a university); Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 (a research hospital), and Douglas/Kwantlen Faculty Assn v. Douglas College, [1990] 3 S.C.R. 570 (a community college). The companion decisions rely heavily on the McKinney reasons.
\textsuperscript{218} McKinney, ibid. at para, 52.
employment, [and] the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship”. He found these objectives sufficiently “pressing and substantial” to justify the legal limitations on protection for older workers.

The outcome then turned on the court’s application of the minimal impairment test. For La Forest J., the determinative factor was that mandatory retirement was a policy freely chosen by workers:

> It must be remembered that what we are dealing with is not regulation of the government’s employees; nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled to obtain. It results from employment contracts that ensure stable, long-term employment, and some security for retirement. Far from being an unmitigated evil, it forms, as Professor Gunderson puts it, "an intricate part of the interrelated employment relationship" that is generally beneficial to both employers and employees. Expectations have built up on both sides.

As I stated, the labour movement, which comprises the most protected group of employees, fought for it for many years. University faculties and personnel, with which we are directly concerned here, actively sought it. The labour movement is now worried about its elimination.

As the majority of the court saw it, compulsory retirement was part of a ‘package deal’ sought and valued by unions; compulsory retirement and pensions were conceptualized as part of a complex web of carefully negotiated workplace arrangements worked out over time by equal partners at the bargaining table.

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219 *Ibid.* at para. 96,

220 *Ibid.* at para. 119-122. Cory J.’s judgment, in which he concurs with La Forest on the s.1 issue, also reflected a highly idealized view of the nature and process of collective bargaining: see paras. 432-33. Madame Justice Wilson, in dissent, expressed no real scepticism about the theory of mandatory retirement as a “package deal” [para. 326], although she made the important point that the benefits of this “package deal” are unevenly distributed, and clearly identifies the gender issues raised by this unequal distribution: para. 352. See also L’Heureux-Dubé, J., dissenting: para. 298.
The role played by collective bargaining in any particular workplace in establishing mandatory retirement is presumably an empirical question. In dealing with this question, however, adjudicators have not inquired into the actual dynamics of particular collective bargaining relationships; if mandatory retirement is in place, union consent is assumed. For example, in *Independent Electricity System Operator v. Society of Energy Professionals*,\(^{221}\) an arbitrator upheld a mandatory retirement policy against a union *Charter*-based challenge, despite the fact that the pension plan in question pre-dated the union’s acquisition of bargaining rights for the employees in question, and the collective agreement contained only a ‘maintenance of benefits’ clause of the type which most arbitrators have found incapable of supporting the arbitrability of a pension grievance. There was no evidence that the issue of retirement age had ever been addressed in negotiations between the parties.\(^{222}\) On these facts, the arbitrator nevertheless found the discriminatory retirement policy justified under s.1 of the *Charter*, based on what he called “the collective bargaining rationale”.\(^{223}\)

Quite apart from particular terms of a collective agreement that might be beneficial to employees, there is the value of a freely negotiated or arbitrated collective agreement. The right of employees to bargain collectively with their employer is a core aspect of employment in our society, and ought not to be interfered with without considerable reason. Interference after the fact in one area with the "deal" made by the parties can only place a strain upon their relationship and other parts of the "deal". Where the balance of benefits and costs to each party has been upset through other than mutual agreement, the party losing the benefit (in this case the Employer losing the benefit of mandatory retirement) will no doubt seek in the next round of bargaining some compensatory benefit to recoup its loss. Interference with the "deal" will likely at least lead to a subsequent attempt to reduce other benefits that exist to compensate for the loss.

Boiled down to its essentials, this means that a union which has not successfully challenged a mandatory retirement policy which co-exists with an employer-controlled employment pension plan has been deemed to consent to it. Furthermore, that ‘deemed consent’ is then elevated to the high status of justification for a violation of the *Charter*, Canada’s fundamental law. In the result, it is now received wisdom that unions fought for mandatory

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221 [2005] O.L.A.A. No. 152 ("IESO").
222 Ibid. at para. 16.
223 Ibid. at paras. 83-85.
retirement at the bargaining table; the institution of collective bargaining itself has become
the last and best bulwark against legal challenges to mandatory retirement policies.\footnote{224}{See also \textit{Large v. Stratford (City)}, [1995] 3 S.C.R. 733, in which the role of collective bargaining is important in establishing a “bona fide occupational requirement” defence to a human rights complaint.}

In light of the important role played by the reserved rights doctrine in establishing the
institution of mandatory retirement as part of collective labour law, the irony is profound.
This irony is further compounded when we consider that both the court in \textit{McKinney} and the
arbitrator in the \textit{IESO} case expressly considered and rejected the more s.1 substantive
rationale for mandatory retirement – job creation and renewal for young workers – to which
the Canadian Labour Congress appealed in its 1980 resolution as justifying its own support
for mandatory retirement polices. Instead, adjudicators have found their s.1 justification in a
vision of collective bargaining as a quasi-mystical process achieving an ideal workplace
equilibrium, much like the ‘invisible hand’ so revered by classical economists. Courts and
adjudicators are warned that it is perilous to disturb this equilibrium. In \textit{McKinney}, La Forest
J. describes mandatory retirement as imbedded within “a complex socio-economic problem
that involves the basic and interconnected rules of the workplace throughout the whole of our
society,” as “part of a web of interconnected rules mutually impacting upon each other”.
Tampering with that web holds the potential for unforeseeable and negative impacts on
“almost every aspect of the employer-employee relationship.”\footnote{225}{\textit{McKinney}, supra note 211 at paras. 96 and 107.}

The “web” is clearly not as intricately interconnected as this apocalyptic language would
leave us to believe. While the Supreme Court’s language draws heavily on the section 1
evidence presented by the universities and the government, it would appear that the courts
took it more seriously than the government itself. Even before \textit{McKinney} was decided,
several jurisdictions in Canada had limited or eliminated the protection previously afforded
by human rights codes to mandatory retirement.\footnote{226}{Mandatory retirement has been prohibited in the U.S. since 1986 under the Age Discrimination in Employment Act, with a short-term exemption for university faculty: see at age 65 was banned in the U.S. in 1986: see Kesselman, \textit{supra} note 210 at 181 and McKinney, \textit{ibid.} at para. 381.} The Ontario \textit{Human Rights Code}, the
statute under attack in \textit{McKinney}, has itself undergone important amendment; since January
2006, any employer seeking to enforce a mandatory retirement policy must demonstrate that
compulsory retirement is a \textit{bona fide} occupational requirement, the test formerly reserved
only for those whose systems chose retirement ages below the social norm of sixty-five. There is no evidence that the elimination of mandatory retirement has done damage to the institution of collective bargaining. Whether it has done damage to the employment pension system is a question we will return to in the concluding chapter of this thesis.

7.0 THE IMPACT OF COLLECTIVE BARGAINING ON CANADIAN PENSION PLANS

At the conclusion of Chapter 2, I took stock of the employment pension system at the end of World War II and prior to the advent of formal collective bargaining. That review identified some progress both in the spread of employment pension coverage, and in quality of benefits paid out under those plans. A broader range of employees were covered by pension plans, in a broader range of workplaces. More plans contained some vesting provisions that recognized a limited form of accumulating employee ‘equity’ in the benefits. More employers were taking steps to pre-fund benefits. Despite these improvements, however, a majority of Canadian workers still lacked coverage; either they worked for employers who did not provide pension plans, or they were excluded by plan membership rules which limited access to those workers who were permanently attached to ‘good jobs’. Vesting standards and benefit formulae gave short-service employees little in the way of benefits even where they were plan members. While patent discrimination against women workers in the drafting of pension plans was on the wane, women continued to be discriminated against; structural features of the labour market combined with design features of pension plans to ensure that they got little or no benefits.

These outcomes were rooted in a legal climate in which the law did not recognize employee pension rights. To what extent did collective bargaining ameliorate them? With respect to the coverage issue, the evidence on the role of collective bargaining is very mixed. There has certainly long been a close statistical correlation in Canada between union density and pension coverage. In the critical post-World War II period, newly-enacted legal frameworks for collective bargaining and burgeoning growth in such union-friendly environments as manufacturing and resource extraction fueled a steady increase in unionization from pre-War levels, and pension coverage grew with union density. Throughout most of the period from the early 1950s to the 1970s when pension coverage was on the increase in Canada, union
density too was growing.\textsuperscript{227} The decline in union density in the past two decades in Canada, particularly in the private sector, correlates with a commensurate decline in pension coverage.\textsuperscript{228} The quality of statistical data does not allow us to determine how much real overlap there was between unionized employees and pension plan members, but there is no doubt of that overlap in the more contemporary data; currently in Canada, 76 percent of pension plan members work in unionized workplaces.\textsuperscript{229}

Despite this correlation however, the “cause and effect” relationship between unionization and pension plans is a complex one, and the extent to which collective bargaining has been a factor in the establishment, spread and design of occupational pension plans is not clear. As we saw in Chapter 2, in the late 1940s, a Dominion Bureau of Statistics (“DBS”) study reported that pension plan coverage had reached about 30 percent. Two additional DBS studies in the 1960s, \textit{Pension Plans: Non-Financial Statistics, 1960},\textsuperscript{230} the first compilation of its kind in Canada and \textit{Survey of Pension Plan Coverage, 1965},\textsuperscript{231} which updates much of the 1960 data, provide valuable snapshots of the pension plans of that era and a benchmark against which to measure for impact of the new Canada and Quebec Pension Plans introduced effective January 1, 1966. The 1965 Survey reported that “[t]he accelerated growth rate of pension plans in Canada recorded over the past two decades continued during the first half of the 1960s”\textsuperscript{232}: by 1965, approximately 38 percent of total paid workers were covered by employment pension plans.\textsuperscript{233} Close to an additional 10 percent of the workforce

\textsuperscript{227}This historical correlation is uncontroversial and evident from all statistical measures. The precise data is very difficult to evaluate, however, because of differences in survey methods over time, because definitions of such crucial terms as “workers”, “labour force membership” and “union membership” have varied over time, and because many earlier surveys excluded public sector data. Historical pension coverage data is provided in Deaton, \textit{supra} note 34 at Appendix C-1. Historical union density data can be found in Statistics Canada, “Union Membership in Canada, 1911-1975” (Historical Statistics); René Morissette, Grant Schellenberg & Anick Johnson, “Diverging Trends in Unionization” April 2005 Perspectives (Statistics Canada and CALURA); Dianne Mainville & Carey Olineck, “Unionization in Canada: A Retrospective” Summer 1999 Perspectives, Supplement (Statistics Canada).

\textsuperscript{228} For a more detailed discussion of this issue, see Chapter 6 at section 5.4.


\textsuperscript{232} \textit{Ibid.} at 7.

\textsuperscript{233} \textit{Ibid.}.
was employed in workplaces with pension plans which they were only “temporarily” ineligible to join.\textsuperscript{234}

How much credit can unionization take for the fact that by 1965, at least by the statistical measures of the day, 38 percent of the workforce had pension coverage, and another 10 percent were potentially eligible for coverage? Writing in 1964, Gordon Milling, former research director for the Ontario Federation of Labour, acknowledged that “the labour movement [cannot] take credit for inventing pensions in the first place.”\textsuperscript{235} He argued, however, that “it is probably fair to say that bargaining pressure is responsible for a major share of the recent expansion of industrial pension plans – from one and a quarter million members to about two million in the past ten years.”\textsuperscript{236} In many of the larger workplaces where unions first won bargaining rights, however, pension schemes had already taken root before unions came on the scene, making the role played by unions in the both the initiation and expansion of coverage very difficult to measure.

This is most obvious in the public sector, an important seed-bed for early employment pension plans and a continuing site of employment pension plan provision; 80 percent of Canadian public sector employees are currently covered by pension plans, compared to 25 percent of private sector employees.\textsuperscript{237} While the public sector is currently much more densely unionized in Canada than the private sector, formal unionization came late there. Both federal and provincial governments had sophisticated statutory pension plans firmly in place for their employees many years before these governments granted formal collective bargaining rights to their employees. Even after collective bargaining became widespread in the public sector in the early 1970s, most Canadian governments kept their pensions outside

\textsuperscript{234} \textit{Ibid} at 8: 9.4 percent of paid workers were described as “temporarily ineligible” to join plans, and an additional 7.3 percent as permanently ineligible. While these terms are not defined in the 1965 \textit{Survey}, the more detailed information provided in the 1960 \textit{Survey} makes it clear that “temporary ineligibility” referred to employees who had not yet met age and service requirements, whereas ‘permanent ineligibility’ included both those too old to join the plan on hiring, and those who fell into an employment category ineligible for plan membership (e.g. the plan was restricted to executives, or to male employees): see 1960 \textit{Survey}, supra note 231 at 23-34. The 1965 \textit{Survey} reports that a further 2.4 percent were eligible to join, but had elected not to do so in voluntary plans.

\textsuperscript{235} Milling, supra note 181 at 185.

\textsuperscript{236} \textit{Ibid}.

\textsuperscript{237} See discussion in Chapter 6 at section 5.2.
the legal scope of collective bargaining; only in the last 20 years have public sector unions been allowed to bargain pension benefits, and to play a significant role in pension plan governance.

Unions have had more influence on the expansion of pension plan coverage in the private sector. Pension plans were certainly spreading among large manufacturing organizations prior to the advent of formal collective bargaining; as noted above, the DBS reported 30 percent coverage of the paid workforce in 1940, prior to the advent of formal bargaining rights for unions. In many cases newly certified unions in these sectors found pension plans already in place, although they may have restricted membership to management or white-collar employees. Collective bargaining in the auto sector was instrumental in extending plan coverage to blue-collar workers. Most scholars who have examined this issue conclude, however, that the influence of unions in obtaining private sector pension coverage is more directly measurable in secondary labour markets, where unionization brings pensions to workplaces where they would have been unlikely to emerge from employer imperatives alone, than in primary labour markets where employers already valued such plans.

It does appear, however, that collective bargaining facilitated some genuine improvements in benefit quality. Most available Canadian data make it difficult to measure the impact of collective bargaining, since it does not differentiate between unionized and non-unionized workplaces. It does, however, allow us to trace some of the changes which had taken place in the post-war period during which employment pensions and formal collective bargaining processes co-existed. The 1960 and 1965 Surveys show that the defined benefit plan continued to be the most popular type of employment pension plan. In fact, the popularity of DB plans was growing; the 1965 Survey reports that over 75 percent of pension plan members belonged to such plans, while the “money purchase plans [defined contribution

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238 See discussion at section 3.3, above.
239 See discussion in Chapter 6 at section 3.3.
240 Ghilarducci, supra note 184 at 39
241 Ghilarducci, ibid. at 26-7. See also Freeman, “The Effect of Unionism of Fringe Benefits”, supra note 195 at 489. For Canadian data see Brenda Lipsett & Mark Reesor, Employer-Sponsored Pension Plans: Who Benefits? (Canada, Human Resources Development Working Papers, 1997) at 18, 25 (unionization increases the odds that employees in small firms will have pensions).
plans] continued to lose ground”.242 The most popular benefit formula continued to be a “unit benefit” formula in which years of service leveraged a percentage of earnings, with flat benefit plans covering a mere 14 percent of plan members in 1965, up from 9.5 percent in 1960. While career average plans continued to be popular, they were now significantly outnumbered by plans based on some version of “final average” or “best average” earnings.243

The data on plan vesting standards showed some improvement. The 1960 data showed that plans covering a surprising 31 percent of plan members still gave no vesting rights prior to retirement.244 By 1965, however, that number had dropped to 22 percent. As a measure of benefit security, however, this statistic is misleading in a number of ways. First, general vesting standards had not changed greatly from the early 1950s, with a majority of plans still requiring ten to twenty years of service prior to vesting.245 Second and very importantly, many plans which permitted vesting prior to retirement made that vesting conditional: only those employees who were willing to leave their own contributions behind in the pension plan when they left pensionable employment were able to preserve any right to a future pension.246 The 1965 Survey estimated that over half of Canada’s contributory pension plans permitted employees to withdraw their own contributions when they left pensionable employment; most departing plan members did so, with the result that they forfeited any deferred pension.247

The 1965 Survey offers a snapshot for that year of the extent to which pension benefits replaced final annual earnings, reporting that:248

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242 1965 Survey, supra note 231 at 9. In 1965 money purchase plans covered only 6.5 percent of members, down from 13 percent in 1960, although they still greatly outnumbered defined benefit plans in terms of plans (13,660 DC plans as compared to 4,610 plans).
243 Ibid. at 14: career average earnings plans represented 28.5 percent of DB Plans, whereas final average earnings plans were 11.1 percent, and best average earning plans were 36.7 percent.
244 Ibid. at 11-2, 24.
245 Ibid. at 24.
246 Ibid. at 11.
247 Ibid.. The 1965 Survey reports that less than 3 percent left with an entitlement to a deferred pension, while the “vast majority” took a return of contributions. While no survey data is available, one obvious hypothesis for why so many employees were willing to forfeit a deferred pension is that they had left pensionable employment because they had lost their jobs, and were under financial pressure.
248 Ibid. at 12 (See Table 35, 31). While this table breaks down the data by sex, it is difficult to extrapolate a gender effect; 30 per cent of those retiring with a pension in that year are female, a far higher proportion than
…less than one third of retired plan members received pensions in excess of 50 per cent of their annual earnings at retirement, with pensions for most of this group ranging between 50 per cent and 70 per cent of such earnings; and for over half, the pensions ranged between 20 per cent and 50 per cent of final earnings.

Since there is no previous baseline, it is not possible to say whether or not these benefit levels are higher than they would have been without the impact of collective bargaining. In a 1960 study entitled *The Impact of Collective Bargaining on Management*, distinguished labor economist Sumner H. Slichter and colleagues argue based on U.S. data of that era that unions did not have a great deal of impact on raising benefit levels; a pension replacing 50 percent of pre-retirement income was the norm both before and after collective bargaining.249 These norms are target pensions for long service employees, however; an important feature neither the Surveys nor Slichter et al. report on is the level of pensions actually received by the many employees covered by these plans who would never qualify for full pension.

The 1960 and 1965 Surveys reveal a number of ways in which pension plans continued to differentiate between the rights of female and male employees. By the 1960s very few plans closed their doors entirely to female members, although there were a few remaining holdouts.250 Some plans which made membership compulsory for male employees offered voluntary membership to females.251 For most plans, there was no differentiation on the basis of sex for basic membership eligibility.252 Many plans, however, maintained sex-differentiated age and service eligibility criteria. The 1960 Survey identifies a number of common sex-based patterns, included the exclusion of younger women from membership (a common age of entry for men was 21, while many plans forced women to wait until they reached the age of 25 or even 30),253 and the establishment of a higher upper age eligibility limit for women than for men.254 Neither survey provides any information on whether plans continued to differentiate on the basis of sex with respect to the age of normal retirement,
although the retirement data provided in the 1965 Survey certainly confirms that women were retiring earlier than men.\footnote{1965 Survey, supra note 231 at 28, Table 32. This table reports over 60 percent of men taking ‘normal’ retirement at age 65, while only about 34 percent of women took ‘normal’ retirement at that age. A larger percentage of women than men took normal retirement earlier than age 65: although there is no clear pattern, there is a cluster of female retirements at age 60.} The data from both 1960 and 1965 also reveals that women were more likely than men to belong to pension plans which provided for no vesting of benefits prior to retirement.\footnote{Ibid at 17. In 1960, 37.7 percent of women, as compared to 29.3 percent of men belonged to plans with no vesting. By 1965, this figure had dropped for both sexes, but more for men than for women; the figures were now 32.4 percent of women and 18 percent of men: see 1965 Survey, supra note 231at 24, Table 23.} The Survey documents themselves provide no explanation for any of these sex-based differences.

As noted above, these DBS Surveys do not differentiate between plans in unionized and non-unionized workplaces. From other sources, however, we do get some sense of the direct impact of collective bargaining on benefit design. Like all plans, unionized plans were likely to be defined benefit plans. They were more likely than non-unionized plans to adopt flat benefit rather than unit benefit formula, a more egalitarian approach, and one that made it easier both to negotiate benefit increases and to incorporate credit for past service.\footnote{Slichter, Healy & Livernash point out that unions preferred flat rate benefits in the early days of pension bargaining for other reasons in addition to their egalitarian impact; because they were not tied to career earnings they were more responsive to bargaining upwards, and therefore easier to adjust to increases in the cost of living than percentage-based plans. They were also more transparent than earnings-based plans, making final pensions more predictable: supra, note 188 at 377-380. For a Canadian discussions of unionization and flat-rate benefits, see Pesando, Gunderson & Shum, supra note 203.} Unions have not consistently favoured flat-rate benefits, however.\footnote{Harbrecht notes that in the 1950s, there was a division between the AFL and the CIO on this issue, with the AFL favouring wage-based pensions and the CIO a flat-rate approach: supra note 188 at 96.} In its manuals of the 1950s for pension bargaining, the AFL-CIO promoted final average earnings approaches over ‘flat benefit’ approaches.\footnote{\textit{AFL-CIO Pension Plans, supra} note 182 at 55-6.} In addition, it is fairly clear that unionization in this era had a negative effect on vesting standards; in general, union plans were more likely to have longer vesting periods than other DB plans, rather than shorter.\footnote{For Canadian data on this point see Canada, Economics and Research Branch of the Department of Labour, “Vesting Provisions in Canadian Industrial Pension Plans” 1955 Labour Gazette 30 at 35. See also Freeman & Medoff, supra note at 194; Slichter, Healy & Livernash, supra note 188.} The fact that the \textit{Blue Books} did not apply their minimum vesting standards to unionized plans was no doubt a contributing factor to this outcome.\footnote{See discussion in Chapter 2 at section 4.1.}
that unions were ambivalent about the value of vesting, and were by no means opposed to lengthy vesting periods that favoured long-service over short-service employees.

8.0 CONCLUSION

Collective bargaining frameworks gave unions an important legal tool to challenge employer hegemony over pension plans. There is evidence that by the early 1950s, unions were playing a role in making pension coverage more widespread. They helped to sweep away the last vestiges of discretionary pensions, and worked at improving both the adequacy and security of pension benefits for unionized workers. The impact of collective bargaining on pension coverage and quality was limited, however, for three key reasons. First, the interpretation placed on the Canadian collective bargaining framework by arbitrators and courts consistently enhanced employer bargaining power at the expense of union bargaining power. Notwithstanding acknowledgement by labour boards and courts that pension rights were terms and conditions of employment within the scope of collective bargaining, arbitrators ratified employer strategies to keep employment pension plans safely confined within the realm of reserved management rights, making it more difficult and costly for unions to make bargaining inroads on pension issues, and severely hampering union efforts to enforce employee pension rights through the arbitration process. Second, the structure of Canadian collective bargaining allowed unions to play only a limited role in spreading pension plans and pension benefits beyond the boundaries of the enterprises in which pensions had already taken firm root before unionization became widespread. Likewise, the asymmetry between pension structures and collective bargaining structures within individual enterprises impeded effective collective bargaining. Where pension plans breached the boundaries of individual bargaining units, as they frequently did, unions faced significant challenges to effective bargaining. In addition, their bargaining power was diluted because they did not have the right to speak for all plan members and interested parties, including retirees. Third, union bargaining agendas and political survival strategies within an exclusive representation system undermined union incentives to disturb a pension status quo which left employers responsible for key pension decisions and favoured elite workers over more disadvantaged workers. Unions frequently found themselves aligned with employers on important issues of plan design and benefit structure. Accordingly, they did little to challenge key plan design
features such as lengthy vesting periods, defined benefit formulae that put ‘breakage’ to use to subsidize the benefits of elite workers at the expense of workers with lower wages and shorter service, and mandatory retirement.

After almost two decades, collective bargaining had not emerged as the catalyst needed to transform a mechanism designed to meet the needs of employers into a system capable of meeting the retirement income needs of workers. While the employment pensions of the 1960s were an improvement over the employment pensions of the late 1940s, they fell very far short of delivering good pensions to a majority of Canadians. Most Canadian workers still had no employment pensions, and those that were members of plans could not count on receiving adequate or reliable benefits. While pensions were no longer gifts, the precise nature of pension rights and the relationship between those rights and the contract of employment were far from clear, creating benefit security and enforcement problems both for current employees and for retirees collecting pensions. Despite the fact that unions had little power within the existing legal framework to change pension plans, the law assigned them joint responsibility with employers for these practical pension outcomes.

In the next Chapter, I will explore the efforts of Canadian governments in the 1960s and again in the 1980s to address the retirement income problem for Canadians within an overall policy framework, efforts which resulted in cementing a central role for employment pension plans within the national retirement income system. In particular, I will explore the decision to regulate employment pension plans, and the extent to which regulation addressed either the conceptual problems for employee pension rights left by the common law and the law of collective bargaining, or the weaknesses of employer-controlled pension plans in meeting the needs of a broad spectrum of Canadian workers.
CHAPTER 4

THE STATUTORY REGULATION OF EMPLOYMENT PENSION PLANS

1.0 INTRODUCTION

Until the 1960s in Canada, the terms of employment pension plans were shaped almost exclusively by the labour market imperatives of employers. As instruments of enterprise-based human resource policy, employers were largely free to shape these plans to their own ends. National income tax policy maintained an interest in insuring that pension plans did not become a strategy for tax evasion, an interest that increased during the war years and in the immediate post war period when both corporate profits and average wages increased. But in general, employment pension plans proliferated throughout Canadian workplaces both before and after World War II outside any coherent legal or policy framework except the principles of private law, modulated in unionized workplaces by the influence of collective bargaining.

It was the policy-building process of the post-war welfare state that brought retirement income policy in general and employment pension plans in particular onto the national agendas of the developed nations, including Canada. Welfare state construction triggered

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2 The broader international story of the pre- and post-war evolution of pension policy in the developed countries has also been told many times: see W. Graebner, A History of Retirement (New Haven: Yale University Press, 1980); Leslie Hannah, Inventing Retirement: The Development of Occupational Pensions in Britain (Cambridge: Cambridge University Press, 1986); Jennifer Klein, For All These Rights: Business, Labor and the Shaping of America’s Public-Private Welfare System (Princeton: Princeton University Press, 2003); Ann
intense national debate over the appropriate role of government in meeting the welfare needs of its citizens, pitting proponents of free markets as the principal engine of prosperity against proponents of government as active agents in the pooling and distribution of social risks and social benefits. High on the welfare state agenda was the issue of income security in old age.

In this chapter, I will examine the process by which employment pension plans in Canada became integrated into a national retirement income system and regulated by statute as part of that system. I will examine in some detail the initial policy decision in the 1960s to confine public pensions within narrow boundaries which would leave room for a continuing and important role for employment pension plans, and the unsuccessful efforts in the 1970s and 1980s to redraw those boundaries by expanding the role of public pensions. The focus of this thesis is on employment pensions, and I have not dwelt in detail on the precise structure of Canada’s public pensions, or how they have changed over time. It is important to my argument, however, to understand the significance for worker pension outcomes of the policy choice to leave space for employment pensions by minimizing the role of state ‘second pillar’ provision. Accordingly, in this Chapter I do explore some of the design features of Canada’s Pillar 2 pension, the Canada/Quebec Pension Plan (“C/QPP”), and how those features address pension inequality issues which have proved difficult to confront within the employment pension system. I will examine the role played by regulatory statutes in defining and shaping employment pension entitlements, arguing that regulatory statutes made breakthrough advances in defining and protecting a concept of accrued pension rights, but


3 The concept of 3-pillar retirement income systems is discussed in Chapter 1 at section 2.1.

4 Because the national second pillar system consists of the Canada Pension Plan (applicable in all provinces except Quebec) and the very similar Quebec Pension Plan (applicable in Quebec), the usual acronym is the C/QPP. I will use that acronym, although my focus in this chapter is on the Canada Pension Plan and I have not attempted to analyze the divergences between the two plans.
pulled back from recognizing any entitlement to continued accrual of pension benefits throughout a working life.

In designing a regulatory framework for pensions, Canadian governments rejected clear evidence from their own experts that voluntary pension systems would not promote retirement income equality, adequacy and security; mandatory systems, whether public or private were called for. I will argue that in opting for a continuing important role for voluntary employment pension plans, governments were responding to issues and interests unrelated to better pensions: to concerns of federalism, and to the interest of Canadian business in accumulating large pools of capital for investment purposes, and keeping control over that capital in private hands. Above all, they were responding to the interests of employers in maintaining control over employment pensions; while governments were willing to reconstruct pensions as rights rather than gifts, they were not willing to disrupt the balance of power between employers and employees by challenging employer control over the fundamental conditions which under those rights would be conferred.

2.0 THE POLICY PROBLEM

As I noted in Chapter 1, from the perspective of social welfare provision, Canada falls generally into Esping-Andersen’s category of liberal states: those states that rely first and foremost on the market to provide for the welfare of their citizens, and see only a ‘residualist’ risk-management role for the state.5 That liberal orientation has historically been evident in Canada’s approach to old age income security. Nineteenth Century Canadian governments saw old age poverty as a private matter to be addressed primarily within families, with private charity as the backstop for those whom fortune had failed to supply with able-bodied sons and daughters to care for them in old age.6 Not until the early part of the 20th century did the federal government take its first tentative steps in the direction of developing a Canadian old age income policy. The first federal program reflected a classic liberal approach; established in 1908 under the Government Annuities Act, it was not a public

6 Most of Canada never adopted the English poor law model, in which municipalities (or “parishes”) took responsibility for paupers ‘settled’ in their communities, offering poor relief to the indigent on terms designed to create incentives for economically marginal families to provide for themselves: see Guest, supra note 1 at 11-19.
pension scheme, but a program which facilitated ‘self help’, making annuities available to Canadians at costs modestly below market rates. There was very little take-up of these annuities among working class Canadians; most low income workers needed every penny they earned simply for the expenses of day-to-day living, and had little or no capacity for savings.

In 1927 the federal government, under pressure from social reformers, labour organizations and left-wing politicians, finally moved to establish an old age pension program. The *Old Age Pensions Act* took its lead primarily from Great Britain, adopting a rigorously means-tested non-contributory benefit targeted at relieving the desperate poverty into which many Canadian families fell when their breadwinner became too old to work. It was restricted to British subjects, federal and provincial residency requirements penalized recent immigrants or those who had moved from province to province to follow work or family, and the means test was both punitive and inconsistently applied. Consequently, the new program left much old age poverty unredressed.

Despite its flaws, however, the 1927 *Old Age Pensions Act* placed Canada ahead of the United States, which up to the mid-1930s had been almost unique among advanced capitalist democracies in providing no national old age benefit to its citizens. In 1935, however, the U.S. leapfrogged Canada by establishing a broad-based retirement security system. The U.S. *Social Security Act* of 1935, an important weapon in the New Deal arsenal of economic measures to combat the Great Depression, took a two-pronged approach to the provision of

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7 The government established the annuity program in response to recommendations from the 1887 Royal Commission on the Relations of Labour and Capital. As Dennis Guest notes, “[t]his[Royal Commission] recommendation was predicated on one of the most cherished beliefs of those nineteenth-century Canadians who lived above the poverty line – that much poverty in old age, or any other time of life, could be avoided by the application of thrift”: *ibid.* at 25-26. See also Bryden, *supra* note 1 at 51-59, for a detailed discussion of the history of the government annuity program, and the vigorous and durable opposition of the life insurance industry to what they perceived as unfair competition from government.

8 Guest, *supra* note 1 at 37.

9 R.S.C 1927, c.156.

10 Bryden, *supra* note 1 at 75-76. Australia and New Zealand had also adopted this model

11 See Guest, *supra* note 1 at 77-78; Bryden, *supra* note 1 at 82-101.

12 Theda Scopkol argues that the U.S. program of civil war pensions was an important precursor of social security, making the U.S. a “precocious social spending state” with a system of social provision [which] in many respects exceeded what early programs of ‘workingmen’s insurance’ were giving needy old people and superannuated industrial wage earners in fledgling Western welfare states around the turn of the century”: *Protecting Mothers and Soldiers: The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Harvard University Press, 1992) at 2-3.
retirement income: the Act combined a means-tested flat-rate old age benefit with a mandatory earnings-based contributory public pension, together geared towards producing a retirement income which would permit working and middle-class families to maintain consumption levels after the bread-winner left the workforce.\textsuperscript{13} The New Deal program generated pressure in Canada for retirement benefits that would exceed poverty relief standards. By the mid-1930s Canada was on track to develop its own ‘new deal’: a package of reforms designed to include universal unemployment insurance and a contributory earnings-related pension plan to supplement the means-tested old age benefit. In 1937, however, the prototype Canadian ‘new deal’ program, the new federal \textit{Unemployment Insurance Act}, was ruled unconstitutional on the basis that it purported to regulate the employment contract and therefore belonged within provincial jurisdiction under the division of powers established by the \textit{British North America Act}.\textsuperscript{14} After this legal defeat, Canada abandoned plans for further ‘new deal’-style social insurance at the federal level.\textsuperscript{15}

As a result, Canada entered the relatively prosperous period following World War II with a significant problem of financial insecurity in old age. This presented a political as well as a social problem. As Kenneth Bryden puts it, “[t]he greatest war in history, following hard after the greatest depression in history, created a strong sentiment in the western world…that there could be no return to the conditions of the 1930s.”\textsuperscript{16} The public craving for security brought with it a perception that the state had an important role in providing ‘social

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\item[\textsuperscript{13}] Bryden describes the U.S. system as follows: “Contributory pensions constitute the core of the U.S. design, as they were intended to do at its inception in 1935, but means-test pensions continue to form a not inconsiderable part of the whole”: \textit{supra} note 1 at 7.
\item[\textsuperscript{14}] \textit{Reference Re: Employment and Social Insurance Act (Canada)}, [1936] S.C.R. 427. The case tested the constitutionality of a federal statute creating a system of compulsory national unemployment insurance funded by employer contributions. The Supreme Court of Canada focused primarily on the relationship between unemployment insurance and the contract of employment. As Kerwin J., described it, “[The statute] deals with contracts of employment and attaches thereto a statutory condition. It interferes with property and civil rights”. Rinfret J. characterized the Act as “attach[ing] statutory terms to contracts of employment”, and “impos[ing] contractual duties as between employers and employees” (per Rinfret J., Cannon and Kerwin JJ. concurring). The Privy Council concurred: “[t]here can be no doubt that, \textit{prima facie}, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province”: \textit{Reference re: Employment and Social Insurance Act (Canada)}, [1937] J.C.J. No. 6; [1937] 1 D.L.R. 684 (Judicial Committee of the Privy Council) at 6.
\item[\textsuperscript{15}] Bryden, \textit{supra} note 1 at 106, 123; Orloff, \textit{supra} note 2 at 19.
\item[\textsuperscript{16}] Bryden, \textit{supra} note 1 at 109.
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insurance’ against broad social and economic risks. In 1951, as a first step down the road to modernizing its approach to retirement income security, Canada replaced its old means-tested benefit with two new benefits: a universal flat-rate benefit payable to all citizens at age seventy, supplemented by a means-tested benefit payable to those between sixty-five and sixty-nine in recognition that many Canadian workers were forced to leave the labour force prior to eligibility for the universal benefit.

While these were pivotal steps in the process of constructing a new role for the state in the provision of retirement income, they were relatively small ones. Both new pensions were maintained at ‘poverty relief’ levels; they did not aspire to U.S.-style income maintenance standards, and were certainly never high enough to operate as an inducement to retirement.

There was continuing public pressure throughout the 1950s to increase the universal old age benefit, pressure to which politicians succumbed with some regularity, particularly in response to election schedules. There was clearly a public appetite for pensions that would do more than simply relieve poverty, for pensions that would provide some measure of income replacement security for Canadians who had reached the end of their working lives.

For most Canadian, such pensions were not to be found in the marketplace. The primary market instrument for retirement income, and for many years the only tax-assisted instrument, was the employment pension system, an instrument whose manifest flaws we have already examined in some detail. When Queen’s University did its historic study of

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17 Bryden explains that the term “social insurance” was widely used at the time, but in a variety of different senses, ranging from “benefits which were directly related to (‘purchased by’) premiums” to “a guarantee to the entire population of a basic income in (insurance against) adversity”: ibid. at 110.

18 Old Age Security Act. S.C. 1951, c.18. The Old Age Security (“OAS”) benefit was not quite “universal”, since there continued to be a twenty year residency requirement: see Bryden, ibid. at 104-106.

19 Old Age Assistance Act, S.C. 1951, c.55. Unlike the OAS benefit which was entirely federally funded and administered, the Old Age Assistance (“OAA”) benefit was a joint federal provincial program. As part of the policy process from which the Canada Pension Plan emerged, the Old Age Assistance Act was repealed and by January 1, 1970, OAS was payable at age 65: see Bryden, ibid.. at 130-31.

20 One objective of U.S. social security was clearing labour markets of older workers, inducing them to retire to make room for younger unemployed workers: see Orloff, supra note 2 at 21.

21 Registered Retirement Savings Plans (“RRSPs”) were introduced in Canada in 1957, primarily as a tax-assisted tool to promote pension savings among the self-employed, who had no access to employment pension plans: see Ontario Committee on Portable Pensions, Second Report (Toronto: Queen’s Printer, Aug. 1961) at 69.
pension plans in Canada in 1938,\textsuperscript{22} it was evident that employment pension plans covered only a fraction of the workforce. The authors estimated – almost certainly generously - that perhaps as much as 30 percent of the workforce at that time was employed in workplaces that provided some pension coverage. The \textit{Queen’s Study} emphasized, however, that only half of these workers were actually members of plans. Even in workplaces that provided pension coverage, many employees were excluded from plan membership, and many more would never collect pensions because they left the workplace before reaching retirement age.\textsuperscript{23} The authors were pessimistic about the potential for expansion of the system, arguing that employment pension plans had no future outside narrow primary labour markets.\textsuperscript{24} As they saw it, such plans could never protect the majority of Canadians, and could not be regarded as a serious alternative to an inclusive state-operated plan.\textsuperscript{25} While the situation had improved somewhat by the late 1950s, as we have seen in Chapter 3, coverage still remained both incomplete and uneven. Furthermore, many workers who had belonged to plans for much of their working lives were receiving inadequate pensions or no pension at all. At the end of Chapter 3, I took a close look at employment pension outcomes for workers in the late 1950s and early 1960s.\textsuperscript{26} The situation had clearly improved by then, but the system’s benefits were still very uneven, and reserved primarily for elite workers.

The Committee on Portable Pensions, appointed by the government of Ontario in the early 1960s to examine employment pensions, identified a variety of continuing and serious problems with employment pensions. As its name indicated, the Committee’s key concern was a problem it identified as “lack of portability”.\textsuperscript{27} The Committee used the term “portability” in a sense rather more narrow than its use in modern pension parlance; the core focus was on the loss of pension value by employees who had worked in pensionable jobs

\footnotesize{\textsuperscript{22} Industrial Relations Section, School of Commerce and Administration, \textit{Industrial Retirement Plans in Canada} (Queen’s University, Kingston, Ontario, 1938) [“Queen’s Study”]. This study is discussed in greater detail in Chapter 2 at 2.1 and 2.2.1 - 2.2.3.  
\textsuperscript{23} \textit{Ibid} at 8-19.  
\textsuperscript{24} \textit{Ibid} at 108.  
\textsuperscript{25} The \textit{Queens Study} saw a continuing role for employment pension plans as supplement to a public pension: \textit{ibid.}, at 108.  
\textsuperscript{26} See Chapter 3 at section 7.0.  
\textsuperscript{27} \textit{Queens Study, supra} note 22 at 65.}
but never earned the right to a pension. The Committee linked the issue of ‘portability’ directly with the issue of vesting rights, characterizing delayed vesting as “the principal obstacle to portability of pensions”. Committee findings confirmed that many workers who were members of employment pension plans failed to collect benefits from those plans because they had left pensionable employment prior to retirement. In many cases, they abandoned any right to a pension on departure because the plans had limited vesting rights. The late vesting problem was further compounded by the fact that even under plans with earlier vesting rights, employees were typically forced to sacrifice the value of employer contributions if they chose to withdraw their own contributions when they left their jobs.

The Committee had a label for the problem of the “high proportion of workers whose pension accumulations do not come to fruition”: “wastage”. Overall, the low rate of coverage we saw in Chapter 3, the uneven nature of that coverage, and the “wastage” within the system combined to make employment pension plans unlikely candidates to solve the retirement income gap left by Canada’s inadequate public pensions.

3.0 THE MAKING OF CANADA’S THREE-PILLAR SYSTEM

3.1 The Evolution of the Canada Pension Plan: The Federal Political Process

At both the federal and provincial level, pressure mounted throughout the 1950s from the labour movement, social democratic political parties and social welfare organizations for a supplementary public pension plan on the model of the U.S. Social Security Act of 1935:

28 Modern pension experts use the term “portability” to refer to the right to transfer vested credits out of a plan and into another plan or locked-in retirement account; the Committee was more focused on the rights themselves, regardless of whether or not they remained in the plan as a “deferred pension” when the employee departed.

29 Queens Study, supra note 22 at 51. The moving of pension credits from plan to plan it labels “transferability: “transferability” is seen as a much less pressing policy issue than “portability”.

30 Ibid. at 42-43. The Committee noted that plan rules which required employees who withdrew their own contributions to forfeit the already-vested value of employer contributions “has been examined and found appropriate in light of the circumstances and objectives, notwithstanding the widely-held impression that the employer’s portion retains the character of a deferred wage”: ibid. at 55.

31 Ibid. at 20. The Committee’s “wastage” is very similar to the concept of “breakage” discussed in Chapter 3 at 6.3.2.

32 Guest, supra note 1 at 137. There was a prevailing perception that U.S. social security was significantly superior to existing Canadian programs. A study commissioned by the federal government in the late 1950s cast some doubt on that view: see Robert M. Clark, Economic Security for the Aged in the United States and Canada: A Report Prepared for the Government of Canada (Ottawa: Queen’s Printer, 1960). Clark found that U.S. Social Security promised more than it delivered, particularly to low income Americans and the already
public plan that would be mandatory, contributory, and earnings-based, and would generate benefits high enough to secure not just freedom from poverty in old age, but a comfortable retirement for working people. By the late 1950s, a federal-provincial consensus had emerged that state action to establish such a plan would be required. Under Canada’s federal system, however, it was far from clear at which level of government the problem of designing and implementing such a contributory public pension system should be tackled.

Old age security issues had been dealt with at the federal level over the years, but not without controversy. The federal government had legislated unchallenged in 1908 to launch the government annuity program. By 1927 when the means-tested old age pension was established, however, the federal government had been careful to involve the provinces; the 1927 Old Age Pensions Act provided for federal-provincial cost-sharing, and left the job of administering the system to the provinces.33 The enactment of the Old Age Assistance Act and the Old Age Security Act in 1951 was hedged with even more caution; a carefully and narrowly worded amendment to the British North America Act, the new s.94A, was negotiated with the provinces, clarifying the federal government’s authority to enact “legislation in relation to old age pensions in Canada”, but acknowledging provincial jurisdiction in the field and specifically providing that provincial legislation would be paramount in the event of conflict.34 As a result of this recent constitutional compromise, jurisdictional antennae in the 1950s were still high. There were concerns that the 1951 constitutional amendment was too narrow to enable legislation making provision for disability and survivor benefits, two desirable features of any proposed national plan. Federal and provincial governments alike agreed that before a national earnings-based pension plan could be implemented, another constitutional amendment would be required.

The series of events which ultimately gave birth to Canada’s three-pillar system has been analysed frequently by politicians, historians and scholars as a pivotal chapter in the history

elderly, who had not had an opportunity to build up a contribution record for the new benefit: see discussion in Bryden, supra note 1 at 142.
33 See Bryden, ibid. at 61-63.
34 The version of Section 94A of the BNA enacted at that time read: “The Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of the Provincial Legislature in relation to old age pensions”.
of modern Canadian federalism. It is a tangled tale, much influenced by intergovernmental power struggles and considerations of partisan political advantage, and accounts of its intricacies are conflicting. For the most part, these conflicts do not affect my main focus, the role this episode played in shaping the emergence of a new legal framework governing employment pension plans. For that purpose, it is important to understand that the constitutional issue gave the provinces leverage they might not otherwise have had over the shape of the plan, leverage of which two provinces in particular, Ontario and Quebec, made effective use. Quebec was newly energized by the election in 1960 of a Liberal government after almost twenty-five years of iron rule by a conservative, Catholic and corporatist party, the Union Nationale. About to embark on the Quiet Revolution, the province was looking for opportunities to make Quebecers Maîtres chez nous, to take Quebec economic development into its own hands. The new government was deeply interested in the idea of a public pension plan, but it envisioned such a plan operating at the provincial rather than the federal level. This would allow Quebec to achieve two objectives; it could ‘repatriate’ an important aspect of social welfare policy from the clutches of the federal government, and at the same time it could use the mandatory and contributory features of such a pension plan to accumulate a significant pool of capital for public investment in the provincial economy. Accordingly, in the early 1960s Quebec embarked on its own project, the Quebec Pension Plan, designed to preempt the federal government’s project of a Canada-wide program.

Meanwhile Ontario too was solidifying its resistance to a national pension scheme, for very different reasons. Firmly committed to market liberalism and a minimal social and economic role for government, Ontario’s reigning Conservatives saw a public pension plan as a threat to market mechanisms. They strongly favoured a private sector approach to pension

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36 Bryden, supra note 1 at 162-63. “Maîtres chez nous” had been used as a liberal election slogan.

reform. Ontario’s Premier, the Honourable John Robarts, went into the federal-provincial negotiations arguing that there was no need whatsoever for a public second-pillar pension plan. He was well-armed to take that position; in response to the recommendations of its Committee on Portable Pensions, the province had recently passed a new statute, The Pension Benefits Act, 1962-63, establishing a system of mandatory private employment pension plans, designed to take full effect by January 1, 1965.

The Committee’s recommendation of a mandatory private system reflected its serious concerns with the both the quality and quantity of pension provision under Ontario’s current voluntary employment pension system. It equally reflected its serious concerns about the deleterious impact of public pension plans on the economy. Employer briefs to the Committee had emphasized the wide range of vital functions such plans served for employer human resource management strategies. In response to these concerns, the Committee had expressed grave apprehension about the “crowding effect” of a public plan on the private sector; it was anxious to preserve as much room as possible for employment plans. The Committee was equally concerned, however, about the importance of the funds accumulating in such plans, and about the deleterious economic impacts that would follow if such a large concentration of funds were to fall into the hands of a state agency. The Committee expressed concern that this would produce a highly problematic concentration of “monopoly power”. Furthermore, the state might well use those funds “as a means of subsidizing some plan members at the expense of others”. Use of pension funds for redistributive rather than investment purposes, suggested the Committee, was both unsustainable and likely to


38 For Premier Robarts’ own view, see Honourable John Robarts, “The Ontario Approach to Pensions” in Laurence E. Coward ed., Pensions in Canada: A Compendium of Fact and Opinion (Don Mills, CCH Canadian Ltd: 1964) 1. Robarts argues that “[p]ublic plans provide a basic floor for everyone, but except in a socialist state no government pension system even attempts to provide for all the pension needs of all the people”: 3. His reference to a “basic floor” is clearly a reference to first pillar instruments.

39 The key Committee document is the Second Report, supra note 21, which provides background information to a Summary Report issued in February of the same year, and also modifies some of the key recommendations originally made in the Summary Report. For a discussion of some of the background to this Committee by one of its members, see Robert M. Clark, “The Pension Benefits Act of Ontario and its Relation to Federal Pension Proposals” in Laurence E. Coward ed., Pensions in Canada: A Compendium of Fact and Opinion (Don Mills, CCH Canadian Ltd: 1964) 27.

40 S.O. 1962-63, c.103.

41 Committee on Portable Pensions, Second Report, supra note 21 at 4-5.

42 Ibid. at 68; see also 13.

43 Ibid.
produce low pensions, an outcome that “might have serious consequences for the nation as a whole through its effect in increasing interest rates and the amount of borrowing abroad”.  

The Committee made no secret of its strong preference for private over public pensions. Premier Robarts obviously felt the same way. Speaking to the Canadian Pension Conference in 1964, he had lauded the role of employment pension funds as “a most important source of savings essential to our developing and capital-hungry country”. In the same speech, Robarts emphasized his government’s commitment to an approach to retirement income policy in which “capital formation through pension funds [w]ould not be stunted”.  

Like Quebec, then, Ontario saw the potential of pension funds as economic levers within the province. Unlike Quebec, however, Ontario was anxious to keep the increasingly large pools of pension fund capital out of the hands of government and leave them firmly in the hands of private enterprise. Ontario was prepared to listen to arguments in favour of a modest public system to fill some of the retirement income gap the market had so far failed to fill. But its ear was equally tuned to the chorus of powerful business voices arguing that solutions to the employment pension plan problem should be sought and found in the market.  

It was not until 1963 that the federal government placed a specific proposal for a Canada Pension Plan squarely on the federal-provincial table. Intense negotiations between federal and provincial governments ensued about the substance of the proposed plan, and about the constitutional amendment required to implement it. A new version of 94A of the British North America Act was agreed upon, providing that “Parliament may make laws in relation to old age pensions and supplementary pensions, including survivor and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.” This constitutional compromise laid the basis for the new national three-pillar retirement income scheme. Quebec achieved its goal; there would be national program, but it would be structured to permit provinces to ‘contract out’ and establish provincial plans. Quebec alone chose to exercise that option; there would therefore be two plans in Canada, the Canada Pension Plan (“CPP”) and the Quebec Pension Plan (“QPP”), with substantially uniform provisions and transferability of

44 Ibid. at 68.  
45 The Honourable John Robarts, “The Ontario Approach to Pensions” in Laurence E. Coward, ed., Pensions in Canada: A Compendium of Fact and Opinion (Don Mills, CCH Canadian Ltd: 1964) 3, 5. At the time he was speaking, Robarts was defending the merits of Ontario’s 1963 mandatory private plan approach.
credits between the two plans. Both plans would be partially funded; Quebec would use its contributions to fund provincial development goals, while funds accumulated in the C/QPP would be loaned at favourable rates of interest to the provinces. Ontario too largely achieved its goal: the goal of ensuring that a public plan did not ‘crowd out’ private enterprise in the pension field. When the dust settled, maximum C/QPP benefit levels replaced only 25 percent of average salaries,46 a level considerably below international standards,47 and one acknowledged as inadequate to maintain pre-retirement livings standards even for average income earners with continuous full-time employment records. Ontario took care to build a bulwark against pressure for an early increase in C/QPP levels by insisting on a complex amending formula which gave Ontario an effective veto over any changes.48 Ontario repealed its Pension Benefits Act, 1962-63, content that the C/QPP would supply at least the basic needs of the unpensioned, in an overall framework within which private enterprise could thrive.

3.3 The Structure of the C/QPP Benefit49

Even at relatively low benefit level, for the majority of Canadians the C/QPP offered much that was not available from employment pension plans. All working Canadians earning above an established minimum were required to contribute, regardless of whether they were employees or self-employed. All contributors earned credits towards a deferred pension, which could be realized when they reached retirement age, regardless of how sporadically they had contributed.50 Contributions vested immediately. There were no issues of portability

46 Bryden, supra note 1 at 155-56. 
47 International comparisons are discussed in Canada. Task Force on Retirement Income Policy (Harvey Lazar, Chairman), The Retirement Income System in Canada: Problems and Alternative Policies for Reform (Ottawa, Ministry of Supply and Services, 1980), Vol. I at 30-31 [“Lazar Report”]. The data reported there indicates that at that time, Canadian public pensions including the OAS and the Guaranteed Income Supplement replaced about 57% of average income for one-earner couples, as compared to Sweden at 80% and France at 77%. Canadian replacement rates would have been lower for two-earner couples or single people. For more current international comparisons, see discussion in Chapter 1 at section 2.1.
48 Bryden, supra note 1 at 174.
50 Pensionable age was initially pegged at 70, although members who retired between 65 and 69 could collect reduced pensions if they retired earlier. The eligibility rules have been changed a number of times. Currently,
or transferability, and no complex valuations required to convert vested credits from one plan to another. Unlike most employment pensions of the era, the C/QPP had indexation features designed to ensure that benefit levels, as well as earnings minima and maxima, were continually adjusted to compensate for inflation.\textsuperscript{51}

In general, the plan pegged contributions to earnings, and pensions to contributions, with the result that pension benefits roughly tracked labour market earnings. There were exceptions to this principle for high and low earnings. No contributions were made or benefits paid on earnings above an established maximum based roughly on average earnings; the plan was thus targeted towards average wage earners, and provided lesser benefits relative to income to higher earners. Likewise contributions were not made on earnings below an established minimum. This feature had modestly redistributive impact; it meant that low wage earners contributed less overall in return for their pensions than higher earners. It also meant, however, that those whose earnings did not pierce the minimum did not accumulate any pension credits at all. The benefit formula generally required a ‘full career’ of forty-seven years to earn the maximum benefit; however, plan members were allowed to exclude their worst seven earning years from the calculation, another modestly redistributive feature that allowed those who were late entering the labour market, or those who had period of broken service or unemployment, to improve their benefits.

The decision to restrict eligibility for C/QPP benefits to labour market participants meant that many Canadian women would still be unable to earn pensions in their own right. Reformers saw significant advantages for working women in the design of the C/QPP;\textsuperscript{52} workers whose employment histories were characterized by part-time employment, and by short and discontinuous service, would benefit from the immediate vesting and complete ‘transferability’ of pension credits. Indexation would give some much-needed protection to the purchasing power of women’s benefits, and the redistributive features of the plan would

\footnotesize{\textsuperscript{51} The indexation formula has always been quite complex, capped and hedged in various ways to control costs and make them more predictable, with the result that benefits frequently fell behind the average wage: Bryden, \textit{supra} note 1 at 156-9; Royal Commission on the Status of Pensions in Ontario, \textit{Report} (Government of Ontario, 1981) at Vol. V, 24.}

\footnotesize{\textsuperscript{52} These advantages are discussed in detail in Townson, \textit{Independent Means}, \textit{supra} note 49 at 73-84.}
benefit women because of their low pay. But from the policy-makers’ perspective, the centerpiece of the new plan for women was the provision of mandatory survivor benefits, equal to 60% of the pension which had been paid or would have been payable to the wage-earning husband.\footnote{While survivors’ pensions had been relatively commonplace in civil service pension plans since at least the 1920s, they were still uncommon in private sector pension plans, and were a valuable hedge against the statistical probability that the wives of C/QPP contributors would outlive their husbands, and consequently their husbands’ breadwinner pension.} While survivors’ pensions had been relatively commonplace in civil service pension plans since at least the 1920s, they were still uncommon in private sector pension plans, and were a valuable hedge against the statistical probability that the wives of C/QPP contributors would outlive their husbands, and consequently their husbands’ breadwinner pension.\footnote{Mortality tables published in the Second Report of the Committee on Portable Pensions show that at age 65, women had a life expectancy 3.28 years longer than men: supra note 21 at 133.}

3.3 First Round Pension Reform and Policy Objectives

Notably absent from the political process we have just examined is any focus on any comprehensive national retirement income policy. At no point in the delicate negotiations which resulted in the C/QPP do we find any broad assessment of the nature and scope of the retirement income needs of Canadians. The first round of pension reform did not answer such questions as what commitment the state was prepared to make towards meeting the retirement income needs of Canadians, what distributive principles should guide state action, or what contribution state pensions and employment pensions respectively might make to meeting policy goals. There were no benchmarks set for, or commitments made about retirement income adequacy. The key policy questions were never directly posed in the course of the debate, nor were they transparently answered, although the shape of the resulting three-pillar system clearly reflected, in practical terms, a set of policy decisions with profound impact on the lives of Canadians.

The 1964 federal White Paper which introduced the C/QPP was generally quite unforthcoming about the policy choices animating the design of the system. The CPP White Paper described the program as providing “social insurance protection”; it is “a contributory pension plan ensuring that, as soon as possible in a fair and practical way, all Canadians will...
be able to look forward to retiring in security and with dignity”.

In explaining the “Economic Implications” of its benefits, it speaks of a “reasonable” retirement income for people of average earnings, and of aspiring to “provide a level of pensions which is appropriate to a society that values the security and dignity of those whose working life is past or who suffer the major misfortune of death or disablement of the family bread-winner”. Nowhere does it speak of adequacy, of comfort, or even of maintaining living standards or replacing pre-retirement income. Above the level provided by the plan, protection … will remain a matter of individual choice. That is to say, the individual – in association in many cases with his employer – will remain responsible for the saving by which, as income rise, more and more people can afford to make further provision for themselves if they so desire.

Much of the CPP White Paper was taken up by explanations of the technical details of the plan. Almost one-quarter of the document’s text was devoted to reassuring business that the plan will not have a negative effect on capital markets.

As we shall see, the structure of C/QPP contributions and benefits reflects a clear decision to tie Pillar Two instruments to labour market participation, and to maintain a close relationship between contributions and benefits. Nowhere, however, do we find any clear articulation of what policy goals are served by these choices. The links between benefits and contributions suggest a policy decision that pre-retirement income replacement is a Pillar Two goal, but there is no articulation on the public record of what value choices are implicit in that decision, or what target level of income we should be seeking to replace. The redistributive features of the C/QPP benefit appear to reflect a judgment on the part of government that social policy objectives may be appropriately served by Pillar Two instruments, but the very modest nature of those redistributive features reflects considerable ambivalence on that issue. We are left to guess what debates and compromises those design features reflect; our policy makers do not tell us.

The resulting system was framed by no clearly articulated overall policy goals. What we have is a ‘deal’, negotiated among powerful players in a federal system with objectives often

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56 Ibid. at 23.
57 Ibid.
58 Ibid. at 21-26.
unrelated to, certainly much broader than, and perhaps even antithetical to good retirement income policy.\(^{59}\)

### 3.4 A Continuing Role for Employment Pensions: The Policy “Deal”

Business, championed by Ontario, had fought hard against a public ‘second pillar’. Business interests lost that battle. Overall, however, they had been very much parties to the ‘deal’ ultimately negotiated, and had reaped substantial benefits. In its overall structure, the ultimate C/QPP was decidedly business-friendly. The most critical decision for the preservation of employment pensions was, of course, the benefit level; the C/QPP was set to replace, at a maximum, only 25 percent of the average wage. The benefit level was not the only important issue for business, however. Business was concerned not just with the survival of employment pension plans but also with the structure of co-existence; how public benefits and private benefits were linked had significant implications for the flexibility of employment pensions plans as labour market tools, for overall pension costs to employers, and for the profitability of the private pension industry. One option for co-existence, a proposal to permit employers who had already established employment pension plans to contract out of the C/QPP altogether, never gained any traction.\(^{60}\) The alternative, and more popular business position was that C/QPP benefits should be fully integrated with benefits from private plans. Under the simplest integration models, overall pension levels would remain the same; for example, if employees expected a pension benefit of $100/month and the C/QPP paid $25/month, the employment plan would reduce its own benefit to $75/month.\(^{61}\) Integration would meet the concerns expressed by employers who were

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\(^{59}\) I do not, of course, suggest that this approach to policy-making is in any way unique to retirement income issues. Banting points to Ontario’s role in the making of national pension policy as a prime example of how federalism, with its “multiple veto points” has a conservatizing impact on Canadian social policy: *supra* note 1 at 69. He argues that “[f]ederalism affords the private pension industry with greater protection than it would otherwise enjoy, providing it with more time and political opportunities as it attempts to adjust to a new and harsher economic climate”.\(^{73}\)

\(^{60}\) The “contracting out” model had been followed in Great Britain. Ontario’s Committee on Portable Pensions had recommended that if a mandatory public pension system were introduced, employers who provided or were prepared to provide comparable plans should be permitted to contract out: see Committee on Portable Pensions, *Second Report, supra* note 21 at 67.

\(^{61}\) Most integration models were more complex than this, designed to protect employers from unpredictable costs based on the fluctuation of C/QPP benefits: see presentation of James Gill in Canadian Pension Conference, *Symposium of Views on the Canada Pension Plan*, Presented to a Special Meeting of the Canadian Pension Conference held in Toronto (Toronto: CCH Canada Ltd., 1964) 62 at 64-65. Integration rules penalize lower wage earners, and in particular, have an adverse impact on women: see Cynthia Fryer Cohen, “The
already contributing to private plans on behalf of employees and did not want employer
C/QPP contributions ‘stacked’ on top of those existing costs. Equally importantly, it would
give employers a license once again to target their employment pension dollars to their more
highly-paid employees, as they had done before income tax rules intervened to forbid plans
from discriminating on this basis. Under an integration model, employer pension
contributions could be applied primarily to improve benefits payable on wages above the
level of the average salary on which C/QPP was based. James M. Gill, Chief Actuary for the
Confederation Life Insurance Company, was frank in promoting the benefits of integration to
an industry conference in 1964 on this basis:62

The general objective in the integration of private pension plans with benefits
provided under a Government pension scheme, is to permit persons earning more
than the wage base provided under the Government scheme to receive equivalent
benefits on their total earnings.

The concept is thus quite simple. Applied to the present situation in Canada under the
proposed Canada Pension Plan, if a person is to receive a Canada Pension Plan
benefit on his first $5,000 of earnings of 25 per cent, then it is permissible to pay the
employee a pension from a private pension plan of 25 per cent of pay in excess of
$5,000 without the private plan being discriminatory.

The integration model had proved very attractive to U.S. employers after the passage of
social security legislation. Instead of the catastrophe anticipated by the private pension
industry following the passage of social security, integration of private plans with public
benefits had turned social security legislation into a business windfall. The industry hoped
that a combination of low benefit levels and integration of benefits would produce a similar
pattern in Canada.63

Business lobbyists sought to persuade government to make integration mandatory.
Predictably, unions seeking to protect collectively bargained benefits for lower paid workers

Impact on Women of Proposed Changes in the Private Pension System: A Simulation” (1983) 36 Industrial and
Labor Relations Review 258 at 260, 268.
62 Canadian Pension Conference. Symposium of Views on the Canada Pension Plan, Presented to a Special
Meeting of the Canadian Pension Conference held in Toronto, ibid at 62.
63 Sass, The Promise of Private Pensions, supra note 2 at 100; Teresa Ghilarducci, Labor’s Capital: The
integration was not uncontroversial in the U.S.: see Hurd v. Illinois Bell Telephone Co., 136 F. Supp. 125 (N.D.
Ill. 1955), which Paul P. Harbrecht describes in Pension Funds and Economic Power (New York: Twentieth
Century Fund: 1959) as “one of the most thorough analyses of the pertinent cases yet made, but [the court] was
forced to conclude that the rules of law on the subject cannot be reconciled in all cases”:171.
took the opposite position, lobbying hard for a statutory requirement that C/QPP benefits be ‘stacked’ or ‘decked’ on top of private benefits, so that all workers would get full value both from new public benefits and from their employment plans.\(^64\) The government opted for a hands-off approach, arguing that any relationship between C/QPP benefits and employment pension benefits was an entirely private matter: “those responsible for each pension plan” could work the issue out for themselves in individual workplaces.\(^65\) As we have seen in previous chapters, “those responsible for each pension plan” in most cases meant the employer. It should therefore be no surprise that the integrated model won the day; by 1970, 75 percent of plan members belonged to plans that integrated plan benefits with C/QPP benefits, a number that has since increased.\(^66\) In non-unionized workplaces, employers simply imposed integrated models. In unionized workplaces, many employers did the same. As we saw in Chapter 3, unions grieved forced integration with mixed results; despite the decision of the Supreme Court of Canada in *International Association of Machinists and Aerospace Workers, Flin Flon Lodge No. 1948 v. Hudson Bay Mining and Smelting Co.*\(^67\), upholding an arbitrator’s decision barring forced integration, arbitrators in such influential cases as *Re Canadian Union of Public Employees, Local 1000 and Hydro-Electric Power Commission of Ontario*\(^68\), held that unions could not come before an arbitrator to challenge such unilateral conduct unless the pension plan was incorporated by reference into the collective agreement. Integration with the C/QPP is now so widespread that it has been described by the government as “a cornerstone of the [employment pension plan] system”.\(^69\)

\(^{64}\) See Special Joint Committee of the Senate and of the House of Commons Appointed to Consider and Report on Bill C-136, An Act to establish a comprehensive program of old age pensions an supplementary benefits in Canada payable to and in respect of contributors [the Canada Pension Plan], *Minutes of Proceedings and Evidence, 26*\(^{th}\) Parliament, 2d Sess., 1964-65, 2 Vols. (Ottawa: Queen’s Printer, 1965) at 25-6 (testimony of Minister Judy Lamarch), 1184 (testimony of L.J. Etherington, chairman of the board of the Life Underwriters Association, 1184), 1465-95 (testimony of the railway unions) and 1596-1628, esp. 1599 (testimony of the CLC). See also presentation by J.H. Craigs, Research Director for the Ontario Federation of Labour, OFL in Canadian Pension Conference, *Symposium of Views on the Canada Pension Plan*, Presented to a Special Meeting of the Canadian Pension Conference held in Toronto, supra note 61 at 59.


\(^{66}\) Hubert Frenken, “C/QPP costs and private pensions”, 1993 Perspectives Autumn, vol.5, no. 3.


\(^{68}\) (1966), 17 L.A.C. 244 (Thomas) (“Hydro-Electric”).

\(^{69}\) Bruce Little, *Fixing the Future: How Canada’s Usually Fractious Governments Worked Together to Rescue the Canada Pension Plan* (Toronto: University of Toronto Press, 2008) at 17-8. Without citing any source, Little observes that widespread integration has been achieved “usually through normal collective bargaining.
Business interests therefore achieved a number of important benefits from the ‘deal’. Low public pensions combined with integration between the public plans and private pensions left ample space for employment plans to continue to perform their valuable management functions, with the important enhancement that they could now tilt their employment benefits even more favourably in the direction of elite workers. The system could grow and prosper, with expanded business opportunities for the pension industry, and ample capacity for pension fund expansion to produce investment funds controlled by the private sector.

What did the government expect in return for doing so much for business interests? What did government get out of the ‘deal’? The government’s expectations were unarticulated, but nevertheless clear enough. The government expected that business, in its own self-interest, would do its part in filling the gap that had so helpfully been left between Canadians’ retirement income objectives and the level of income to be provided by public pensions. The government was told by business, and confidently expected, that the employment pension system would continue to expand; employers already providing pension plans would continue to do so, and more would join their ranks. The government expected that employment pension plans would absorb a significant portion of the risks of retirement, such as longevity risk, investment risk, and interest rate risk, which threaten good retirement income. These risks, which would otherwise have to be borne by the individual or assumed by the state, would instead be assumed and collectivized by employers acting in their own interest, aided and abetted by finance capital acting also in its own interest.

The government chose not to back up its expectations about increased employment pension coverage with legislation. Its expectations about pension quality, however, it did decide to bolster with statutory regulation. In section 6.1, below, I will examine in detail the nature of that regulation and its impact on employment pension plans. Before moving to that issue,
however, it is important to get a fuller picture of the complex nature of the continuing
problems regulation was designed to address. Those problems can best be understood as they
were articulated in the second round of policy-making which became known as the Great
Pension Debate.

4.0 THE GREAT PENSION DEBATE

4.1 Introduction

In the first round of pension reform, federalism issues had taken centre stage in the debate.
The battle about whether pension policy should be made federally or provincially had
diverted attention from other issues at the substantive core of pension policy. That round had
nonetheless resulted in the establishment of boundaries between public pension plans and
employment pension plans in Canada, boundaries which had important consequences for
pension outcomes. Although Ontario’s foray into mandatory private plans had squarely
raised the issue of the division of labour between state and market in the provision of
retirement income, there had been surprisingly little serious public debate about the drawing
of those boundaries. The compromise which constituted the CPP and the first generation of
regulatory statutes had papered over fundamental differences of opinion about substantive
retirement income policy and the role of the state in implementing that policy, but only
temporarily. Those differences were to erupt again between the mid-1970s and the mid-
1980s in the course of the Great Pension Debate, a process engaging business, labour and
civil society, as well as governments at both the federal and provincial level, in an extended
and intensive period of study and debate both about national retirement income policy
objectives, including gender equity, and about the respective roles of public and private
mechanisms in fulfilling those objectives.

The Canadian labour movement is almost universally credited with initiating the Great
Pension Debate by championing a massive expansion of the C/QPP.71 At first blush, the
labour movement was not the most likely spear-carrier for public pensions. The major
beneficiaries of the C/QPP were unorganized workers, who were far more likely than

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71Donald Coxe, “A Look at the Pension Iceberg” in David W. Conklin, Jalynn H. Bennett & Thomas J.
Courchene, eds., Pensions Today and Tomorrow: Background Studies, supra note 37 at 439; Myles and
Teichroew, supra note 1 at 92.
organized workers to be without pension plans. As we have seen in Chapter 3, unions had a considerable stake in the employment pension system; by the 1950s and 60s the labour movement had firmly embraced the system, despite its initial opposition.  

As John Myles and Les Teichroew point out in their important study of this period in Canada’s pension history, however, labour’s motives in pushing for improved public pensions “were not entirely altruistic”. While unions were certainly concerned for the majority of Canadians who had no private pension coverage, they were equally concerned for their core constituency, union members who did have private pension coverage, but who were victims of the continuing deficiencies of the system. Myles and Teichroew argue that “[b]y the mid 1970s, it was …clear [to the labor movement] that, dollar for dollar, the public system and especially the CPP provided a superior product to private-sector alternatives.” Unions had become convinced that collective bargaining, even leveraged by statutory minimum standards legislation, would not solve the problems inherent in the occupational system. Employment pension plans had simply become a “bad buy”.

While the initiative for the Great Pension Debate came from the labour movement, there were keen participants on both sides of the arguments. The original pension policy ‘deal’ had given business, including the private pension industry, important territory to defend. They were determined to hold that territory against further encroachment, and perhaps even to expand it through such “stealth” cut-back strategies as partial, rather than full indexation of C/QPP benefits. By contrast, those who favoured public pension solutions recognized the

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72 The role played by the labour movement in employment pension plans is discussed in Chapter 3 at 6.3.
73 Myles and Teichroew, supra note 1 at 93-4.
74 Ibid. at 93.
75 Ibid. at 93.
76 The “sides” were scarcely evenly matched. The 1982 federal Green Paper identified them as follows:

There is clearly no consensus among Canadians on this issue. The Governments of Ontario and British Columbia – as well as nine business organizations which issued the “Business Consensus on Pension Reform” in August 1982 – have suggested that no expansion of mandatory pensions is required at this time. On the other hand, the Canadian Labour Congress and the National Action Committee on the Status of Women have called for a significant increase in the size of the Canada and Quebec Pension Plans.

Canada, Department of Finance, Better Pensions for Canadians (Ottawa: Minister of Supply and Services, 1982) (“Green Paper”) at 35.
C/QPP as an achievement, but saw its income replacement rate as inadequate, both in absolute terms and by international standards. They saw no realistic prospect that statutory regulation could ameliorate the ills of the employment pension system sufficiently to enable it to fairly and adequately supplement the existing public benefit.

The detailed research studies conducted in connection with the Great Pension Debate certainly appeared to bear out the critique made by the employment pension plan sceptics. The various federal and provincial task forces and Royal Commissions studying the pension system were united in condemning the outcomes of the employment pension system for most Canadians. They were virtually unanimous in concluding that employment pension plans as currently configured were simply incapable of providing coverage and adequate benefits to the majority of working Canadians. As a remedy, they called either for “a massive expansion of the CPP, along with a major overhaul of the private pension system”, or for mandatory private pension coverage, the same remedy that had been recommended by Ontario’s Committee on Portable Pensions back in 1961.

As we shall see, however, policy makers did not choose to alter their direction. Instead, they opted generally for more of the same liberal approach they had taken in the 1960s: ensuring

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79 See Myles & Teichroew, supra note 1 at 93. Official government reports supporting expansion of the C/QPP included the Lazar Report, supra note 47, Senate Special Committee Report, supra note 78, and COFIRENTES +, supra note 78.

80 This solution was recommended by the Royal Commission Report, supra note 78. The key exceptions to the call for mandatory state interventions were the committees of elected politicians appointed to review the expert report, the Frith Task Force, supra note 78 at 69-72 and the Ontario Select Committee, supra note 78 at 31-32. Both these committees argued that employment pension plans should be given one more chance.
that the public system did not “crowd out” employment-based plans, addressing what they regarded as ‘social policy’ issues through moderate changes to the public plan, and deploying the regulatory structure to provide some improvements in minimum standards and benefit security within employment pension plans, without placing any significant fetters on employer hegemony or altering in any fundamental way the balance of power between employers and employees.

4.2 Continuing Problems with Employment Pension Plans

The research studies associated with the Great Pension Debate universally acknowledged a wide range of continuing problems with the employment pension plan system. In its 1982 Green Paper, Better Pensions for Canadians, the federal government singled out a number of key deficiencies. Unquestionably the biggest continuing problem was coverage. According to the Green Paper, coverage had improved in Canada since the original reforms of the 1960s, climbing from 42 percent of employed workers in 1970 to 47.9 percent by 1978. That period of escalation appeared to be over, however; the Green Paper reported that by 1980 the coverage curve had flattened and even dropped marginally to 47.7 percent. In addition, Ontario’s Royal Commission Report made it clear that at least in Ontario, most pension growth had taken place as a result of the expansion of the heavily pensioned public sector; pension coverage had barely budged in the private sector in the twenty years since the Committee on Portable Pensions had done its work. To compound the problem, coverage figures, inadequate as they were, still overstated the real level of pension protection. As the Green Paper pointed out:

Point-in-time coverage does not take into account whether the pensions being accrued will be forfeited due to inadequate vesting rules, or if vested, whether they will retain a reasonable value in the face of inflation. They make no distinction between generous pension plans and those with poor benefits…. They also do not indicate the extent of adequacy of survivor pensions….

…it is estimated that over half of middle-income couples and individuals will, over their working careers, be unable to build up employer-sponsored pensions, with

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81 Supra note 78.
82 Ibid. at 19. The coverage figures presented in the Green Paper are slightly higher for the same period than those reported in Chapter 6 at section 5.3, which show coverage peaking in 1976 at 46.2.
83 Royal Commission Report, supra note 78 at 63.
84 Green Paper, supra note 76 at 19.
adequate inflation protection and survivor benefits, to replace more than 10% of pre-retirement earnings.

Where coverage existed, the Green Paper identified three key quality shortcomings: first, employment pension plans did not provide benefits indexed to inflation; second, they robbed employees of pension credits if they changed employers or left their jobs before retirement; and they were ineffective at delivering benefits to women.\(^85\)

The problems of coverage and “wastage” had been well-trodden ground for many years now in policy reports. The broad issue of inequality was a newer theme. In the Green Paper, the federal government pointed to a number of specific ways in which the standard membership rules in employment pension plans promoted discrimination. These included offering plan membership only to select groups of employees; placing different employee groups working for the same employer in different pension plans with substantially different benefits; or setting up differential categories of contribution and benefit levels for different groups of employees within the same plan.\(^86\) Also noted were age discrimination issues such as the refusal to allow employees who deferred retirement beyond the normal age of retirement to continue to accumulate pension credits.\(^87\) Methods of integration with the C/QPP and Old Age Security pensions were identified as raising discrimination concerns; some common integrated formulae forced lower-income members of plans to pay more for their benefits than higher-income plan members.\(^88\)

### 4.3 Gender

One distinctive and important sub-category of inequality on which the reform studies focused was the problem of gender. Women had historically fared poorly in pension schemes that depended on labour market participation. Many adult women in the 1960s were not significant participants in the labour market. Women who did perform market work rarely held good, permanent, full-time jobs in the primary labour markets where pension plans were...
most likely to be found. The problems which the research studies had identified as plaguing the employment pension system in general – lack of coverage, exclusionary membership rules, “wastage”, inflationary erosion of pension benefits – all affected women workers more negatively than they affected male workers because of women’s typical work and life patterns.

In the first round of pension reform, the problem of gender was papered over by conceptualizing women as dependents. Analysis of the gender issue was informed throughout by the image of the male breadwinner/female homemaker family. The stereotype driving first round pension reform for women was not Rosie the Riveter; it was the elderly widow left destitute by the death of the family breadwinner. While the C/QPP structure was expected to benefit women as workers, the key C/QPP policy initiative for women was the survivor benefit. As women began to enter the workforce in larger numbers in the 1970s, gender equality issues began to bubble up more vigorously. Among the very few interim amendments to the C/QPP between 1965 and 1985 were a number responding to the complexities of women’s dual role within workplaces and families. By the time the Great Pension Debate was in full swing, Canadian women were entering the workforce in such numbers that it was no longer possible for pension reform to ignore their role as workers. Women were energetic and informed participants in the Great Pension Debate. Ontario’s Royal Commission on Pensions, reporting in the early 1980s, noted that the briefs it received

89 See Nicole M. Fortin & Michael Huberman, “Occupational Segregation and Women’s Wages in Canada: An Historical Perspective” (2002) 28 Canadian Public Policy S11. The authors note that female labour force participation in Canada rose from less than 30 percent in 1961 to more than 75 percent 1996: S11. They identify 1961 as the “beginning of the surge in female labour force participation that characterizes the second half of the twentieth century”: S16.

90 The inability of policy-makers of the 1960s to imagine women as serious participants in the paid labour force is evident in the very gendered language of the CPP White Paper, supra note 78, which talks throughout about a worker as “a man” (e.g. “Pensions are to be 25 per cent of ‘what a man has been earning’”: 11).

91 In 1974, survivor benefits were extended to widowers on the same basis as widows, and the plan was amended to recognize common law unions as a basis for entitlement to spousal benefits. In 1977, further amendments provided for the splitting of pension credits between spouses on divorce. An additional “woman friendly” change, a “drop-out” provision permitting parents who left the labour force to care for young children to leave certain low-earning years out of the calculation for benefit entitlement, had also been enacted. This provision was opposed by two provinces, Ontario and British Columbia, and during much of the period of the Great Pension Debate it had not yet been proclaimed. British Columbia withdrew its opposition, but because Ontario had an effective veto, legislation facilitating the drop-out provision was still unproclaimed at the time the Green Paper was issued: Green Paper, supra note 76 at 14. The provision subsequently came into effect in 1983, retroactive to January 1, 1978. See list of CPP “enhancements” since 1966 at Guest, supra note 1 at 287. There were no parallel provisions in the regulatory statutes prescribing minimum standards for employment pension plans.
from the pension industry were generally oblivious to the position of women as an issue for pension planning: “[w]hen the matter is addressed, it is in terms of the dependent stereotype – that is, women are not considered as pension plan members, but only as survivors of plan members.” By contrast, the Royal Commission pointed to the many submissions it had received from individual women and women’s organizations as evidence that “while ‘women’ might not be an issue for the pension industry, it is clear that pensions are indeed an issue for women.”

Statistics provided in the *Green Paper* indicated that women were woefully under-served by both second and third pillar pensions. Within the C/QPP, only 25 percent of total benefits went to women, only 32 percent of C/QPP pension recipients were women, and only 40 percent of C/QPP contributors were women. Women constituted only about 30 percent of the membership of employment pension plans. The *Green Paper* observed that the general frailties of the employment pension system hit women harder:

>Pension problems are worse for women. Women are often in jobs where they are less likely to be offered pension plan coverage. Women who are covered by pension plans are more likely to lose any pension benefits they may have accumulated because they change employers more frequently than men. Many pension plans do not provide adequate survivor benefits and few married women benefit from the pension credits of their spouses upon marriage breakdown.

It also highlighted a wide range of pension issues of particular concern to women in both public and private plans: workers who leave the labour force to raise children lose opportunities to accrue retirement benefits; homemakers are treated as dependents within pension plans and do not have the opportunity to accrue pensions on their own; life annuities are more expensive for women because of sex-based annuity pricing which takes into account the greater longevity of women; and women are more seriously affected by the

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93 *Green Paper, supra* note 76 at 6 (1980 figures). While the Green Paper notes that almost half (about 45 percent) of employment pension plan members worked in the public sector, it does not break this figure down by gender: *ibid.* at 7. Women made up approximately 1/3 of those who contributed to RRSPs in 1980: *ibid.* at 7.
impact of inflation on their benefits because they live longer.\textsuperscript{98} Within a system broadly based on rewards for market work, policy-makers grappled with a fundamental and self-evident conundrum; as one federal Parliamentary Committee put it, “women’s work and the patterns of their working lives are not the same as those of men”.\textsuperscript{99} Policy-makers recognized the intimate relationship between women’s work patterns and their role in families, but could not agree on a fair conceptual foundation for integrating paid and unpaid work to provide more equal pensions. There was consensus that treating women as dependents was no longer acceptable, but treating women simply as individual workers was clearly a recipe for increased inequality.

The federal Task Force on Retirement Income Policy (the \textit{Lazar Report}) espoused the concept of the family as an economic partnership. The Report argued that a ‘family’ approach rather than an ‘individual worker’ approach was the best reflection of the social realities of the 1980s:\textsuperscript{100}

\begin{quote}
[T]he family approach provides a sounder basis for the reform of the retirement income system at this time. Unless and until the rate of labour force participation and remuneration of married females are similar to those of their male counterparts, the individual approach involves the risk that there will continue to be many poor female survivors well into the future.
\end{quote}

Under a family approach, “marriage would be explicitly recognized in plan design. Provision for survivors would be broadened, and in the case of marriage breakdown, pension credits accumulated during the period of the marriage would be divided between the parties”.\textsuperscript{101} By contrast, both Quebec’s \textit{COFIRENTES+} and Ontario’s \textit{Royal Commission Report} regarded the family approach, and particularly survivors’ benefits, as an outmoded relic of a male-breadwinner world which no longer existed. \textit{COFIRENTES+} recommended that survivor pensions should be temporary, designed solely to enable widowed women to make a smooth transition back into the workforce.\textsuperscript{102} The Royal Commission was more cautious about the pace at which social change was actually occurring, and about the implications for women of

\begin{footnotes}
\item[98] \textit{Ibid.} at 42.
\item[99] \textit{Frith Report, supra} note 78 at 74.
\item[100] \textit{Lazar Report, supra} note 78 at Vol. 1, 337.
\item[101] \textit{Ibid.}.
\item[102] \textit{Cofirentes+}, supra note 78.
\end{footnotes}
assuming too quickly that women were well on their way to becoming equal participants in
the labour market. The Royal Commission Report argued:  

It is clear that a majority of married women do not fully conform to either the old or
the new stereotype. There still exists a wide range of dependency within the family
unit; and the range of choice available to people both within and outside the family
structure makes it probable that the average or typical Canadian married couple will
make several changes to their economic relationship from time to time before
retirement age. Accordingly, a realistic pension policy will have to accommodate, so
far as possible, the various degrees of dependence and independence which spouses
actually adopt for themselves. (136)

Its recommendations favoured the continuation of survivor benefits, but not at the expense of
the employer or the plan; instead, the benefit paid to the working member of the couple
should be reduced to cover the actuarial cost of his spouse’s survivor benefit.  

One particularly controversial approach to gender equality involved proposals for
‘homemaker pensions’. In the first round of pension reform, homemaker pensions had been
championed primarily by social conservatives. Senators, Members of Parliament and
witnesses speaking before the Special Joint Committee of the Senate and of the House of
Commons dealing with the C/QPP expressed concern that earnings-based pensions might
entice housewives into the labour force and create social problems, including increased
unemployment. In the Great Pension Debate, however, the issue had broader support. This
included support from some women’s groups who were definitely not of the socially
conservative stripe, although these groups were predictably divided on whether homemakers’
pensions would promote or retard the equality of women within the C/QPP and within
society as a whole.  

Alone among the task forces, committees and Royal Commissions
considering the question, the federal Frith Committee, appointed by the federal government

103 Royal Commission Report, supra note 78 at 136.
104 In the short term, the Royal Commission supported the maintenance of survivor benefits where they already
existed, and was critical of Quebec’s recommendation that such benefits be temporary only, pointing out that
the Quebec proposal “acknowledges woman as worker, but ignores the fact that many women, especially in the
older age cohorts, are not yet able to enter easily into the work-force”: ibid. at 116.
105 See, for example, testimony of D.E. Kilgour, President, The Great-West Life Assurance Company, 1261-
1294, and 1324-5 in Special Joint Committee of the Senate and of the House of Commons dealing with the C/QPP expressed concern that earnings-based pensions might
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conservative stripe, although these groups were predictably divided on whether homemakers’
pensions would promote or retard the equality of women within the C/QPP and within
society as a whole.  
106 See Louise Dulude, Pension Reform with Women in Mind (Ottawa: Canadian Advisory Council on the
Status of Women, 1981) and discussion of this issue in Ascah, supra note 76 at 421-22.
to report on the proposals laid out in the *Green Paper*, took up the cause of the homemaker pension:107

We do not think that the role of women as homemakers will soon disappear. It may change, but it will remain, and it will continue to impose constraints on the ability of women to enter the paid labour force and to earn the wage of someone who is not a homemaker. This is why the problem of pensions for women is not simply a problem of ensuring better pensions for low income workers in the labour force. It is a problem of acknowledging and adequately providing for the work that women do, both inside and outside the labour force, and of identifying the institutions and arrangements, including pension arrangements, that must be changed in order to make this possible.

The Committee’s keystone recommendation for women was a homemaker pension, based on half the maximum C/QPP pension, funded on a basis where “families who benefit from the homemaker pension pay the costs where it is reasonable to expect them to do so”, but where “[c]ontributions by low income and single parent families should be fully subsidized”.108

As individual workers, women would benefit from the few modest general measures recommended to improve C/QPP benefits for low wage earners.109 However, most of the C/QPP reform measures which the federal *White Paper* specifically identified as “of special benefit to women” reflected the ‘economic partnership’ model. The government made firm commitments to a more transparent version of pension credit splitting on marriage breakdown, and to automatic credit splitting when the younger spouse reached age 65. It proposed the continuation of survivor benefits on remarriage.110 The *White Paper* also expressed a strong interest in early consultation with the provinces on the possibility of including a homemaker pension in the CPP, “since the provision of retirement income for women, including homemakers, is vital”.111 In general, the provinces agreed to these proposals, and amendments to the C/QPP were subsequently made.112 The key exception,

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107 *Frith Report, supra* note 76 at 74.
108 *Ibid.,* at 94.
109 While there was general opposition to raising C/QPP benefit levels, there was agreement that it should be re-pegged to the current average wage; while benefits had been indexed, the indexation formula was only partial, and the serious inflation of the 1970s and early 1980s had resulted a significant reduction in the real value of C/QPP benefits: see *White Paper, supra* note 78 at 2-3.
110 *Ibid.,* at iii.
112 The proposal for automatic credit-splitting on retirement within the C/QPP was watered down to voluntary credit-splitting, which means that both spouses have to agree to the split: see Monica Townson, *Independent*
not surprisingly, was the homemakers’ pension, a proposal seen as undermining the foundational link between contributions and earnings. The proposed consultations did not take place.

The White Paper also undertook to make gender equality-related amendments to the legislation regulating employment pension plans. Key commitments included improvements to mandatory survivor benefits, mandatory credit splitting on marriage breakdown, and a prohibition against unequal benefits.113 Other recommendations identified as of particular benefit to women included mandatory inflation protection, “portability” improvements including earlier vesting and the right to transfer the value of vested pension credits out of an employer’s plan.114

4.4 Second Round Pension Reform and Policy Objectives

As noted above, governments in the first round pension reform in Canada had largely avoided answering key questions about retirement income policy. In the second round, they recognized the desirability of working within a principled framework for decision-making. Rather than laying contested issues of principle on the table for debate, however, the preferred framework was simply offered as self-evident. In the introduction to its 1982 Green Paper, the government pronounced that “[h]istorically, Canadian pension policy has been shaped by three central goals”.115 By page 55, these goals have become “principles”, described as follows:116

- Elderly Canadians should be guaranteed a reasonable minimum income
- The opportunities and arrangements available to Canadians to provide for their retirement should be fair
- Canadians should be able to avoid serious disruption of their pre-retirement living standards upon retirement.

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113Ibid. at 5-10. The proposal to ban discriminatory benefits was regarded as particularly complex; the White Paper undertook to create an advisory committee to make recommendations on how this proposal should be implemented: ibid. at 8.

114 Ibid. at 10.

115 Green Paper, supra note 76 at 1.

116 Ibid. at 55.
The Green Paper asserted that Old Age Security had been adopted “to give all Canadians a basic retirement income on which they could count”; the purpose of the C/QPP and the Guaranteed Income Supplement (lumped together, despite the fact that they came from two quite different “pillars”) “significantly expand[ed] the maintenance of living standards and basic income roles of public programs.” In the 1984 White Paper, the government reaffirmed its commitment to this ‘principled’ framework.

As a set of principles, this triumvirate is highly elastic. The Green Paper gives us no benchmark for a “reasonable minimum”; we are simply told that “[s]ome elderly people who are single, particularly single women, have incomes that are insufficient”. We do not know what standards of “fairness” have historically guided us, although the Green Paper’s internal discussion suggests that the concept of “fairness” imbedded in the “opportunities and arrangements” for retirement provision is less about equal coverage and benefits than it is about income tax equity for different kinds of retirement savings instruments. We are given no guidelines for differentiating between “serious” disruptions to pre-retirement living standards with which policy should be concerned, and disruptions that should be tolerable. In fact, the Green Paper fairly acknowledges that the appropriate level of income replacement is a contested issue among Canadians. The question is posed, however, as one of compulsion, not equity: “[a] major unanswered question is whether a higher level of income protection should be guaranteed to Canadians. If so, how large should mandatory pension arrangements be?”

Although we are not told what role employment pension plans are expected to play in achieving these three nebulous overall goals, we are told in no uncertain terms that these goals contemplate a strong and continuing role for such plans. Furthermore, we are told that employment pension plans play a key role within the Canadian system because Canadians want it that way. The system’s goals are the people’s goals: the Green Paper assures us that among Canadians, there is “an evident public desire for a balanced structure – between public pensions and employer-sponsored plans, between universal mandatory pensions and

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117 Ibid.
118 Ibid. at 2.
119 Ibid. at 58.
the personal responsibility of Canadians to provide for their own retirement needs.”

Indeed, the gap between retirement income needs and public pension provision, clearly the product of a political “deal” at the end of the first round of pension reform, has now been retroactively recycled as a tool for the preservation of our personal freedom:

When the current mandatory pension plans – the Canada and Quebec Pension Plans – were established, they were designed to leave a considerable gap to be filled by employer-sponsored pension plans and individual savings. This was in accord with the view of most Canadians that there should be flexibility in the pension system and room for personal initiative [emphasis added].

According to the Green Paper, the issue of whether the gap between mandatory and voluntary retirement income provision should be narrowed “so that Canadians will be better able to avoid disruption of their pre-retirement living standards through individual savings and private arrangements” is open for debate. But the issue of whether or not there will continue to be a gap is not on the table.

5.0 THE ROADS NOT TAKEN

The reform picture we have just looked at shows Canadian policy makers constructing a three-pillar system in which a modest proportion of retirement income is provided by mandatory public pensions. Pillar two public pensions replace, at a maximum, 25% of pre-retirement income for an average earner, and considerably less than that for many Canadians. Pillar 1 pensions replace another 14-15%. For retirement income needs above these modest amounts, governments consistently left Canadians to the mercies of voluntary systems – principally the employment pension system – over either a mandatory employment pension system or increased public pensions.

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120 Ibid. at 2-3.
121 Ibid. at 17.
122 Ibid. at 17.
123 Even at average earnings levels, most Canadians collecting C/QPP benefits get less than the maximum: according to Canada. Human Resources and Skills Development, The CPP & OAS Stats Book http://www.servicecanada.gc.ca/eng/isp/statistics/pdf/statbook.pdf, the average monthly CPP retirement benefit paid in 2008 was $488.86, whereas the maximum payable was $884.58 (see Tables 4 and 14A).
124 Pillar 1 pensions are not “pegged” in the same way as Pillar 2 pensions; Myles and Teichroew, supra note 1 at 990 include a chart which shows the fluctuating relationship between OAS and GIS from 1967 to 1985, showing OAS falling from about 17% to about 14% of the average wage in that period, with GIS taking up the slack, making Canada’s Pillar 1 more ‘targeted’. In 1989, a clawback was applied to OAS, making it a universal benefit in name only: see Battle, supra note 77.
Governments made this policy choice in the face of consistent recommendations from review committees, task forces and Royal Commissions that the voluntary employment-based system was not capable of performing to the job and mandatory approaches were needed. Ontario’s Committee on Portable Pensions, the earliest expert body to recommend a mandatory solution, reasoned that the failings of the system simply would not be remedied voluntarily. The Committee emphasized the need for minimum regulatory standards, but pointed to the paradox of attempting to impose such standards as long as employment pension plans were voluntary instruments. In recommending that Ontario adopt a mandatory system, the Committee observed that it was simply impractical, in a competitive marketplace, to expect employers who offered pensions to take on the higher costs that come with improved pension standards, while other employers who did not choose to offer pensions would bear no costs at all.\footnote{Second Report, supra note 21 at 65-69.} Ontario’s Royal Commission on Pensions, reporting twenty years later, came to similar conclusions about the inefficacy of a voluntary employment pension system.\footnote{Royal Commission Report, supra note 78.} Despite its generally liberal orientation, the Commission came to the research-based conclusion that the market would not supply the needs of Canada’s elderly unaided. Like the Committee on Portable Pensions before it, the Royal Commission opted for a mandatory but privately administered employment pension, “a provincial universal retirement system (PURS), with a money-purchase design, to provide a reasonable amount of replacement income, on an earnings-related basis, in a compulsory, portable, universal and fully funded plan, with individual choice for investment and form of benefit.”\footnote{Ibid. at 3.} Other committees and task forces involved in the Great Pension Debate despaired equally of voluntary employment-based system, but proposed different remedies; the federal government’s \textit{Task Force on Retirement Income Policy}\footnote{Lazar Report, supra note 47.}, the \textit{Special Committee on Retirement Age Policies} appointed by the Senate\footnote{Senate Special Committee Report, supra note 78.}, and Quebec’s \textit{Comité d’étude sur le}}
financement du régime de rentes et sur les régimes supplementaires des rentes\textsuperscript{130} all recommended substantial increases in the C/QPP.\textsuperscript{131}

Governments ultimately did not adopt any of these proposals. As we have seen, Ontario came very close to adopting a mandatory private system in the 1960s, but repealed the program when it became clear that the C/QPP would be introduced.\textsuperscript{132} Politicians of the 1980s rejected the research recommendations, and decided to give the voluntary private system one more chance, a decision clearly not driven by an evidence-based assessment of what would promote the best retirement income outcomes for Canadians. How can we account for this policy choice?

The 1982 Federal \textit{Green Paper} frankly identified the key topic of the Great Pension Debate as the issue of where to locate the boundary between state and market in the provision of retirement income. While the \textit{Green Paper} laid out the two sides of the debate, it was a far from neutral presentation. The government clearly signaled its own market-friendly approach at the outset, emphasizing the difficult economic context within which the debate was taking place,\textsuperscript{133} and identifying as its “first priority” the need “to restore the health of the Canadian economy to its full vigour”.\textsuperscript{134} Whatever the outcome of the debate, the \textit{Green Paper} stressed that “the private sector must continue to be the primary engine of growth.”\textsuperscript{135}

The \textit{Green Paper} bluntly acknowledged that maintaining space for private pension instruments had been an important design feature of the three-pillar system from the outset.\textsuperscript{136} It was clear that a change in this design choice was not regarded as seriously on the

\textsuperscript{130} COFIRENTES \textit{+, supra note 78.}
\textsuperscript{131} \textit{These recommendations are discussed in Ascah, supra note 78. They are also summarized in the Green Paper, supra note 76 at 35.}
\textsuperscript{132} While this repeal was packaged as an inevitable result of the adoption of the C/QPP, in fact it was not; as the Royal Commission Report pointed out, the C/QPP and a mandatory private system could easily have coexisted: \textit{supra note 78 at Vol. V.9.}
\textsuperscript{133} Green Paper, supra note 76. The Foreword to the \textit{Green Paper} referred explicitly to the “6&5” program then in existence, which effectively suspended collective bargaining under the \textit{Public Sector Compensation Restraint Act}, restrained wage increases for federal public sector employees and employees of certain railway companies for two years from June 29, 1982, and fixed the wage increases at 6 per cent in the first year and 5 per cent for the second. The “6&5” restraint program was also imposed on public pensions.
\textsuperscript{134} \textit{Ibid. at iii.}
\textsuperscript{135} \textit{Ibid.}
\textsuperscript{136} “When the current mandatory plans – the Canada and Quebec Pension Plans – were established, they were designed to leave a considerable gap to be filled by employer-sponsored plans and individual savings.”: \textit{Ibid. at 17.}
table. While an increase in C/QPP benefits was one option identified for consideration, the *Green Paper* admonished that “any increase should still leave room for employer-sponsored plans and private savings”.  

Frequently reiterated was a commitment to the maintenance of what was described as “an appropriate balance”, an unspecified but crucial equilibrium between “public pensions and employer-sponsored plans, between universal mandatory pensions and the personal responsibility of Canadians to provide for their individual retirement goals”, and “between mandatory programs and voluntary arrangements.”

Two years later when it issued its *White Paper* announcing the outcome of the Great Pension Debate, the federal government had not abandoned any of the preferences expressed in the *Green Paper*. The *White Paper* returned to the theme of balance: “The government continues to believe an appropriate balance between mandatory and voluntary arrangements must be maintained – a balance in which employer-sponsored pension plans and individual savings continue to play an essential role”.  

The *White Paper* described its proposed *Action Plan for Pension Reform* as “a balanced package designed to improve public pension plans while ensuring that employer-sponsored plans and voluntary savings continue to be a vital part of the Canadian retirement income system”. There would be no expansion of the C/QPP. “Building better pensions for Canadians”, the subtitle of the *White Paper*, meant once again adjusting the employment pension system.

The *Green Paper* had forged a clear link between gender inequality and adherence to private pension solutions. In setting out the pros and cons of public sector versus private sector approaches to filling the gap between resources and retirement income needs, it had observed that:

The public sector approach …offers greater flexibility to incorporate benefits that take into account factors such as the work patterns of women; for instance, the child-rearing drop-out provision in the Canada and Quebec Pension Plans could not be included in employer-sponsored pension plans.

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140 *White Paper, supra* note 78 at 3.
142 *Ibid.* at 38. There is, of course, no reason why a child drop-out provision could not be incorporated into employment pension plans.
The rejection of an expansion of public pensions was a clear choice in favour of instruments less able to address the complex socio-economic factors that produced unequal retirement income for women. Other values choices, not so squarely laid on the table, were also implicit in the government’s approach. Chief among them was concern for the role played by pension funds within the general national landscape of capital formation and deployment.

As we have seen, the issue of control over pension funds had never been very far below the surface of the pension policy debate. Even in the 1960s, the money accumulated within pension funds was seen as an important source of investment capital in Canada, and a concern for pension funds as a key source of investment capital was an important factor in shaping Ontario’s position in the federal-provincial pensions negotiations of the early 1960s. During the intervening years, both pension funds and their role in the Canadian economy had grown in magnitude, in part as a result of the first round of pension reforms which had imposed stringent funding standards on employment plans. By the time the Great Pension Debate moved into high gear, business had become even more dependent on pension fund monies as a source of investment capital. John Myles notes that: 143

During the decade following the Canada Pension Plan legislation of 1965, corporate savings as a means of amassing new investment capital was in decline and corporations had to turn increasingly to external sources of financing. During the same period, private pension funds grew to become the single largest source of private equity capital in Canada, and the major source of corporate borrowing.

In staking out its positions in the Great Pension Debate, business had two separate but related concerns involving pension funds. First, it wanted to keep this source of capital accumulation strong and growing. Second, and at least equally important, it sought assurance that the accumulated capital would remain in the control of the private sector and out of the hands of the state. Business groups lobbied at fever pitch against any pension reform that would place large sums of capital in the hands of government. A self-styled Business Committee on Pension Policy (“BCPP”), positioned in the federal Green Paper as an important voice for the business community, 144 produced an influential brief, entitled “A Consensus Brief On

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143 Myles, Old Age in the Welfare State, supra note 1 at 112-14. See also Myles & Teichroew, supra note 1 at 93-4.
144 Green Paper, supra note 76 at 35.
Canadian Retirement Income Policy”, which included an entire Appendix devoted to exploring the deleterious impact on “the efficient functioning of Canadian capital markets” of allowing financial power to accumulate in the hands of government.

The government was clearly listening to the business lobby. In setting out the pros and cons of public versus private pensions, the Green Paper emphasized the centrality of the capital accumulation issue in language which signaled its own priorities: concern over control of pension funds paralleled in importance concern about how best to deliver retirement income to Canadians. From the perspective of the Green Paper, the private sector could legitimately stake out a claim for consideration as a primary site for pension delivery because it was “very attractive from the point of view of channeling savings into productive investments”. As for the proposal to expand the CPP, according to the Green Paper, “the main criticism leveled at a public sector approach relates to its impact on investments and capital markets”.

The issue, then, was control of pension funds. As laid out in the government policy papers, there are only two real poles in the debate about who should control pension funds: should they be in the hands of government, or in the hands of business? The Canadian Labour Congress attempted to introduce into the mix a third possibility: that pension funds did not properly belong in the hands of either of these institutions. The Congress argued that as ‘deferred wages’, pension funds belonged to the employees who had earned them and should be controlled by those employees. This proposal never seriously got off the ground. The federal Green Paper was prepared to grant the initial premise; pension funds are “deferred wages” and should be considered assets of the employees who are plan members. However, it utterly rejected the Congress’s conclusion, hastening to add that ownership of the funds “does not, by itself, imply that employees should control the funds which back up the employer’s promise as it is normally the employer who runs much of the risk of poor

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145 (“BCPP Brief”). The brief is unpublished and undated. The Green Paper identified it as issued in August 1982: 35. The version I have reviewed here clearly postdates the Green Paper, and indicates that it was prepared for presentation to the Parliamentary Task Force: ii.
146 Ibid. at 4.
147 Green Paper, supra note 76 at 37.
148 Ibid. at 38.
149 Canadian Labour Congress. The CLC Proposal for Pension Reform (Canadian Labour Congress, 1982)
150 Green Paper, supra note 76 at 12.
investment performance” [emphasis added]. Ultimately, the ‘business consensus’ in favour of keeping pension funds out of the hands of government was highly influential, if not decisive, in explaining why government opted against expanding the C/QPP.

Arguments about state control of pension funds do not, however, explain why the government opted against the other recommendation on the table: mandatory expansion of the employment pension system. Such a mandatory expansion would appear, at first blush, to favour the financial services industry. When the Ontario government adopted its mandatory employment pension system in 1963, it was castigated by both opposition parties for pandering to the insurance companies who were anticipated to get the lion’s share of the pension business generated by a massive increase in smaller plans. When the mandatory private option re-emerged in the Great Pension Debate, however, there were few prominent business voices promoting it. The BCPP Brief, entitled “A Consensus Brief on Canadian Retirement Income Policy”, rejected any type of mandatory approach. While the brief does not directly lay out detailed arguments against a mandatory employment system, it contains some important clues as to why the ‘business consensus’ was opposed to mandatory systems, whether public or private. First, there was simply the question of cost, and in particular the increased costs mandatory plans would impose on small business. Both the BCPP Brief and the Green Paper assumed that employers who already offer employment plans would experience very little in increased costs from mandatory expansion of the system; they would simply integrate any new mandatory benefits with their already existing systems. Increased costs, then, would fall almost entirely on the enterprises that did not currently make private pension provision, primarily small business.

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151 Ibid. The observation that ownership does not necessarily carry with it the right to control, a proposition with despite radical implications for labour law, is offered without explanation.
152 According to Myles and Teichroew, it was the “threat to the process and control of capital formation in Canada [that]largely explains the implacable opposition of the business community to expansion of the Q/CPP and the eventual failure of the reform movement”: supra note 1 at 94.
153 Ontario, Legislative Assembly, Official Report of Debates (Hansard), No.93 (May 7, 1964) at 3019 (Elmer Sopha) and 3024 (Donald MacDonald).
154 The Brief’s principal stated rationale for opposing mandatory private plans was simply that it saw no demonstrated need. It argued that the “BCPP anticipates continued growth of Canada’s voluntary private sector pensions”: BCPP Brief, supra note 145 at 5.
155 Ibid. at 2, 5, Appendix : Cost Study at 5.
Second, the brief reflected a commitment to the importance of employer control over the decision as to whether or not to provide a pension plan, and if so, what kind of plan to provide. As we have seen in Chapter 2, larger and more stable employers used pension plans and plan design to gain a competitive edge in the recruitment and retention of employees, an edge they would lose if plans became universal and plan design became less discretionary. Many of the changes in the organization of work that were to make employment pension plans less attractive for this purpose were already well advanced by 1984, and we can discern in the language of the brief a shift away from loyalty to conventional plans built on the defined benefit model in favour of group RRSPs and other defined contribution-type approaches. Nevertheless, employment plans still played a role in human resource management and there remained an evident concern for the employment-related consequences of replacing employer control with state control over decisions about whether or not employers would provide pensions.

There were also clues in the BCPP Brief that, despite the general business interest in the accumulation of private sector investment capital, the large and fungible pools of capital traditionally associated with defined benefit pension plans were becoming less important than they had previously been for investment purposes. The Brief notes with approval the significant expansion of registered retirement savings plans (“RRSPs”) in the market place; by 1981, total RRSP deposits had grown to $25 billion dollars, still a far cry from the $59 billion deposited in pension funds, but of increasing importance nonetheless. In earlier rounds of pension reform, pension savings in the form of RRSPs had been relatively insignificant, and business looked to pension plans to accumulate large pools of capital; in that climate, mandatory private pension plans had significant attractions for finance, even if they were less attractive to employers. Now that RRSPs and other individual capital accumulation plans were a growth industry, however, the appetite for investment capital could be fed through access to pools of funds that came with fewer regulatory strings attached than the funds that came from employment pension plans. Ultimately, I would argue, the issue of ‘regulatory strings attached’ drove the ‘business consensus’ that mandatory systems should be avoided. The Brief ascribes important value to business

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156 This issue will be discussed in more detail in Chapters 6 and 7.
157 Ibid. at 8.
flexibility. Any mandatory system, even if it were left to be provided by the private sector, would cede a measure of control to government that business would prefer to retain in its own hands.

The government policy documents themselves do not shed a great deal of light on why government rejected the mandatory private option. The *Green Paper* poses the issue of mandatory versus voluntary approaches as a core policy question:¹⁵⁸

> The question for governments and the Canadian people to address is this: is the magnitude of … anticipated declines in livings standards for middle income Canadians a problem requiring governmental action? In other words, should Canadians be expected to fill these gaps on their own through additional personal savings and private pensions, or does the situation require an expansion of mandatory pension arrangements?

Its framing its own response, however, the Green Paper turns not to any ethical or operational considerations important to retirement income policy, but simply to our libertarian instincts: we are told that Canadians do not like compulsion. Voluntarism is invoked as an independent value, expressed in the government’s conviction “that most Canadians do not want their governments to *force* them to make pensions and savings arrangements to guarantee 100% maintenance of pre-retirement living standards [emphasis added].”¹⁵⁹ This choice of phrasing obscures two implicit assumptions: first, that income replacement is the goal, and second, that there is no public support or rational argument to justify mandatory provision falling somewhere in between 100% and the much lower figures that current public pensions actually supply for most Canadians.

Overall, then, the government rejected both of the systemic recommendations that had been made as remedies for the deficiencies of the employment pension system. There would be no expansion of the C/QPP, and no mandatory employment pension system. Instead, the remedy in the second round of pension reform, as in the first, would be statutory regulation. I turn now, with a clearer picture of the nature of the problems in the system, to an analysis of the statutory regulatory system.

6.0 PENSION STATUTES

As I noted above, part of the ‘deal’ which ensured the survival of employment pension plans included a decision by the state to regulate these plans through legislation. In this section, I will focus on legislative outcomes in Ontario, resulting in the ‘first generation’ statute, *The Pension Benefits Act, 1965* (‘PBA 1965’),\(^{160}\) and subsequently in the ‘second generation’ *Pension Benefits Act, 1987* (‘PBA 1987’).\(^{161}\) Ontario’s legislative process was a complex one. First generation statutory reform began with the enactment of *The Pension Benefits Act, 1962-63*,\(^{162}\) already discussed. I have talked about those aspects of this statute which set up a mandatory system. In fact, the statute took a two-pronged approach, mandating a basic standard pension plan in all except the smallest workplaces, and regulating “supplementary” plans which offered more generous benefits. The mandatory features of that statute were repealed in 1964,\(^{163}\) followed in 1965 by its full repeal and the passage of the *PBA 1965*. Second generation reform was also multi-staged, encompassing interim amendments to the *PBA 1965* in 1980 to reflect some of the recommendations of Ontario’s Royal Commission on Pensions,\(^{164}\) and culminating in 1987 in the passage of an entirely new pension statute, the *PBA 1987*. I have not attempted here to summarize these statutes, or to recount in precise chronological detail their changes over time. This account focuses only on the regulatory provisions important for this thesis: first the legal construction of individual and collective employee pension rights, and second, the extent to which the regulatory statutes restricted the power of employers to use and shape employment pension plans for their own business purposes, including the impact of those restrictions on the balance of pension power between employees and employers.

6.1 First Generation Regulatory Statutes

Although there was no binding federal-provincial agreement to table regulatory legislation, it was understood that both levels of government would do so, and that efforts would be made

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\(^{162}\) S.O. 1962-63, c.103.

\(^{163}\) *Pension Benefits Amendment Act, 1964*, S.O. 1964, c.88.

\(^{164}\) *Pension Benefits Amendment Act, 1980*, S.O. 1980, c.80.
to ensure a reasonable degree of uniformity across the country.\textsuperscript{165} As a result of its close study of employment pension plans through the Committee on Portable Pensions, and its abortive \textit{Pension Benefits Act, 1962-63}, Ontario was ahead of other provinces in developing a regulatory framework, and its 1965 statute became the national model.\textsuperscript{166} The \textit{PBA 1965} imposed a registration requirement on pension plans, and enacted relatively ‘bare bones’ statutory rules governing minimum standards for pension plans, as well as rules addressing the custody, solvency and investment of pension funds.\textsuperscript{167} The drafters of the 1965 statute saw employment pension plans through a fairly simplistic lens. While the \textit{Second Report} of the Committee on Portable Pensions had acknowledged the existence of a broad range of types of plans in Ontario, including multi-employer plans (“MEPPs”) in both the public and private sector, the new Act was targeted primarily at single-employer defined benefit plans funded through trust instruments.\textsuperscript{168} MEPPS were entirely ignored,\textsuperscript{169} and there very little

\textsuperscript{165} The nature of this understanding is described by Premier John Robarts in his speech to the Ontario legislature on first reading of the 1965 statute: Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, No.104 (May 21, 1965) at 3195 (Hon. John Robarts). Uniform national legislation was important to large companies whose pension plans might encompass employees working in several different jurisdictions. Ontario’s prototype statute contemplated a network of provincial and federal pension authorities that would work together to minimize duplication and inconsistency. Section 10(2) of the \textit{PBA 1965} authorizes the Pension Commission of Ontario, the body responsible for administering the new statute, to enter into reciprocal agreements with federal and other provincial pension authorities “for the reciprocal registration, audit and inspection of pensions plans”, and for the delegation of Pension Commission functions, powers and duties to other pension commissions, or to a joint Canada-wide association of pension commissions. Under this authority, Ontario entered into a pan-Canadian Memorandum of Reciprocal Agreement in 1968, which still governs these issues. The validity of this agreement, of somewhat novel constitutional provenance, was effectively confirmed by the Supreme Court of Canada in \textit{Boucher v. Stelco Inc.} [2005] S.C.J. No. 35 at paras. 20, 35.

\textsuperscript{166} Like Ontario, Quebec passed its first regulatory statute in 1965. Alberta and the federal government followed suit in 1966. Not all provinces moved so quickly. For example, British Columbia, Canada’s third most populous province, missed out entirely on the first generation of regulatory statutes, waiting until 1993 to legislate; Prince Edward Island, Canada’s smallest province, is still without pension regulatory legislation.

\textsuperscript{167} The \textit{PBA 1965} occupied only 14 pages in the statute book, accompanied by a single regulation (\textit{O.Reg. 103/66}) of 10 pages, 6 of which were taken up by forms. Ontario’s current \textit{Pension Benefits Act, 1987} is more than seven times as long; the general regulation, Regulation 909 is even longer.

\textsuperscript{168} While the legislation did recognize the existence of defined contribution plans (see s.1(h)(ii): definition of “pension plan”), their unique needs with respect to funding adequacy and solvency were largely unaddressed by the legislation. Detailed solvency regulation was primarily directed at plans funded through trusts, although a close reading makes it clear that insured plans could also meet solvency standards: see, for e.g. O.Reg. 103/66 at s.5(b).

accommodation for the unique circumstances of the several large public sector pension plans brought under the aegis of the new statute. 170

In introducing the bill which subsequently became the PBA 1965, Premier Robarts described “portability” and “solvency” as the primary focus of the regulatory statutes. 171 As we have seen, “lack of portability” was the term used by the Committee on Portable Pensions to encompass the broad problem of employees who had been members of pension plans, but failed to collect any benefits on retirement because of job turnover. In the debates surrounding the repeal of mandatory plans, Premier Robarts offers the following definition of portability: 172

> By portability, we mean that the employee has a right to pension benefits from his employer’s contributions, as well as his own, and further that these benefits cannot be surrendered or commuted for a cash refund except to a very limited extent as set out in the Act.

The “portability” focus was clearly the primary one; solvency and security of pension funding was necessary to ensure that employees would actually get the “portable” pensions the Act was designed to ensure.

The common thread was a concern that employees who were members of pension plans were not getting the pensions to which they were entitled. To ensure that workers would get their entitlements, of course, it was first necessary to define those entitlements. As we have seen, at this stage in the legal history of employment pensions, there was little consensus either on what pension rights were, as a matter of law, or on what they should be. Arbitrators and some courts were beginning to use the language of “deferred wages”; while this inherently ambiguous phrase implied some notion of rights, it contained no clear conception of the

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170 From the outset, Ontario took the approach that public sector plans should be subject to the general pension regulatory statutes. Accordingly, such plans were operated subject to the provisions both of their constituting statutes and of the general Pension Benefits Act. Other jurisdictions took a different approach; the federal statute, for example, excludes Crown employees and permits the exclusion of Crown agencies by regulation: see Pension Benefits Standards Act, 1985, R.S.C. 1985, c.32 (2nd Supp.) s.49(5) and s.6(a). Ontario’s only concession to the improbability that government plans might become insolvent was O. Reg. 103/66, s.2(12), which allowed government plans to forgo the funding of what was called “initial unfunded liabilities”: the amounts by which a plan was underfunded at time of registration.

171 Ontario, Legislative Assembly, Official Report of Debates (Hansard), No.104 (May 21, 1965) at 3194 (Hon. John Robarts). Robarts was technically describing the purpose of the predecessor statute, but it is clear from his remarks that this purpose had remained unchanged.

nature or content of those rights. Despite a move in the direction of vesting, employers still saw the ‘pension promise’ as a highly conditional one. Many employers still offered no vesting, and those that did clearly offered it only on their own terms: to secure tax deductions, or to meet their own enterprise-specific human resource needs. The labour movement saw pensions as rights, but were engaged in an internal debate about the theoretical basis for that rights claim. Unions associated with the Congress of Industrial Organizations (CIO) wing of the U.S. labour movement characterized employment pensions as compensation for “human depreciation”, owed by capital to labour for a lifetime of debilitating work. On the depreciation theory, all workers were entitled to an adequate (and equal) pension on retirement, regardless of years of service or earnings level. The somewhat less radical but equally rights-based perspective of the American Federation of Labour (AFL) wing was that pensions were a specific species of ‘deferred wage’, earned and vested on an on-going. On this theory, anything less than complete and immediate vesting of pension credits robbed workers of part of their earnings, and the money in money in pension funds belonged to the workers who had earned it. For individual employees, their perspective was needs-based rather than theoretical; they hoped for pensions which would provide them, after a lifetime of work, with an adequate and continuing income stream in retirement.

Canadian regulatory statutes stepped right into the midst of the debate about the nature and content of employee pension rights. Despite having espoused voluntarism as the basis for employment pension coverage, legislatures like Ontario’s rejected the gift theory, and embedded pension rights in contract, requiring that pension plans “contractually provide” for

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173 See Paul P Harbrecht, *Pension Funds and Economic Power* (New York: Twentieth Century Fund: 1959) at 91-97; Steven Sass, “Pension Bargains: The Heyday of US Collectively Bargained Pension Arrangements” in Paul Johnson, Christoph Conrad & David Thomson. *Workers versus Pensioners: Intergenerational Justice in an Ageing World* (Manchester and New York: Manchester University Press, 1989) 92 at 101-2. The “human depreciation” concept was the basis on which a 1949 Steel Industry Board conciliation report was the first in the U.S. to recommend an employment pension plan: Sass, *ibid.* at 102. Canada’s equivalent, the 1950 report of the conciliation board dealing with the labour dispute between the UAW and Ford Motor Company (see 1950 Labour Gazette 454) does not deal with the issue on a theoretical basis, since the company, having already agreed to pensions in its U.S. plants, had conceded the issue and the dispute focused only on the size of the pension. While the depreciation theory would entitle all workers to equal pensions, CIO unions bowed to the inevitable and sought full pensions only for worker who were age 65 with thirty years service: Harbrecht, *ibid.* at 93.
pension rights.\textsuperscript{174} Furthermore, they did not defer entirely to the employer on the content of that contract; instead, they took the much more radical course of establishing minimum standards which made certain rights indefeasible. It is not clear that legislatures were entirely aware of the radical nature of their legislation; the language of “portability”, with its focus on the \textit{mobility} of rights, masked the extent to which new rights were actually being created. Legislatures were well aware, however, that they were at least to some degree impairing the usefulness of employment pension plans as a tool of human resource policy. As the Honourable John Robarts told the legislature: “[t]he pension objective is so important that is should not be frustrated by allowing it to become confused with other objectives of personnel policy, most of which can be accomplished in other ways”.\textsuperscript{175}

While we should not underestimate the extent to which the legislative decision to create statutory pension rights represented a fundamental (re)construction of the nature of employment pensions, the actual content of those rights in first generation regulatory statutes was far from generous. The state was prepared to protect employees – up to a point – from the loss of benefits which it conceptualized as already accrued: already bought and paid for by employees through their labour. But pension policy makers were not prepared to protect any expectation that an employee would be able to \textit{continue} to earn pension benefits throughout the course of a career, and would have a secure and adequate pension on retirement. While the Act provided protection for already accrued benefits, it did not recognize any employee entitlement to continue to accrue benefits, except on terms dictated by the employer. Regulatory statutes, then, continued to leave it entirely up to the employer whether, when and for how long to provide pension coverage, and at what level.

In first generation statutes, the legislative creation of concrete pension rights is most obviously reflected in minimum vesting standards. The gold standard for ‘portability’ would have been immediate vesting of pension credits. The new \textit{PBA 1965} fell far short of that; employer contributions vested once an employee reached 45 years of age and had

\textsuperscript{174} \textit{PBA 1965}, supra note 160, ss. 21-22.
\textsuperscript{175} Ontario, Legislative Assembly, \textit{Official Report of Debates} (Hansard), No.58 (March 19, 1963) at 1884 (Hon. John Robarts); see also Committee on Portable Pensions, \textit{Second Report}, \textit{supra} note 21 at 98.
accumulated at least ten years of continuous service\(^{176}\) (or plan membership), a standard that become known as the “45 & 10 rule”. Pension plans were required to “contractually provide” that a plan member who qualified under the “45 & 10 rule” was “entitled, upon termination of his employment prior to his attaining retirement age…to a deferred life annuity commencing at his normal retirement age equal to the pension benefits …provided in respect of service as an employee…under the terms of the plan.”\(^{177}\) Since this was now clearly a contract right, it was presumptively enforceable through civil action; the civil enforcement concept is reinforced by provisions in the Act recognizing a right of action for third party beneficiaries of any death benefit the plan may provide.\(^{178}\) Once pension rights vested, they were contractually “locked in”; plan members became entitled to a deferred pension based on the value of vested pension credits on reaching the normal age of retirement regardless of whether or not they continue to be employed.\(^{179}\)

In addition to creating ‘portability’ rights, first generation statutes also addressed important concerns about how pensions were paid for, and in particular about the solvency and security of pension funds. Prior to this legislation, there had been no Canadian requirement that pension promises be either pre-funded or insured.\(^{180}\) Unless solvency standards made their way into specific plan texts or trust documents, however, it was up to individual employers and their actuaries to determine at what level to pre-fund benefits. The new statutory rules took a whole new conceptual approach to plan funding. Pension funds were now seen not simply as a ‘reserve’ to take the pressure off operating funds and to control costs, but as a

\(^{176}\) The Act defined “continuous service” as “service for a period of time without regard to periods of temporary suspension of employment”: \textit{ibid.}, s.1(1)(l). This is, to say the least, ambiguous.

\(^{177}\) \textit{Ibid.}, s.21(1)(a).

\(^{178}\) \textit{Ibid.}, 17(2). The Act itself did not mandate death benefits; that right was provided only in second generation statutes.

\(^{179}\) Rights to withdraw credits in any way other than as a pension were very limited. Regulatory statutes permitted the withdrawal of 25 percent of the value of the credits as a lump sum, but only if the plan so provided: \textit{ibid.}, s.21(4).

\(^{180}\) The \textit{Blue Books} had not required funding or insurance of the benefits provided under pension plans. They had required only that employers who sought to deduct contributions for past service produce an actuarial certificate that the amount of the contribution deducted was actually required to fund the benefits: see, for example, \textit{Statement of Principles and Rules respecting Pension Plans for the Purposes of The Income Tax Act} (Taxation Division, Ministry of National Revenue, no date) (“1950 Blue Book”), Part 8 (e)(1)(b) at 17. Some plans adopted “terminal funding”, a method in which the employer made no advance contribution, but simply paid into trust or to an insurer at the time of the employee’s retirement a lump sum certified by an actuary as sufficient to fund the pension benefit to which the employee was entitled: see \textit{Interpretation Bulletin 14}, Part 7, 2533.
guarantee that pension promises would and could be fulfilled. To that end, the *PBA 1965* mandated pension plans to meet solvency levels prescribed by the regulations.¹⁸¹ Most significantly, it was now the law in Ontario that if pension plans terminated without sufficient monies in the fund to pay the benefits, employers had to ‘top up’ the fund in order to ensure that the promised benefits were paid.¹⁸² While no over-riding fiduciary obligation was imposed on administrators of pension funds, there were now restrictions on the investment and use of pension funds; administrators were required to invest in accordance with federal rules applicable to insurance companies.¹⁸³ A variety of specific rules addressed conflict of interest, attempting to draw clear lines of demarcation between employers and the pension funds they established and administered, including an explicit proscription against anyone involved with the pension plan, including the employer or the union, accepting any consideration or gift in connection with fund investments.¹⁸⁴

### 6.2 Second Generation Regulatory Statutes

Ontario’s second generation statute, the *PBA 1987*, went much farther down the road than the *PBA 1965* in creating and expanding employee pension rights. Interestingly, however, it took a different approach to the conceptualization of those rights. As noted above, the *PBA 1965* embedded key statutory rights in contract, requiring that pension plans “contractually provide” for certain core rights and leaving enforcement of those rights up to the courts. Second generation statutes took a more ‘public law’-based approach. No longer were the statutory rights created required to be “contractually provided”. Instead, rights took their force directly from the statute. Front-line responsibility for delivering statutory rights to plan...

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¹⁸¹ The structure of the statute made these funding standards also a matter of contract, by requiring that plans “contractually provide” for certain funding that met statutory standards of solvency and for investment of funds in accordance with the regulations: *PBA 1965, supra* note 160, ss. 22(1)(a) and (c).

¹⁸² *Ibid.*, s. 22(2). The regulation accompanying the statute (O.Reg. 103/66) put some detailed meat on the bones of these statutory provisions, giving legal force to such concrete actuarial concepts as current service costs, initial unfunded liabilities and experience deficiencies, and setting out very specific timetables for employers to make good on any funding deficits.

¹⁸³ O.Reg. 103/66, s.14(2). There were numerous exceptions to the federal rules written into the Ontario regulation.

¹⁸⁴ O.Reg. 103/66, s.14(7). The reference in this regulation to “associations of employees and … any union, officer or employee thereof” is virtually the only reference in the first generation Act and Regulations to the fact that unions might be involved with pension plans. The regulation does not limit the ban to a union which holds bargaining rights, suggesting that drafters may have had in mind not the single-employer plans that might be the subject of collective bargaining, but MEPPs sponsored either solely by unions or jointly by unions and employers: see discussion of MEPPs below and in Chapter 6, section 3.
members was imposed on plan administrators. For the first time, the Act directly regulated the role of plan administrator, providing a closed list of persons or entities permitted to administer pension plans and pension funds, and imposing detailed duties on plan administrators, including the duty to “ensure that the pension plan and the pension fund are administered in accordance with [the] Act and the regulations.” Despite its recognition of potential conflict of interest between the role of employer and the role of plan administrator, however, the Act did not bar employers from administering pension plans; on the contrary, the “employer” is first on the list of permitted administrators. The Act established an elaborate administrative apparatus for the enforcement of rights and obligations. The Superintendent of Pensions took a much more active role than previously in supervising plan administrators, with the Pension Commission of Ontario (now the Ontario Financial Services Tribunal) now playing a formal role as an appellate tribunal from the Superintendent’s decisions. If this change in approach was intended to keep the courts out of pension administration, or to dislodge the now-entrenched identification of pension rights with contract rights, it was ineffective in doing so. What it did do was to create another forum, in addition to common law courts and labour arbitration, for the enforcement of employee pension rights, adding to the legal confusion about the nature and content of these rights. I will discuss the implications for employees of the intersection between the new regulatory rights and evolving common law rights in more detail in Chapter 5.

While vesting rules in first generation regulatory statutes had provided only limited protection for ‘accrued rights’, they had established a legal link between service and indefeasible benefits that proved impossible to sever. Second generation pension rights moved much closer to recognition of full “portability”. The PBA 1987 replaced the old “45

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185 PBA 1987, supra note 161, ss. 8(1); O. Reg.909, s.54.
186 PBA 1987, ibid., ss.20 – 23; see in particular s.20(1).
187 The issue of conflict of interest between “administrator” and “employer” roles is discussed in more detail in Chapter 5 at section 3.
188 PBA 1987, supra note 161, s.8(1)(a).
190 Many jurisdictions now recognize full vesting (i.e. all pension rights accrue from the first day of plan membership). In 2001, Quebec provided for immediate vesting retroactive to January 1, 1966; in 2005, Manitoba enacted the same standard, retroactive to July 1, 1976: see Kaplan, ibid. at 221-223. Kaplan’s book provides full information about vesting standards in all provinces, up to the date of publication. Ontario and the federal government have only recently moved to full vesting; see Pension Benefits Amendment Act, 2010, S.O. 2010, ss.23-24 (not yet in force as of Jan.1, 2011); Jobs and Economic Growth Act, S.C.2010, c.12, s.1805.
“10 rule” with a requirement that benefits vest after two years of plan membership, with no age restriction. While these pension credits remained “locked in”, in the sense that they could only be used for pension-related purposes, they were now fully transferable; in addition to the right to a deferred annuity, plans had to offer two additional options: the right to transfer the commuted value of the credits to another pension plan, provided that any new plan covering the employee agreed to receive them, or to deposit the funds in an individual locked-in account. While continuing to recognize that employers had considerable scope to make unilateral amendments to pension plans, the PBA 1987 spelled out an important limitation on the right to amend that had at best only been implied in the previous statute: plan amendments could not take away already accrued benefits. Furthermore, the new Act now required that plans offer early retirement pensions on an actuarially reduced basis to any employee retiring within ten years of the normal retirement age provided in the plan. In practice, since most plans established a normal retirement date of 65, this entitled employees to retire on a reduced pension at any time after reaching age 55.

In addition to significantly expanding basic vesting rights, second generation regulatory statutes also enhanced the value of those vested rights through what became known as the “50% rule”, which placed important restrictions on an employer’s flexibility to minimize its contributions to the pensions of short service employees. While first generation statutes had required employers to contribute, no minimum contribution level was imposed. In non-contributory plans, the employer’s contribution was 100% of the value of the benefit. In contributory plans, the division between employer and employee contributions was established by the plan. Under typical cost-sharing arrangements for defined benefits plans, the employee’s contribution was fixed, but the employer’s was not; the employer simply assumed responsibility for whatever additional amounts were required to fund the defined

191 PBA 198, supra note 161, s. 38.
192 Ibid., s.43. This provision was first introduced in the 1980 legislation.
193 Ibid., s.14. There is some leeway here for certain types of collectively bargained plans; see discussion in Chapter 6 at section 3.5.
194 There was a contribution requirement in the sense that plans to which employers did not contribute were not subject to the statute: ibid. at s.42(2)-(5).
195 PBA 1965, supra note 160, s.18. Premier Robarts made it clear in introducing the bill that one purpose of this limitation was to ensure that the statute did not apply to “union or fraternal plans” controlled by the “union or fraternal membership”: Ontario, Legislative Assembly, Official Report of Debates (Hansard), No.104 (May 21, 1965) at 3196 (Hon. John Robarts).
benefits. Pursuant to standard actuarial practice, the annual cost of funding defined benefits for young employees was significantly less than the annual cost for older employees. In its Second Report, the Committee on Portable Pensions had tabulated the variable annual service costs to employers in defined benefit plans. That table showed that in the early years of plan membership, the employee’s own contribution paid virtually the entire cost of the benefit; it was only at some point between the ages of 45 and 50 that the employer’s contribution equaled and exceeded that of the employee. Under these cost-sharing arrangements, earlier vesting rules would be of little more value to employees than rules requiring a return of their own contributions, since for employees who left early, much of their accumulated pension value had been funded from their own contributions. The “50 percent rule” provided that the departing member’s own contributions (plus interest) could not be used to fund more than 50 percent of the commuted value of the pension; the member would be entitled to a lump sum refund from the plan if her contributions exceeded 50% of the overall pension value. For longer-service employees, the “50 percent rule” had little impact on employer costs in defined benefit plans, since annual service costs evened out over time. For employees who departed after relatively short periods of service, however, the rule meant that employers had to put significantly more money into their plans.

In addition, the PBA 1987 created a set of expensive right for employees who died prior to retirement. Under early pension plans, employees who died ‘in harness’ normally got nothing from the plan. Contributory plans gradually began to recognize a right to a return of contributions (with or without interest); plans occasionally provided a pre-retirement spousal benefit which ensured some continuing pension value after death for at least those employees with surviving spouses. But although first generation statutes provided a right to sue if survivor and death benefits were not paid, they did not require that plans provide such benefits, and employers who did not provide them enjoyed significant cost savings. The PBA 1987 mandated both pre- and post-retirement survivor benefits, an issue we will examine in

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196 Committee on Portable Pensions, Second Report, supra note 21 at 29.
197 PBA 1987, supra note 161, s.40(3)-(6).
more detail below. In addition, it mandated a death benefit even for those plan members who did not leave a surviving spouse, equal to the commuted value of the pension.\footnote{Ibid., s.49(6). This death benefit may be offset by an amount payable under employer-funded group life insurance: see s.49(11).}

On the issues of security and solvency, second generation regulatory statutes continued along the same course as the first, providing higher standards of solvency and more detailed supervision of plan administrators. Unlike the prior statute, Ontario’s \textit{PBA1987} directly addressed the issue of pension security for employees of insolvent employers, creating “deemed trusts” for unremitted pension contributions, and establishing a Pension Benefits Guarantee Fund which would ensure payment of the first $1000 per month of pension benefits if a pension plan became insolvent and was unable to meet claims for benefits.\footnote{Ibid., s.58 and s.83-87. Both the “deemed” trust and the Pension Benefit Guarantee Fund provisions made their first appearance in the 1980 statute.}

For the first time, the thorny issue of ownership of pension fund surpluses was addressed by the statute, which now prohibited employers from removing funds from a plan without the consent of the Pension Commission, and strictly regulated the circumstances under which the Commission could consent to surplus withdrawal.\footnote{Ibid., ss. 79-80. While the statutory conditions were strict they were far from clear. The surplus issue has remained a highly contentious one, and will be discussed in more detail in Chapter 5.}

The Act likewise, for the first time, imposed general standards of care on plan administrators and other fiduciaries with respect both to fund and plan administration.\footnote{Ibid., s.23.}

The \textit{PBA 1987} addressed a variety of the issues identified in the research reports and the \textit{Green Paper} as gender equality issues. The Act now contained a general prohibition against sex discrimination in respect of conditions of eligibility for plan membership, contributions required by a plan, benefits paid by a plan.\footnote{Ibid., s.52(1). Section 52(2) spells out some options for administrators to produce sex-neutral outcomes for employees, including the use of “annuity factors that do not differentiate as to sex” and employer contributions that did vary on the basis of sex, but produced equal benefit outcomes.}

The Act also now mandated that plans provide “joint and survivor” benefits, with a statutory minimum 60 percent survivor benefit.\footnote{Ibid., s.45(1).} While the ‘joint and survivor’ pension was the default option, it could be waived by agreement of both spouses, unlike the C/QPP where survivor pensions were mandatory. A further difference from the C/QPP was the fact that under the \textit{PBA 1987}, the cost of survivor
benefits could be charged to the member, resulting in a reduction in the member’s monthly payment; under the C/QPP, survivor benefits were a cost to the plan as a whole. While the White Paper had promised mandatory pension credit-splitting between spouses, the PBA 1987 took a different approach to the division of pension value on separation or divorce. It contemplated that pension value would be treated as part of an overall division of matrimonial property. If parties chose to divide pension credits, the PBA 1987 mandated that plan administrators should give effect to such “domestic contracts”, but only subject to statutory limitations that protected retirement income for plan member and the financial integrity of the plan; “domestic contracts” could not give the non-member spouse more than half the value of the pension, and could not compel any payout prior to the member’s actual or normal date of retirement. Spousal rights were accorded both to married and common-law partners, provided they were of the opposite sex.

A number of issues identified in the research studies leading up to second generation reform as of particular importance to women were not addressed in the PBA 1987. Important among them was the issue of inflation protection for pension benefits. The ambivalence of the new Act with respect to inflation protection reflected the controversial nature of the issue; s.54(1) mandated inflation protection in accordance with “the established formula…and in the prescribed manner”, but s.54(2) spelled out that “[a]ny formula …for any inflation related adjustments to pension benefits, pensions or deferred pensions shall be established only by amendment to this Act”. In fact, no such amendment has ever been enacted.

On the all-important issue of plan coverage, first generation statutes had had very little to say. While second generation statutes were equally silent with respect to employers who did not establish plans, they did make some effort to broaden coverage where plans existed by

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204 Ibid., s.45(2).
205 Ibid., ss.52(4)–(5), (2) and (1).
206 Ibid., s.1(1), definition of “spouse”. The definition was amended in 2005 to include same-sex relationships: see Spousal Relationships Statute Law Amendment Act, 1985, S.O. 1985, c.5, s.56.
207 In 1987, the Ontario Government appointed a Task Force, chaired by Martin Friedland, to explore inflation protection for employee pension plans, with terms of reference expressing the government’s commitment to inflation protection, subject to expert assistance “to determine the most appropriate formula and phase-in procedure for inflation protection”: see Ontario, Task Force on Inflation Protection for Employment Pension Plans, Research Studies, Vol. I (Toronto, Queen’s Printer, 1988) (“Friedland Report”) 2. The Task Force reported in 1988 recommending an inflation adjustment formula linked to the consumer price index. No action was ever taken on this recommendation.
providing mandatory eligibility rules. Under the *PBA 1987*, employers could not impose waiting periods of longer than two years for plan membership,\(^{208}\) and were required to offer membership to all employees who fell generally within the scope of the plan.\(^{209}\) The *PBA 1987* also required that all employees who were members of a “class of employees” for whom a pension plan was provided must be eligible for membership.\(^{210}\) It provided no guidance, however, on what constituted a “class of members”, leaving the door open for restrictive interpretations that left employees with less than permanent attachment to the workforce excluded from plans.\(^{211}\) It did, however, clearly spell out that employers who provided pensions for full-time employees were now required to offer plan membership to part-time employees in the same class as well.\(^{212}\)

In her pioneering article, “Pension Plans and the Law of Trusts”;\(^ {213}\) Eileen Gillese (now Gillese J.A. of the Ontario Court of Appeal) argues that Canada’s pension regulatory statutes significantly altered the “balance of power between employer and employee”,\(^ {214}\) a conclusion with which I vigorously disagree. There is no doubt that regulatory statutes very significantly altered the pension landscape for the benefit of employees, creating rights where no clear rights had previously existed. To the extent that minimum standards always ‘raise the floor’ for bargaining, they have presumably provided some enhanced leverage for unions at the

\(^{208}\) *[Ibid.]* s.32(2).

\(^{209}\) *[Ibid.]* s.32(1).

\(^{210}\) *[Ibid.]*, s.32(1).

\(^{211}\) *In CAW-Canada Local 2007 v. Superintendent of Financial Services and Woodbine Entertainment Group*, FST Decision Number P0345-2009-1, January 27, 2010, the Ontario Financial Services Tribunal held that a group of employees who were not on the seniority list could be excluded from the pension plan, notwithstanding the fact that they performed similar job functions in a similar manner to those seniority-rated employees for whom the plan was created, and were generally subject to the same managerial authority, training, regulatory rules and discipline [para.2(n)]. The Tribunal found that the requirement to include all employees within a “class of employees” does not require coverage of “all employees performing the same or similar job functions where there are fundamental differences in the terms and/or nature of the employment as defined by the essential characteristics of the employment relationship relevant to the issue of pension plan coverage” [para. 9(e) and 9(f)]. The differences it found relevant all related to the fact that the non-seniority employees had inferior access to the rights and benefits provided under the collective agreement. The Tribunal was strongly influenced by the fact that the distinction between seniority and non-seniority employees had been created through collective bargaining [para.9(a)]. An application for judicial review has been filed by the union.

\(^{212}\) *PBA 1987*, *supra* note 161, s.32(3). Not all part-time employees were included; the right is restricted to those who earned at least 35% of the YMPE in the two years prior to applying for plan membership. The employer may meet its obligation under this section by setting up a separate plan for part-timers, as long as the plan is “reasonably equivalent”: s.35


bargaining power table. But their key thrust was entirely paternalistic. Legislatures were content to leave pension power in the hands of employers, provided employers complied with minimum standards handed down by law. First generation statutes did nothing whatsoever to give employees any role in plan governance. When members of the New Democratic Party attempted to amend pension bills to provide plan members with rights to detailed information about the pension plans to which they belonged, the government’s response was that such information was unnecessary; if employees wanted information about their personal entitlements, they could ask the employer, and they had no need for general information about their plans and funds because their interests would be fully protected by the Pension Commission. Second generation statutes took more interest in plan administration, but except in the case of certain multi-employer plans, did not mandate member involvement in plan governance, or greatly improve the amount and quality of the information to which plan members and their representatives were entitled. The PBA 1987 recognized the right of plan members and former members to establish pension “advisory committees”, but imposed no obligation on the employer to consult the committee, or to take its “advice”.

I would argue that in enacting pension regulatory statutes, governments were interested in improving pension benefit outcomes, but not at all in altering the balance of power between employers and employees in the design and administration of pension plans and pension

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216 Section 22(1)(b) of the PBA 1965 imposed a minimum disclosure requirement that employers must provide:

….a written explanation to each member of the plan of the terms and conditions of the plan and amendments thereto applicable to him, together with an explanation of the rights and duties of the employee with reference to the benefits available to him under the terms of the plan and such other information as may be prescribed by the regulations.


218 *Ibid.* at 25. Advisory committees appear to be entitled to more information than plan members about the plan and fund, although the statutory standards are vague. Most second generation statutes provide no role for plan members in governance; the exception is Quebec, which provides that all registered plans must be administered by a “pension committee” with membership representation: see *Supplemental Pension Plans Act*, S.Q. 1989, c.38, s.147.
funds. This conclusion is bolstered by the curious silence of pension regulatory statutes on the role of unions, an issue explored in the next section.

7.0 UNIONS AND COLLECTIVE BARGAINING UNDER REGULATORY STATUTES

As we saw in Chapter 3, within the legal framework for collective bargaining in Canada, employment pension plans were clearly recognized as terms and conditions of employment.219 As we also saw, however, that recognition often failed to translate into any parallel recognition that pension plans were part of collective agreements, leaving plan members without a meaningful framework for negotiating the terms of their pension plans, or for enforcing their pension rights. While collective bargaining law gave unions a formal right to bargain pensions, it provided them with little substantive leverage on such fundamental issues as the establishment, amendment, termination and administration of employment pension plans.

First generation regulatory statutes did nothing to improve this situation. Ontario’s PBA 1965 reinforced the legal concept, already recognized in collective labour law and now slowly making its way into the common law, that employment pension plans created contractual rights. There is little evidence, however, that the statute visualized more than one contracting party. Obligations with respect to registration and administration of plans and funds were imposed only on the employer, and the statute clearly operated on the assumption that employers unilaterally made all the key decisions with respect to the establishment and continued existence of pension plans, their content and their administration. While this was no doubt a relatively accurate reflection of the practical reality, it clashed directly with labour law doctrine which recognizes pension issues as within the scope of bargaining, and was distinctly unhelpful to trade unions seeking some point of entry for more meaningful pension bargaining.

Not all first generation regulatory statutes ignored the role of unions and collective bargaining in relation to employment pension plans. The Quebec Supplemental Pension

219 See discussion at Chapter 3, sections 4 and 5.
Act,220 imposed a joint obligation on “the parties to a collective labour agreement containing provisions relating to a supplemental [employment] plan existing at the time of the coming into force of this act” to file information and a copy of the plan with the regulator.221 The Quebec statute also took care to ensure that pension plans which were subject to collective bargaining had a legal status independent of collective agreements, presumably to protect them against the instabilities arising from the fixed expiry dates of collective agreements. The statute spelled out that:222

The provisions respecting a supplemental plan contained in a collective labour agreement shall constitute a contract having an existence separate from that of the collective labour agreement and shall remain in force notwithstanding its expiry or cancellation.

Most jurisdictions followed the Ontario model, however, which assumed that pension plans were under exclusive employer control.

The labour movement sought to use the Great Pension Debate to secure recognition for collective bargaining as a legitimate mechanism for establishing and amending pension plans. It also sought statutory status for unions in the administration of pension plans and funds. In 1982 the Canadian Labor Congress issued a general manifesto, The CLC Proposal for Pension Reform.223 This manifesto pointed out that “a central element in the reality of employer-employee relations at many places of employment where workers are covered by private pensions is that workers are represented by a trade union and their relationship with their employer is defined by collective bargaining.”224 However, “this central element in reality is not recognized in pension benefits legislation”,225 “both the law and the practice of employer-employee relations has tended to deal with private pension plans as if they belonged to employers”.226 The Congress argued that “[t]he degree of mandatory employee participation and the method by which unorganized employees might request participation

220 S.Q. 1965, c.25, s.3
221 Ibid., s.12. Whether unions had registration obligations with respect to newly-created plans is not clear.
222 Ibid., s.3.
223 Supra, note 149.
224 Ibid. at 149.
225 Ibid.
226 Ibid. at 148.
are open questions, but the appropriateness of employee participation is undeniable given their proprietorial interest in private pension plans”.\textsuperscript{227}

To patch this hole in the regulatory framework, the Congress called for a number of specific amendments to the legal framework. First, the Act should clearly spell out that pensions fell within the scope of bargaining. Second, it should require that where there was a bargaining agent, collective bargaining must be the mechanism for the introduction or amendment of a pension plan. Third, it should recognize the right of workers to participate in the administration and trusteeship of pension plans, and the right of workers and their bargaining agents to participate in all disputes about whether plans conform to regulatory requirements. Fourth, it should provide for broader rights for employees and their bargaining agents to information about their plans. Finally, it should recognize the right of bargaining agents to negotiate benefit improvements on behalf of retirees.\textsuperscript{228}

This set of proposals had little impact on reform outcomes; second generation regulatory statutes were almost as silent as the first on the role of unions. That silence was even more inexplicable in light of the fact the \textit{PBA 1987} now recognized multi-employer plans, many of which had been established either exclusively by trade unions, or jointly by trade unions and employer associations.\textsuperscript{229} While the \textit{PBA 1987} recognized a member interest in the governance of these plans, it refused to recognize any trade union interest; it required that MEPPs established under a collective agreement or trust agreement be administered by boards of trustees that included at least equal representation from plan members,\textsuperscript{230} but left the relationship between plan members and their unions completely unaddressed.

The \textit{PBA 1987} gave indirect acknowledgment to the representative role of trade unions by permitting plans established by collective agreement or trust agreement to contract out of certain minimum standards established by the new Act, including the general requirement that plan amendments could not reduce already accrued benefits, and the requirement that employers ‘top up’ the funds in such plans when they fell below specified funding

\textsuperscript{227} \textit{Ibid.} at 149-50.
\textsuperscript{228} \textit{Ibid.} at 150. The CLC did not seek the right to negotiate more generally for retirees.
\textsuperscript{229} The structure of MEPPs will be discussed in more detail in Chapter 6.
\textsuperscript{230}\textit{Ibid.}, s.8(1)(e).
standards. In general, however, the Act gave no specific role to trade unions. Where plan members had rights, they were clearly expected to exercise those rights as individuals. The complex administrative mechanism established by the PBA 1987 for dealing with disputes about pension rights, did not accord unions statutory standing in the enforcement process. Furthermore, despite the identification of coverage as the number one problem with the system, the regulatory statutes provided no forum for the negotiation of pension rights, and no tools to assist unions in bringing pensions to unionized workplaces.

8.0 CONCLUSION

As we have seen, Canada has now incorporated employment pension plans into its overall retirement income system; such plans are expected to play a major role in filling the gap between retirement income provided by public pensions and the retirement income needs of the majority of Canadians. The primary policy tool linking employment pension plans to the national retirement income system is the regulatory statute. In framing regulatory statutes, governments wrestled with the legal construction of pension rights and the extent to which employers would be left in control of the system. Ultimately, they opted for a concept of pensions as rights accrued on an on-going basis through labour over the course of a working life, and provided a measure of legal protection for those accrued rights. This construction of pension rights fell short of union and employee aspirations, and the protection offered by the law even to “accrued rights” was incomplete. Nevertheless, the approach taken by the regulatory statutes was important to the final overthrow of gift theory and to the entrenchment in law of pensions as contract rights. As statutory regulation matured, the state was prepared to enhance both the substantive content of employee pension rights, and the

231 *Ibid.*, ss.14(2)-(3). It is likely that these exemptions envisioned plans jointly administered by unions and employers, where contribution levels were established by collective bargaining and benefits were tailored to meet the funding levels agreed to in bargaining. In fact, the language of the statute has been interpreted to allow the exemption of plans established by trust agreements which do not involve either unions or collective bargaining. Some of the problems for plan members caused by this broad exemption will be discussed in Chapter 6 at section 3.

232 At the federal level where there is no appellate tribunal built into the administrative apparatus, unions may have no meaningful opportunity to seek standing, even on issues with profound implications for plan member rights: see, for example, *CAW-Canada and its Locals 112 and 673 v. Superintendent of Financial Services and SPAR Aerospace Ltd.*, FST Decision No P0276-2006 – 1, January 19, 2007 (OFST). Ontario’s most recent amendments to the PBA in the Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, give unions a somewhat broader representative role in the establishment of advisory committees (s.11 amending ss.24(2), (4.2)), but the role of the advisory committee itself is not otherwise expanded.
level of state protection for those rights, imposing fiduciary duties on pension administrators and creating complex regulatory structures for the supervision of administrators and the monitoring of pension fund solvency.

What the state was not prepared to do, however, was to challenge the principle of employer hegemony over the provision of employment pensions. Regulation left entirely in the hands of the employer the decision as to whether or not to offer a pension plan, and what type and level of benefits any such plan would provide. Such basic decisions as whether to amend the plan, change the type and level of benefits or terminate the plan entirely were left unregulated; as long as the employer respected the ‘minimum standard’ that already-accrued benefits could not be revoked, he was free to deal as he saw fit with employee expectations about future benefit accrual. Despite the centrality of ‘contract’ to the nature of statutory pension rights, regulatory statutes took no steps to ensure that there were in fact two parties to the contract; members of single-employer plans were given no right to be involved in plan decision-making, and trade unions were given no statutory role of any kind, despite the clear correlation between pension plans and unionized workplaces.

The decision of governments to leave fundamental employment pension decisions in the hands of employers is a clear reflection of the extent to which employee pension outcomes took second place to other interests in the shaping of the Canadian pension framework. Canada’s three-pillar system did not evolve in the way that it did because governments decided, on the basis of the evidence, that it was the best and most efficient way to deliver adequate, reliable and equitable retirement income to Canadians. In making pension policy decisions, governments were frequently brokering interests other than those of current and future retired Canadians. In the 1960s, federal politics gave business interests - employer control of pension plans, the profits of the financial service industry and the needs of private capital markets – more leverage than they might otherwise have had in an international climate still concerned with the building of the welfare state. By the 1980s, deference to the market ethos had become explicit government policy; business opposition to an expanded role for the state in pension provision had more influence over Canada’s policy direction than the ample research findings, most of them commissioned by government itself, that the needs of elderly Canadians would be best served by expanded public pensions.
While regulatory statutes in some Canadian jurisdictions provided administrative mechanisms for the enforcement of newly-created statutory pension rights, not all jurisdictions did so, and even those that did made no effort to make that jurisdiction exclusive. Arbitrators and the courts continued to play an active role in dealing with employee pension rights. In doing so, however, they now had to deal not only with private law and collective bargaining law, but also with the additional layer of complexity created by the statutory context within which pension rights were now regulated. In Chapter 2, I looked at how courts understood pension rights and the role of the employer prior to the advent of collective bargaining. In Chapter 3, I examined how arbitrators approached pension rights questions in the context of collective labour law. In the next chapter, Chapter 5, I will take up the question of how Canadian courts deal with employee pension rights in a new legal climate in which the regulatory statutes we have just examined are an important part of the overall context within which employment pension plans operate.
CHAPTER 5

THE EVOLUTION OF ‘PENSION LAW’

1.0  INTRODUCTION

At the end of Chapter 2, we left behind a legal world in which it was plausible for courts to characterize employment pension benefits as gratuitous. As early as the 1960’s, at least in part under the influence of collective bargaining legislation, Canadian courts were beginning to recognize employment pensions as earned benefits rooted in the contract of employment. Statutes which regulated employment pensions based on the premise that they created contractual rights also contributed to a changing legal climate. By the latter part of the 20th Century, superior court judges glibly referred to “the promise of a pension as a contractual obligation”, and appellate courts characterized pension benefits as “present wages postponed or deferred”. As the Supreme Court of Canada has recently observed, “[e]mployees rightly see their pension benefits as part of their overall compensation.” Employment pensions are now clearly understood as employee rights.

It is far from clear, however, what is meant when courts describe pensions using the language of rights. Judges attempting to apply the principles of private common law to pension plans have encountered serious practical and conceptual obstacles. Employment pension plans do not look like or ‘read’ like contracts, nor are they typically generated by conventional bilateral negotiation processes. The concept that lies at the heart of the common law contract paradigm, the “intention of the parties”, is frequently impossible to apply intelligibly in the employment pension context. Likewise such plans do not look or ‘read’ like common law trusts, another ready-made common law category into which courts have

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1 See discussion in Chapter 2 at 3.5.
5 See also Burke v. Hudson’s Bay Co., 2010 S.C.R. 34 (“Burke”) at para. 6: “the pension plan text is a contract between the employer and the employee”.

sought to squeeze them. Employment pension plans are clearly more than private instruments, as the nature of pension regulation becomes ever more complex. Courts have sought to construct a unique legal framework for pension rights by adapting both contract and trust paradigms to the regulatory model. While they have ultimately located what they now call “pension law” at “the intersection of contracts, trust law, and statute law”, they continue to have difficulty defining the precise nature and content of the employee rights generated at that intersection.

In this Chapter, I explore how modern Canadian courts have sought to evolve a coherent common law of employee pension rights. I will examine how judges and other adjudicators struggled to fit the elusive ‘pension promise’ into the framework of the law of contract. I will explore the rise and fall of the notion of trust-based pension rights, invoked initially in an effort to find some fixed benchmarks for employee rights and impose fiduciary standards on employer discretion, but now effectively if not formally abandoned as too restrictive of employer hegemony in a voluntary system dependent on employer participation. I will conclude by arguing that courts, like labour arbitrators, have adopted principles for pension law that enhance employer power at the expense of employee pension rights, leaving not only such critical issues as whether there will be employee benefits, but also the terms on which those benefits will be offered, entirely within employer control, subject only to the pension rights guaranteed by minimum standards legislation.

2.0 PRIVATE LAW AND PENSION PLANS

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6 Trust law and contract law are, of course, quite closely related. As John Langbein points out, while trust law is normally seen as a branch of property law, it is more properly characterized as a branch of contract law: see John H. Langbein, “The Contractarian Basis of the Law of Trusts” (1995-96) 105 Yale L.R. 625 at 627. The close ties between trust and contract law are clearly illustrated in the cases discussed in this chapter; many of the cases do not involve express trusts, but instead involve determinations that trust commitments arise from the terms of the contractual documents establishing the pension plan and its funding arrangements.

2.1 The Problem of Pension Surplus\(^8\)

Few of the leading pension cases in Canada have involved claims for pension benefits *per se*. Instead, the modern common law of employee pension rights has evolved almost entirely out of disputes over ownership and control of surpluses accumulated within pension funds. At first blush, this appears to be unpromising ground on which to map a conceptual legal framework for employee rights. As we shall see, however, the ‘pension surplus wars’ forced judges to confront broad and important conceptual questions about rights, responsibilities, liabilities and duties arising within pension plans. The surplus cases raised fundamental issues about the nature, scope and content of the so-called ‘pension promise’. They required courts to give concrete meaning to the notion that pension plans are part of the consideration for services rendered. They obliged courts to explore the question of whether the establishment of a pension plan imposes fiduciary obligations on employers, or whether employers are merely parties to a contract who can use their superior bargaining power as they see fit. They demanded that courts address the problem of what kind of controls, if any, the law should impose on employer power over employment pensions, in order to protect employee interests.

How did the pension surplus wars come about? As we have seen in Chapter 4, the regulatory statutes of the 1960s established solvency standards which required employers to maintain pension funds at levels high enough to ensure that the associated plan would be able to meet the obligations created by the plan, both currently and in the future. The federal *Pension Benefits Standards Act* defines “surplus” as “the amount, determined in the prescribed manner, by which the assets of a pension plan exceed its liabilities”\(^9\); other Canadian statutes contain similar definitions. Pension regulations prescribe that surpluses must be calculated by qualified actuaries, who project asset values and liabilities based on assumptions about the future. Actuarial assumptions must be made in accordance with standards established by

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\(^9\) *Pension Benefits Standards Act*, 1985, R.S.C., 1985, c.32, 2nd Suppl. s.2(1), P-7.01.
professional bodies which provide guidance but leave considerable flexibility for individual actuaries to exercise professional judgment based on the individual circumstances of the plan.\(^\text{10}\)

In *Schmidt v. Air Products Canada Ltd*\(^\text{11}\), Cory J., outlined the difficulties faced by actuaries in accurately projecting the value of both assets and liabilities.\(^\text{12}\)

> Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

If actuaries were perfect economic forecasters, assets and liabilities would always be in balance. In the real world, of course, events may well deviate from the forecasts; when they do, plans can fall either into deficit or into surplus. In on-going plans, surpluses may be ephemeral; they are mere “actuarial surpluses”, which may disappear with the next actuarial valuation. Once a plan is terminated, however, surpluses are realized and become “actual” surpluses.\(^\text{13}\)

Why did the pension surplus issue come so prominently to the attention of the Canadian courts in the 1980s? Gary Nachshen provides a detailed account of the economic events which came together to produce significant deviations on both the asset and liability sides of many pension ledgers from the results projected by their actuaries, sending numerous

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\(^{10}\) Ontario law requires that plan valuations be prepared in a manner “consistent with accepted actuarial practice and with the requirements of the Act and this Regulation”: R.R.O. 1990, Reg. 909, s.16. Other Canadian regulatory statutes contain similar provisions.

\(^{11}\) [1994] 2 S.C.R. 611 ("Schmidt").

\(^{12}\)*Ibid.* at para. 5. Dissenting in part in the same case (but not on this point), McLachlin J. expanded the list of factors that must be considered by actuaries in making funding calculations:

> In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options [para. 178].

\(^{13}\) This distinction between “actuarial” and “actual” surplus was made by Cory J. in *Schmidt, ibid.* at para. 89.
Canadian defined benefit (“DB”) plans into surplus at the same time. These events included a decision by U.S central bankers, with spill-over effects in Canada, to fight inflation by allowing interest rates to rise precipitously and to unprecedented levels. This helped to trigger a recession, which in turn produced significant layoffs. One consequence of these layoffs was that in an era in which the ’45 & 10’ rule was still the regulatory norm for vesting, many laid off employees left unvested pension credits behind them in pension plans. In addition, the layoffs put downward pressure on wages, with the result that for a period of time wage increases were lower than had been forecast by actuaries projecting pension liabilities. Finally, the successful macro-economic battle to quell inflation fueled a stock market boom which continued for a period of about five years through the mid-1980s. The result was that pension funds were left holding assets significantly in excess of their liabilities.

At the same time, corporations were hungry for capital. As Nachshen puts it:

> Over the past several years, corporations seeking fresh infusions of capital have devised ever more ingenious means of financing, from currency swaps to junk bonds to flow-through shares. It should not be surprising, then, that some corporations would reach for an even more original source of funding: namely the surplus assets in their employee pension plans.

Employers began to implement strategies both to put surpluses to use to fund pension-related expenses that would otherwise have to be paid for out of operating funds, and to extract surpluses from both on-going and terminating plans. Employees and retirees in both unionized and non-unionized workplaces went to court to challenge these initiatives, arguing that because pension contributions were ‘deferred wages’ and pension funds were trust funds, employer appropriation of surpluses violated the pension contract and constituted a revocation of trust. Employers countered by arguing that in DB plans, the ‘pension promise’ was fulfilled as long as employees got their pension benefits; how the employer funded those benefits was no concern of the employees, and pension funds were not their property.

In most jurisdictions, regulatory standards did not clearly address the issue. To complicate the picture further, the language of the plan themselves had typically been designed not to

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14 Nachshen, supra note 8.
15 Ibid. at 61.
reflect negotiated pension agreements or even to further employer pension objectives, but simply to comply with registration requirements imposed for income tax purposes. As we saw in Chapter 2, Canadian income tax authorities had made early attempts to impose standards on employment pension plans to ensure that employers did not use these plans simply as tax shelters. The Blue Books had required pension plans to make employer contributions irrevocable, and tax authorities maintained that position until the rules changed in the early 1980s. Accordingly, most plans and trust agreements drafted in the period of pension expansion in the ‘50s, ‘60s and ‘70s contained provisions designed to ensure that pension funds were used for the benefit of employees; if they addressed surpluses at all, they typically assigned them to the employees. Effective January 1, 1982, Canadian tax law reversed course. Rather than focusing on the irrevocability of contributions, the focus of tax regulation now shifted to the accumulation of surpluses, imposing specific limits on the amounts that could be amassed within pension funds and providing that surplus funds which accumulated above a clearly established limit must be returned to the employer. Plans established after that date typically provided that surplus belonged to the employer, and many existing plans were amended to reflect the new rules, transferring surplus ownership from employees to employers.

2.3 The Early Pension Surplus Cases

The first reported pension surplus case in Canada, Little v. Kent-McClain of Canada Ltd., addressed a fact pattern which was at the time novel in Canada, but which subsequently became commonplace. The case involved an employer-sponsored DB pension plan which had initially provided that:

> If the Plan is discontinued, the Pension Trust Fund shall be allocated among the Members, retired Members, their estates, beneficiaries and contingent annuitants in an equitable manner determined by the Pension Committee in consultation with the Actuary and the Company.

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16 The state of regulatory law on pension surpluses across Canada prior to the second generation of regulatory statutes is well summarized in Nachshen, *ibid.* at 67 and 81.
17 This tax history is discussed in Schmidt, *supra* note 11 at paras. 34-37, 169 and 186. The current registration requirement is found in Information Circular No. 72-13R7.
18 [1972] O.J. No. 1 (“Little”). This case deals with a plan surplus generated some ten years earlier than surpluses began to appear *en masse* in Canadian plans, for reasons which are unexplained in the decision.
It also provided that:

…all contributions made by the Company are irrevocable and together with all contributions made by the Members, may only be used exclusively for the benefit of Members, retired Members, their estates, beneficiaries and contingent annuitants.

Notwithstanding these provisions, the company had amended the plan to give itself ownership of any surplus. The company then immediately terminated the plan, claiming the surplus pursuant to the amendment. The claim was challenged by plan members, who argued that ownership rights were governed by the original provisions of the plan. The company argued that the amendment was authorized under the plan’s general amendment clause, which provided that:

It [the company] must necessarily reserve the right to change, modify, suspend, or discontinue the Plan, or reduce its contributions, if in the future the Board of Directors of the Company consider circumstances so require.

This general amendment power was limited, however, by an additional clause providing that "no amendment shall affect any rights accrued to Members, retired Members, their estates, beneficiaries and contingent annuitants prior to the date thereof."

Despite its novelty, the judge saw the issue as a relatively straightforward problem of contract interpretation. He clearly viewed the pension plan as giving rise to enforceable employee rights; without specifying the precise legal nature of those rights, he simply interpreted the language before him and gave effect to it. As he saw it, the language of the clause reserving the right to amend the plan did not “even remotely authorize the Company … to substantially and effectively divest the Members or the retired Members [or] their representatives from rights accrued….” The right to surplus distribution on termination was an “accrued right” that could not be stripped from employees by plan amendment.

Subsequent cases probed somewhat more deeply into the conceptual basis both for employee rights created by pension documents, and for the employer right to amend those documents.

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20 Ibid. at 3. This clause was consistent with the income tax rules in effect at the time.
21 The text of the amendment is not quoted in the decision.
22 Little, supra note 18 at 2.
23 Ibid.
24 Ibid. at 2.
Reevie et. al. v. Montreal Trust Co. of Canada et al., the first surplus case to reach the Ontario Court of Appeal, also involved a dispute over surplus ownership. Here the fact scenario was somewhat more complex than in Little, introducing a new factor that would also become commonplace in surplus disputes: a plan merger arising out of a corporate reorganization. Reevie involved a dispute over the ownership of surplus in the Canada Dry Pension Plan. The original plan provided that “all Contributions made by the Company are irrevocable”, and that if the Company discontinued the plan, “[c]ontributions made by the Company cannot be withdrawn, but must remain in the Trust Fund. In such event, the Trust Fund shall be distributed among the Members.” In 1981 the employer amended the plan to divert surplus ownership from the plan members to the employer if the plan was discontinued; the terms of the amendment provided that after liabilities were met, “[a]ny assets remaining shall be returned to the Company”. In 1982 the shares of Canada Dry were sold to Dr. Pepper. The pension plan was not part of the transaction; instead, Canada Dry’s parent company, Norton Simon Inc., merged the Canada Dry plan with another plan covering a different company subsidiary. It then implemented a partial wind-up with respect to the employees of Canada Dry. The assets of the transferred plan exceeded its liabilities by $2 million, a surplus which the company sought the court’s permission to extract pursuant to the 1981 amendment. The lower court held the 1981 plan amendment invalid and found the members entitled to the surplus. The company appealed.

Zuber J.A., writing for the court, affirmed the lower court decision. After analyzing the provisions of both the plan and the trust agreement, he characterized the issue as a problem not of contract law, but of trust law:

At the centre of this dispute lies the simple fact that the funds in dispute are trust funds. The settlors of the fund were the employer (Canada Dry Limited) and the employees. The pension plan and the trust agreement provide that the contributions were irrevocable and that the beneficiaries of the trust were the members of the pension plan (i.e., the employees, spouses, etc.).

Quoting a standard Canadian trust law text to the effect that “a Settlor cannot revoke his trust unless he has expressly reserved the power to do so”, Zuber J.A. examined the plan

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26 Reevie, ibid. at 600.
documents before him to see whether they gave the employer power to revoke the trust. Like
the employer in Little v. Kent McClain, the employer here sought to justify the amendment
pursuant to its general power of amendment, which in this case read as follows:28

While it is the intention and hope of the Company to make contributions regularly
and build up a reserve fund sufficient to provide all of the benefits contemplated
under the Plan, the Company does not assume a contractual obligation to continue its
contributions. It reserves the right to change, modify, suspend or discontinue the Plan,
or reduce its contributions.

Like the plan in Little, however, the Reevie plan made this power of amendment subject to
the protection of accrued rights.29

Zuber J.A. was unpersuaded that the amendment clause, broad as it was, was sufficiently
broad as to authorize what he clearly saw as a partial revocation of trust. He was likewise
unpersuaded by the employer’s more general argument that once it provided the defined
benefits promised by the plan, its obligations were spent. Like the judge in Little, he saw the
right to surplus distribution on termination as a right that accrued independently of the right
to pension benefits. Because the pension fund was a trust fund, the accrued right to surplus
was a trust right; in the absence of language in the plan documents permitting a revocation of
trust, the employer had no right to amend the plan to deprive the employees of their accrued
right to surplus on plan termination.30

In Reevie, Zuber, J.A. made it clear that he was not establishing a general rule for pension
surpluses; whether plan members had an accrued right to surplus and whether a pension trust
was revocable or irrevocable would turn on the pension documents involved in each case.
Consistent with that case-by-case approach, not every early Ontario surplus case was

27 Ibid., at 600, quoting Waters Law of Trusts in Canada, 2d ed.
28 Ibid. at 596 (s.11.1 of the plan).
29 Ibid. at 597. The relevant clause in the plan read:
   However, all Contributions made by the Company are irrevocable and, together with all Contributions
   made by Members, may only be used exclusively for the benefit of Members, retired Members,
   Eligible Spouses, Contingent Annuitants or their Beneficiaries, and no change or modification will
   affect any rights which a Member may then have with respect to the terms of payment of, or the annual
   amount of, pension which the Contributions made by the Member and/or the Company prior to the
effective date of such change or modification will provide (s.11.1).
This language, which does not protect accrued rights generally, but refers only to “any rights a Member may
then have with respect to the terms of payment of, or the annual amount of, pension…” is obviously more
equivocal than the Little language. While the Reevie decision cites Little, there is no discussion in the decision
of this difference in language.
30 Ibid. at 600-601.
resolved in favour of the employees. Nevertheless, Bernard Adell fairly summarized the Ontario cases when he observed in his research report for the 1988 Ontario Task Force on Inflation Protection that “a judicial presumption of sorts is arising in favour of employee rights in pension plan surpluses.” Quebec law appeared to be headed in a similar direction. While most of the plans considered in the cases involved non-union workplaces, issues and outcomes were similar in the few cases dealing with unionized workplaces.

Employers continued to push hard against the “judicial presumption”, however, for at least three important reasons. First, as noted previously, pension surpluses had become an important source of capital for Canadian business, feeding corporate motivation to continue seeking new strategies and arguments to put before the courts in order to secure access to these funds. Second, the propensity of the courts in these cases to impose limitations on the broad power of employers to amend pension plans was a potential threat to employer pension autonomy more generally. And third, even employers who had never sought to extract surpluses were often routinely accessing those surpluses for purposes of funding their annual pension contributions; in other words, they were routinely taking what had become known in

31 See, for example Campbell v. Ferrco Engineering Ltd. (1984), 4 C.C.L.I. 268 (Ont. H.C.J.), in which the High Court held that a plan amendment giving the employer ownership of surplus was valid in the face of plan language providing that the pension fund was “exclusively for the provision of benefits to members in an equitable manner and as fully as possible in accordance with the provisions of the plan”. The court read the term “benefits” narrowly, applying it only to the right to receive pension benefits. As the court saw it, the employer’s “obligation is discharged when the benefits under the Plan are fully provided.” See Ari Kaplan, Pension Law (Toronto: Irwin Law, 2006) at 606-609 for a Table of Surplus Ownership Cases updated to 2004.

32 Adell, supra note 8 at 218.


34 In Collins et al. and Pension Commission of Ontario et al. (1986), 56 O.R. (2d) 274, the High Court applied Reevie to determine that pension funds were trust funds held for the benefit of the plan members. The provisions of the pension plan and trust agreement at issue in the case differed very little from those to be found in non-unionized workplaces. The court found that the plan amendment giving the employer entitlement to surplus while the plan was on-going had not been made the subject of collective bargaining. In National Automobile Aerospace and Agricultural Implement Workers Union of Canada et al. and White Farm Manufacturing Canada Ltd. et al. (1988), 66 O.R. (2d) 535 (H.C.J.); aff’d [1990] O.J. No. 1988 (C.A.) the court considered, in the context of a bankruptcy, whether the plan members or the employer were entitled to surplus on plan termination. While the court in that case noted that the union had been bargaining agent since 1950, had “negotiated the terms, benefits and/or renewal of the Plan as they negotiated successive collective agreements” and that the pension plan “was included in and covered by the terms of the office and hourly employees' collective agreements and represents part of the employees' monetary package”, its terms were not materially different from those considered in other cases. Likewise the original trust agreement, which the court improbably describes as an agreement between the union and the company, contains terms almost identical to those of trust agreements seen in other cases which were contracts strictly between the trust company and the employer. The court followed Reevie in finding that the surplus in the trust fund belonged to the plan members.
the pension vernacular as ‘contribution holidays’.\textsuperscript{35} In his 1988 article summarizing the state of the Canadian jurisprudence on pension surplus, Gary Nachshen pointed hopefully to what he saw as a trend in the case law in western Canada towards a more realistic perspective on surplus ownership, one which assigned ownership to plan “settlers”.\textsuperscript{36} He predicted that the surplus ownership issue would eventually have to be resolved by the Supreme Court of Canada, and expressed some optimism that when it did so, the court would approach the issue from a purposive perspective, “namely the preservation of retirement income security”. He had no doubt that this objective would be best served by “allowing employers to retain access to pension surpluses”.\textsuperscript{37}

2.4 \textit{Schmidt v. Air Products: The Primacy of Trust Law}

As Nachshen had predicted, the surplus issue did eventually surface before the Supreme Court of Canada. If there had ever been a clear divide between courts in western and eastern Canada as Nachshen had argued, that divide appears to have disappeared by 1994. When the issue finally reached the court in \textit{Schmidt v. Air Products Canada Ltd},\textsuperscript{38} it came in the form of an appeal from a decision of the Alberta Court of Appeal in which the court, citing \textit{Reevie} and other Ontario decisions, found that the originating plan documents for one group of Air Products plan members had ‘impressed’ the pension fund with an irrevocable trust for the exclusive benefit of the employees.\textsuperscript{39} Accordingly, a plan amendment purporting to give the employer ownership of any surplus on termination was invalid as against that group of employees. In addition to the issue of surplus ownership on plan termination, \textit{Schmidt} also directly raised the closely related issue of the validity of employer contribution holidays in plans which had a surplus.\textsuperscript{40} The Alberta courts had seen the contribution holiday issue as

\textsuperscript{35} Nachshen points out that contribution holidays were specifically sanctioned under the \textit{Ontario Pension Benefits Act}: \textit{supra} note 8 at 69. Over 60 percent of employment pension plans in Canada were registered in Ontario at this time: \textit{ibid.} at 62.

\textsuperscript{36} Nachshen cites \textit{Re Canada Trust Co. and Cantol Ltd.} (1979), 103 D.L.R. (3d) 109 (B.C.S.C.) (since the plan was non-contributory, the settlor was deemed to be the employer); \textit{Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba}, [1980] M.J. No. 334 (Q.B.) (since the plan was contributory, the court found that the settlors were both the employer and the employees): \textit{ibid.} at 73-74. Nachshen argues that the Canadian presumption in favour of employee rights is out of line with U.S. and U.K. jurisprudence: \textit{ibid.} at 74-75.

\textsuperscript{37} Nachshen, \textit{ibid.} at 86.

\textsuperscript{38} \textit{Supra} note 11.


\textsuperscript{40} The issue of whether plan surplus could be used to take contribution holidays had been litigated from time to time in Canada before \textit{Schmidt}: see, for e.g. \textit{Canadian Union of Public Employees-C.L.C. et al and Ontario...
indistinguishable from the over-all surplus issue, and disposed of it in the same manner; where pension funds were subject to an irrevocable trust, they could not be used to fund contribution holidays. The *Schmidt* case therefore forced the Supreme Court of Canada to confront core issues relating to the scope of an employer’s authority both to make unilateral amendments to pension documents, and to make use of pension funds for its own purposes.

The *Schmidt* case arose out of the 1988 termination of the pension plan of Air Products Canada Ltd., a DB plan with a significant surplus on termination. The Air Products plan text expressly provided that assets not required to fund retirement benefits would be refunded to the employer on termination. Air Products applied to court for a declaration that it was owner of the surplus. Plan members challenged the employer’s claim and put forward their own claim to surplus ownership, based on the plan’s history. For good measure, they also challenged various contribution holidays taken by the company from 1985 to 1988, which had come to light on the wind-up of the plan.

As in many surplus cases, the Air Products plan had a complex history. The plan was the result of the 1983 merger of two previous plans, known as the Catalytic plan, and the Stearns plan. For reasons that will be discussed in more detail below, the court was unanimous in

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41 The relevant provisions of the Air Products Plan, as well as its predecessors, are set out in full in Appendix A to Cory J.’s decision, *supra* note 11. Article 18.05 of the Air Products plan provided:

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuittants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.

Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans. The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

42 While the decisions do not spell out when and how the employees became aware of the contribution holidays, the most reasonable hypothesis is that they learned of this only on plan termination, and possibly only in preparation for the surplus ownership litigation: see decision of the Alberta Court of Appeal, *supra* note 39 at 764, setting out the litigation history, a history which demonstrates that the employee claim initially related only to the surplus, and was subsequently amended to raise the issue of contribution holidays.

43 Catalytic Enterprises Ltd. and Stearns-Rogers Canada Ltd. were the corporate predecessors of Air Products Canada Ltd.: see *Schmidt*, *supra* note 11 at para. 9.
finding that contribution holidays were valid under the plan with respect to all plan members, regardless of whether their rights had originally arisen under the Catalytic or the Stearns plan. On the issue of ownership of surplus on plan termination, however, the court divided. Here the fundamental question before the court was whether the employer had the right to allocate to itself in the merged plan the ownership of surplus on plan termination, in light of the plan’s history. The majority of the court, in a decision penned by Cory J., found essential differences in employee rights depending upon which of the two parent plans the employee had originally belonged to, grounding its distinction on differences in the nature and terms of the funding arrangements chosen by the employer at the time the plans were established. Employees whose rights flowed from the Stearns plan had no entitlement to plan surplus on termination, while those whose rights flowed from the Catalytic plan did have such entitlement. The two dissenting judges both held, in separate reasons, that none of the employees had a right to surplus, regardless of which plan they had originally joined. While both dissenting judges accepted trust analysis as relevant, they came to very different conclusions as to its implications for the case before them, for reasons that will be discussed in more detail below.

In his discussion of the historical evolution of pension funding instruments, Cory J. noted: 44

An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions.

It is pension plans that establish the obligation to pay pension benefits as between employers and employees; pension funds were created to assist employers to meet their obligations under those plans. Cory J. captures this relationship when he observes that “[e]mployer-

44 Ibid. at paras. 44-45.
funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created *pursuant to the plan*, either by way of contract or by way of trust” [emphasis added].\(^{45}\) His general description of the evolution of pension funding instruments makes it clear that while the pre-funding of plans enhanced employee benefit security, the specific funding instrument was chosen by the employer for reasons unrelated to the nature of the pension benefits *per se*.

It is therefore puzzling that in his ultimate disposition of the question of surplus ownership, he attributed such significance to the nature of the funding arrangements. In his view, that choice had crucial ramifications for the legal principles that would govern ownership rights. Where the employer chose a trust vehicle, that trust was a “classic” or “true” trust,\(^{46}\) subject to “all applicable trust law principles”.\(^{47}\) Accordingly, the terms of the *trust* take precedence over the terms of the *plan* when it comes to the distribution of the plan assets:\(^{48}\)

> [W]hen a trust is created, the funds which form the corpus are subjected to the requirements of trust law. *The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.* [emphasis added]

Where the employer chooses a contract funding vehicle, however, “the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the *plan*” [emphasis added],\(^{49}\) and principles of contract law apply to plan amendments and plan mergers. The distinction between these two vehicles turns on the wording of the funding instrument and related documents: “If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund”.\(^{50}\)

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\(^{45}\) *Ibid.* at para. 47.

\(^{46}\) *Ibid.* at para. 52.


\(^{48}\) *Ibid.* at para. 48. See also para. 92, where Cory J. observed that the pension trust is “governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail.”


\(^{50}\) *Ibid.* at para. 47.
In the case before the court, this distinction between contract and trust funding dictated different outcomes for employees on the surplus ownership issue, depending on which of the two predecessors of the Air Products plan was the original source of their pension rights. In the case of Catalytic, the original 1959 pension plan contemplated that pension funds would be held in a “Trust Fund”, in accordance with a trust agreement between Catalytic Ltd. and the Canada Trust Company which was explicitly made a part of the plan.\(^{51}\) That trust agreement provided that the trust was for the “exclusive benefit” of the plan members,\(^{52}\) and prohibited the company from reducing members’ benefits or recovering any sums it had contributed to the fund.\(^{53}\) On the basis of this evidence, Cory J. concluded the Catalytic fund had originally been constituted as a trust, and that the original trust had never been validly terminated. Accordingly, the company’s attempt to amend the trust to give itself ownership of any surplus was a partial revocation of the trust.

As Cory J. conceded, there is no trust principle which absolutely prohibits a partial revocation of trust. Whether there can be such a revocation depends on the language of the original declaration of trust:\(^{54}\)

> The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property.

But in his view Catalytic had retained no such a power. The plan text had reserved to the employer a general power of amendment, a power which Air Products argued was broad enough to encompass a revocation or partial revocation of the trust. Cory J. held, however,

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\(^{51}\) Section V of Catalytic Plan, Appendix A to decision of Cory J., \textit{ibid.}.

\(^{52}\) Article V (1) of the Trust Agreement, headed “Modification and Termination”, read as follows:

> Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.

See Appendix A to decision of Cory J.: \textit{ibid.}.

\(^{53}\) \textit{Ibid.} at para. 23, para. 97 ff. .

\(^{54}\) \textit{Ibid.} at para. 59.
that “a general amending power should not endow a settlor with the ability to revoke the trust”. In his view, a power of revocation would require “extremely clear and explicit language”. Since the Catalytic trust contained no such explicit power of revocation, the employer had no subsequent right to amend the plan to appropriate the surplus. The provisions of the Air Products plan giving ownership of surplus to the employer were therefore invalid as against the former Catalytic employees.

With respect to the former Stearns employees, however, Cory J. came to the opposite conclusion. The Stearns plan had originally been funded by a group annuity contract purchased in 1970 from the Mutual Life Assurance Company. While the plan contained a standard “exclusive benefit” clause and standard language protecting “accrued benefits”, it also contained a provision that:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

The original Stearns funding document was not a trust agreement; it was a group annuity policy with an insurer. Cory J. did not reject trust status on form alone, however; he examined the terms of the policy closely to determine whether or not they should be construed as impressing the pension contributions with a trust. He found no trust, based on two key distinctions from the Catalytic documents: the term ‘trust’ was nowhere used in the original Stearns documents, and the original plan gave the company discretion over the disposal of any surplus. Accordingly, the “accrued benefits” and “exclusive benefits” clauses in the plan protected only the pension itself; they did not extend to a merely “potential” employee interest in the possibility that the company might exercise its discretion over surplus in their favour. Since the company was free under the initial plan documents to

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55 Ibid. at para. 66.
56 Ibid. at 66.
57 Ibid. at para. 122 ff.. There had been an earlier Stearns DC plan, but the court found that it had been validly terminated, which made the 1970 plan the starting point for its analysis of the pension history for the former Stearns employees whose pension rights had been transferred to the Air Products plan.
58 Article 14.1(c), ibid., at para. 108.
59 Ibid. at paras. 11, 20-22, 120.
dispose of the surplus as it saw fit, the provisions of the Air Products plan providing that the surplus reverted to the employer were valid as they applied to the former Stearns employees. 60

The two dissenting judges concurred with Cory J. in dismissing the claim for surplus in the Stearns plan. They differed from the majority, however, on the disposition of the surplus in the Catalytic plan; they would have dismissed that claim as well. Although their judgments did not prevail, they are worth examining in some detail, for two reasons. First, to the extent that they differ both from Cory J. and from each other on the application of trust concepts to employment pension plans, the judgments illustrate the malleability of those concepts and the difficulties attendant upon applying them to the atypical trust arrangements associated with pension plans. Second, the dissenting judges take far more seriously than Cory J. the contract context within which pension rights have evolved, struggling to find within the plan documents evidence of the “intention of the parties”. While their logic did not prevail in this case, their judgments provide a blueprint for subsequent courts who have preferred the contract paradigm as a more satisfactory vehicle for assigning responsibility for the results of pension cases to the “parties” and absolving the court of responsibility for outcomes that may sit awkwardly against normative concepts of fairness.

Looking first at Sopinka J.’s judgment, it is clear that at the core of his difference with Cory J. is the centrality he accorded to “intention” in construing the pension plan documents. The employer’s obligation, as he saw it, flows ultimately from contract; in construing the pension plan documents, it is the “intention of the parties” that governs. In his brief sixteen-paragraph decision, Sopinka J. referred to “intention” some six times, twice describing it as clear. Although it would appear from the context that he conceptualized the “parties” as the employer and some generic embodiment of the employees, at no point did he specifically identify those “parties”. He invoked no evidence suggesting that any negotiation actually took place, or even that the employees ever so much as saw the plan documents which are said to reflect their “intention”. Nevertheless, the characterization of the pension documents as reflecting a contractual consensus was crucial to his reasoning. Consistent with his view that the problem is at root a problem of contract, he disagreed with Cory J. that the trust

60 Ibid. at para. 148.
agreement should be given primacy. On his approach, the trust agreement is simply one component of the pension plan; the terms of both documents are relevant to the issue of whether and how the trust could be amended.

On Sopinka J.’s construction of the Catalytic plan documents, the company had expressly reserved the right to amend or terminate the plan, subject only to the limitation that plan amendments would not reduce “benefits which have accrued”. In his view, while the surplus was definitely part of the trust and subject to the trust, it was not a benefit contemplated by the plan, and in any event was not accrued prior to plan termination. It therefore did not fall within the express limitation on the company’s power to amend the plan. Accordingly, he would have interpreted the general power of amendment as broad enough to permit a revocation of trust as it applied to the surplus. As he saw it, such an interpretive approach was more consonant with the “intention” of the “settlor”, whom he does not identify. The settlor’s intention need not be express: “[w]ords are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis”. Sopinka J. denounced Cory J.’s insistence on express language permitting revocation or partial revocation as a formulaic approach which ignores “the clear intention of the parties”. For his part, Sopinka J. saw the plan documents as reflecting a “clear intention” to permit the employer to revoke any part of the trust not necessary to fund the benefits.

McLachlin J. was likewise guided by a quest to ascertain the intention of the parties. She emphasized the “private law” nature of the arrangements at issue:

The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the

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61 At that time, the plan was a DC plan; Sopinka J. notes that “no surplus was possible under a defined contribution plan”: ibid. at para. 162
62 Ibid. at para. 162.
63 Ibid. at para. 163.
64 Ibid. at para. 163.
65 Ibid. at para. 167.
66 Ibid. at paras. 195 -96.
plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

Unlike Sopinka, she clearly recognized that in some cases, pension plans are not negotiated: they may be “bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees”[^67] [emphasis added]. However, in taking what she described as a “practical view of things”, McLachlin J. reverted to the same fiction animating the Sopinka dissent: the fiction that the employer’s commitment to provide a pension reflects some *consensus ad idem* between employer and employee. It is on the basis of assumed employee consent that she reasoned, in perfectly circular fashion:[^68]

>[P]ermitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees’ legitimate expectations under a defined benefit plan. *The employees, having bargained for specific benefits, will receive precisely what they bargained for.* The benefits, as defined by the plan, are the quid pro quo for their services and contributions. Indeed, the *intention of the parties* -- and the very purpose of the plan -- is that they receive these benefits. *To give the employees the surplus, however, is to give them more than they bargained for.* It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus [emphasis added].

There was, as we have already seen, no evidence whatsoever before the court that the employees “bargained” at all in any meaningful sense. McLachlin J. has constructed their “bargain” for them on the basis of plan documents unilaterally drafted by the employer, and her own notions of a fair allocation of the benefits and burdens of a DB pension plan.

McLachlin J’s approach to construing the scope of the trust as set out in the trust agreement likewise assumes that the employees were “parties” in some meaningful way not just to the pension plan but also to the trust agreement.[^69]

In the case at bar, there is nothing in the evidence that suggests that *the parties who signed Article V* intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which *the parties* were putting in place in 1959. …

[^67]: Ibid. at para. 196.
[^68]: Ibid. at para. 185-86.
[^69]: Ibid. at paras. 203-4.
The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting … There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary [emphasis added].

This passage is intelligible only if the “parties who signed Article V” were the parties to the pension plan. In fact, of course, the “parties who signed Article V” were not the employer and the employees; they were the employer and the Canada Trust Company. The trust company had no conceivable interest in how surplus proceeds would be distributed as between the employer and the employees, except to ensure that it was given clear direction on what to do with the fund from time to time. Why, therefore, would its “intention” be relevant? Nevertheless, on the basis of this hypothetical “bargain” on the surplus issue, McLachlin J. concluded that plan surplus was an “unanticipated development…never contemplated by the original trust agreement”70. Accordingly, she reasoned, it never became properly subject to the declaration of trust.

Having determined that surplus was never subject to the trust, McLachlin confidently assigned its ownership to the employer, based on the principles of resulting trust.71 Since the plan was contributory, this allocation of ownership is interesting. Other judges faced with resulting trust situations in contributory plans have taken the view that such a plan has two “settlers”, the employer and the employee, and any surplus would be shared between them.72 In his majority judgment, Cory J. saw the employer and employees as joint settlors in a contributory plan.73 McLachlin J., however, in another exercise in circular reasoning,

70 Ibid. at para. 213.
71 In Waters’ Law of Trusts in Canada, the authors explain the concept of “resulting trust” as follows: “Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party’s name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it”: Donovan W.M. Waters, Mark Gillen & Lionel Smith, Waters’ Law of Trusts in Canada, 3d ed. (Toronto: Thomson Carswell, 2005) 362.
73 Schmidt, supra note 11 at para. 94.
identified the employer as the only relevant beneficiary of a resulting trust *because the employees have no interest in the surplus*, the very question that was before her:  

But as we have seen, even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits…. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary -- he or she has exhausted his or her rights under the plan.

Having constructed the employees’ bargain for them on the basis of her interpretation of plan documents unilaterally drafted by the employer, McLachlin has then turned that bargain against them; they have no right to more than they bargained for, and accordingly no claim to the surplus.

On the contribution holiday issue, Cory J. wrote for the full court. The Alberta court had seen the distribution and contribution holiday issue as one inseparable question: who owns the surplus? Based on its holding that the Catalytic surplus belonged to the employees, the court held that the employer could not appropriate that portion of the surplus for its own purposes, either before or after plan termination. Cory J. approached the issue from an entirely different perspective. On his analysis, the question fell to be determined simply by interpreting the scope of the employer’s contribution obligation as set out in the plan documents. The Air Products plan described the employer’s contribution obligation in the following language:

The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

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75 *Ibid.* at para. 84.
76 *Ibid.* at Section 4.03, quoted at para. 114. Cory J. noted that the terms of the 1978 Catalytic plan contained a contribution obligation identical to that of the Air Products Plan.
In determining what “amounts are … necessary to provide the retirement benefits accruing to Members during the current year”, standard actuarial practice would take into account the existence of an actuarial surplus. In any year where the surplus was large enough, an actuary would recommend that no additional contribution was required to fund the benefits. In such circumstances, to withhold an annual contribution on the certificate of an actuary would conform to the terms of the plan.

Accordingly, the court saw no trust issue arising in connection with the company’s contribution holiday under the terms of the plan. On Cory J.’s reasoning, there was no encroachment on the trust property: “[t]o permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees”. The court saw no inconsistency between employee ownership of surplus on plan termination, and an employer right to encroach on that surplus for purposes of calculating its contribution liability while the plan is ongoing.

While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

Only the actual surplus can be said to belong to the plan members; prior to that point, it is simply part of the fund, to be dealt with in accordance with the terms of the plan.

3.0 THE RETREAT FROM SCHMIDT

3.1 Introduction

What did the Schmidt case decide? The extent to which the decision was a victory for employee pension interests should not be underestimated. The court’s strong, unequivocal language in characterizing pension trusts as “classic” or “true” trusts, and “subject to all
applicable trust law principles”\(^{80}\) gave employee pension rights a firm foundation with some degree of immunity from employer discretion, and placed an important legal barrier in the way of employers who sought to use their general amendment powers entirely in their own interest. While the decision does not explore questions of surplus ownership from the perspective of ‘deferred wages’, the court’s embrace of trust principles, and in particular its dictum that “the plan beneficiaries have an equitable interest in the total assets of the fund while it is in existence”\(^{81}\), was at least potentially a meaningful step towards legal recognition of employee ownership of pension funds. For more than a decade, Schmidt fed a voracious appetite for pension surplus litigation, and was applied both by regulators and the lower courts in favour of employee ownership rights.

In understanding subsequent legal developments, however, it is important to note the limitations on the scope of the Schmidt holding. The Supreme Court of Canada did not recognize a broad right to surplus ownership for all employees in the Air Products plan, both during the life of the plan and on plan termination. Indeed, the court recognized no indefeasible trust-based pension rights for employees as a matter of pension principle. On its face, the decision recognized as indefeasible only such trust-based rights as had been granted to employees in the initial design of the plan, a matter typically under the sole control of the employer. Under the Schmidt approach, the outcome of surplus litigation for employees was quite arbitrary and historically contingent, as the outcome in the case itself makes clear. The most important and most durable holding in Schmidt was the holding that even where pension funds are impressed with a trust, employers can continue to make use of those funds to take contribution holidays. By making it clear that even where plan drafting had (perhaps inadvertently) imposed trust-based limitations on employer discretion, employers could nonetheless access pension surpluses to fund their on-going pension obligations, Schmidt provided the road map for employers to reassert unilateral control over pension plans.

The dissenting judgments in Schmidt foreshadow the extent to which subsequent courts would backtrack on employee rights, ironically in the name of a freedom of contract which in theory makes employees equal partners with employers in plan formation. This reality is

\(^{80}\) Ibid. at para. 57.
\(^{81}\) Ibid. at para. 89.
clearly illustrated in decisions of the Supreme Court of Canada over the decade and a half since the \textit{Schmidt} decision, decisions which have effectively freed employer discretion from the fiduciary fetters \textit{Schmidt} appeared to impose. In the \textit{Buschau} series of cases,\(^ {82}\) we see the court refusing to apply trust principles where doing so would clearly clash with the principle of employer control which the court finds embedded both in plan texts and regulatory statutes. In \textit{Nolan v. Kerry (Canada) Ltd.},\(^ {83}\) the court moves even farther away from the \textit{Schmidt} decision to sanction what comes close to a free-standing right for employers to use pension surplus to pay plan expenses and make pension contributions. In its most recent pension decision, \textit{Burke v. Hudson’s Bay Co.},\(^ {84}\) the court appears to have further limited the reach of employer fiduciary obligations, holding that the fiduciary obligation of even-handedness applies only where employee legal rights are involved, and not to discretionary conduct which does not implicate legal rights.

### 3.2 Preserving “the Balance”: \textit{Buschau v. Rogers Communications Inc.}\(^ {85}\)

#### 3.2.1 “Applicable Trust Law Principles”

There was an interval of some ten years between the Supreme Court’s \textit{Schmidt} decision and its next direct confrontation with the challenge of applying the common law to employment pension plans in \textit{Buschau v. Rogers Communications Inc} ("\textit{Buschau}").\(^ {86}\) In the interim, the court also decided another leading pension case, \textit{Monsanto Canada Inc v. Ontario}.\(^ {87}\) \textit{Monsanto} focused on interpreting the partial wind-up provisions of the Ontario \textit{Pension Benefits Act}, and did not address the common law. However, the court’s discussion in \textit{Monsanto} of the policy considerations that should be brought to bear in interpreting and

\(^{82}\) \textit{Buschau v Rogers Communications Inc}: see [2006] 1 S.C.R. 973. For the legal history of this case, see note 85, below.

\(^{83}\) 2009 SCC 39 ("\textit{Kerry}").

\(^{84}\) Supra note 5.

\(^{85}\) The \textit{Buschau} case has a complex legal history, which will be discussed in more detail below. The key decision of the Supreme Court of Canada is \textit{Buschau v. Rogers Cablesystems Ltd.} [2006] 1 S.C.R. 973 ("\textit{Buschau}"), on appeal from two decisions of the British Columbia Court of Appeal reported as 2004 BCCA 80 (\textit{Buschau No. 2}) and 2004 BCCA 282 (\textit{Buschau No.3}). These decisions build on a prior decision of the British Columbia Court of Appeal reported as [2001] B.C.J. No. 50 (C.A.) ("\textit{Buschau No. 1}"). The litigation subsequent to the release of the 2006 Supreme Court of Canada decision is reported as \textit{Buschau v. Canada (Attorney General) (appeal by Rogers Communications Inc.)} [2009] F.C.J. No. 1119(C.A.) ("\textit{Buschau No. 4}"), leave to appeal denied [2009] S.C.C.A No. 457.

\(^{86}\) \textit{Buschau}, ibid.

\(^{87}\) Supra note 7.
applying law to pension plans was an important harbinger of developments to come. The Monsanto court invoked Schmidt in holding that where a plan provided for surplus distribution to plan members on plan wind up, the legislation permitted no distinction between full and partial plan wind ups. In doing so, however, it highlighted the extreme caution with which legislatures had intervened in the employment pension field: “Steps have been taken to improve many employee rights but the importance of maintaining a fair and delicate balance between employer and employee interests, in a way which promotes private pensions, has also been a consistent theme.” The Monsanto decision emphasized the need for courts interpreting regulatory legislation to respect the “fair and delicate balance” among the complex interests that arise within voluntary pension plans. In a passage subsequently much quoted by lower courts and tribunals rejecting Schmidt-based employee claims, the Monsanto court stressed the need to avoid interpretations of employee pension rights that would operate as disincentives to employers:

The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans … This is especially important when, as recognized by this Court in Schmidt v. Air Products Canada Ltd. … it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards. [emphasis added]

The obvious concern is that if regulatory rules place too onerous a burden on employers, those employers can and will simply cease to provide pensions, an outcome which, in the court’s view, would serve neither the public interest nor the interests of the employees. In Monsanto itself, the court was unanimous in holding that the balance was best maintained by

88 Ibid. at para. 24.
89 Ibid. at para. 38.
upholding the employee claim to surplus distribution. In *Buschau*, however, the court took very much the opposite tack.

The *Buschau* case was the predictable fruit of Cory J’s twin holdings in *Schmidt*: that a pension trust agreement took primacy over its companion pension plan, and that a pension trust was a “classic” or “true” trust, subject to “all applicable trust law principles”. The case dealt with an attempt by plan members to collapse a pension trust contrary to the wishes of the employer and to claim the surplus to which they were entitled on plan termination pursuant to the terms of the plan. The basis of the challenge was an esoteric common law trust doctrine known as the Rule in *Saunders v. Vautier*. This Rule dates back to an 1841 English case involving a testamentary trust with a single beneficiary. Where the Rule applies, the beneficiaries of a trust may call on a court to collapse the trust and distribute the trust property to the beneficiaries, regardless of the intentions of the settlor as expressed in the trust agreement. As emphasized by Deschamps J. writing for the majority in *Buschau*, the Rule “allow[s] beneficiaries of a trust to depart from the settlor’s original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property.”

Citing Waters’ *Law of Trusts in Canada*, she described the genesis of the Rule as follow:

> [T]he rule …originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of the trust would eventually receive the property, they should decide how they intended to enjoy it.

The *Buschau* case was thus an attempt to use trust law as the basis for a direct and fundamental challenge to the employer’s right to make basic decisions about the establishment and continuation of employment pension plans.

In on-going pension plans, the continuous creation of new beneficial interests as new employees become members of the plan ensures that the conditions triggering the Rule in

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91 The stakes were quite high in this case. According to the facts recited in the decision of the Supreme Court of Canada, by 2002 the plan had only 112 members, and a surplus which had started out in 1980 at approximately $800,000 had grown to $11 million: *Buschau*, supra note 85 at paras. 1-2, 5.


Saunders v. Vautier do not normally arise. The plan involved in the Buschau case, however, had an unusual history. The plan had originally been created in 1974 by Premier Communications Ltd. (“PCI”) to provide defined pension benefits for its employees. The plan documents expressly provided that any surplus would revert to plan members on termination. In 1980, PCI was purchased by Rogers, with the pension plan included as part of the transaction. By 1984 the plan had begun to accumulate a significant surplus, which Rogers sought to appropriate for its own use. In light of accumulating caselaw, it was concerned that it could not achieve this objective directly, either by terminating the plan or amending the plan to give itself ownership of the surplus. It therefore took a series of steps to achieve the same goal indirectly. First, in 1984, Rogers closed the plan to new members. The plan’s actuary recommended that the surplus be used to improve employee benefits. Instead of following this recommendation, Rogers replaced the actuary. It then initiated efforts to persuade the plan’s trustee to pay out the surplus to the company. When the trustee refused to do so without securing a legal opinion, Rogers replaced the trustee with one more compliant, and in 1985 received a “refund” of a substantial amount of the fund surplus. The company also began to take contribution holidays. When surplus continued to accumulate, it merged the plan with other less well-funded Rogers plans, and drew on the PCI surplus to take contribution holidays with respect to its liabilities in those other plans. Rogers’ motivation throughout this process was never in any doubt; the Supreme Court cites an internal memo in which the company identified one of the objectives of its strategy: “to get at the surplus the plan had”.  

The original PCI plan members brought action against the company in the British Columbia courts, and succeeded in obtaining a declaration that under Schmidt principles, the company’s merger of their plan with other company plans did not eliminate their ownership rights to the surplus accumulated under the original trust agreement. In the course of that initial litigation, the Court of Appeal discussed the Rule in Saunders v. Vautier as a potential route by which plan members might secure control of their property, despite the company’s

94 Buschau, ibid. at para. 6. The company strategy is described more fully in Buschau No. 2, supra note 85.
decision not to terminate the plan. Newbury J.A., writing for a unanimous court, commented: 95

In my view, the right of the members of the Premier Plan to invoke Saunders v. Vautier (or for that matter, I suppose, the Trust and Settlement Variation Act … if applicable) in respect of the Premier trust remains unaffected by the merger, just as their rights to receive the Premier Plan surplus on termination of the Premier trust continues notwithstanding the merger. These are rights whose source lies in trust law and which trust law protects…

The company did not appeal this decision.

Following this success, the plan members decided to follow up on this clear judicial hint, and went back to court invoking the Rule in Saunders v. Vautier, seeking to have the fund terminated over the objections of the company and the surplus distributed. This case too reached the Court of Appeal. On its initial appearance there, the court confirmed the applicability of the Rule in Saunders v. Vautier, but found that not all trust beneficiaries were before the court because certain ‘designated beneficiaries’ of plan members had not been found. 96 It gave the members leave, however, to rectify the situation, which they did simply by exercising their right to revoke the designations of the missing beneficiaries. 97 When the plan members returned to the Court of Appeal, the Court found that all conditions to invoke the Rule had been met. The court applied the Rule and ordered the pension trust effectively terminated. 98 The company appealed to the Supreme Court of Canada from the Court of Appeal decisions; it is this appeal that reached the Supreme Court of Canada in 2006.

The Supreme Court of Canada unanimously reversed the decisions of the Court of Appeal. All judges held the Rule in Saunders v. Vautier inapplicable. 99 Deschamps J., writing for a majority 100, held that the Rule had been displaced by regulatory rules providing for the

95 Buschau No. 1, supra note 85 at para. 68.
96 Buschau No. 2, supra note 85.
97 Under second generation regulatory legislation, plan members who do not have spouses have the right (but not the obligation) to designate someone else as a beneficiary entitled to any pre-retirement death benefit. Because these designations are not required by law, the problem of missing beneficiaries could be solved in this case simply by revoking the designations, thereby eliminating any rights those missing persons might have had in the plan.
98 Buschau No.3, supra note 85 at paras.16-17.
99 The Deschamps judgment left open the possibility that the Rule in Saunders v. Vautier might apply in the situation of executive pension plans applicable to a few officers of a corporation: Buschau, supra note 85 at para. 33.
100 Ibid.. Deschamps wrote for herself and for Lebel, Fish and Abella JJ.
termination of pension plans. In her view, the application of the Rule would defeat not just the intention of the settlor; it would also defeat the intention of the legislature.\textsuperscript{101} As she saw it, the plan members’ recourse was to make an application to the Superintendent of Financial Institutions pursuant to the provisions of the federal \textit{Pension Benefits Standards Act} to seek termination and wind up of the plan. Bastarache J., writing concurring reasons for the minority,\textsuperscript{102} took a more technical trust law approach, holding the Rule inapplicable on the facts.\textsuperscript{103} In addition, he agreed with the Deschamps view that the Rule was inconsistent with the statutory scheme. However, he disagreed that the members could approach the Superintendent for termination of the plan. In his view, “the unilateral right of members to terminate the Plan simply does not exist in this case”, under either the plan or the statute.\textsuperscript{104}

Both judgments are remarkable for the extreme deference they pay to the employer interest in employment pension plans. While inconsistency with the statute led the list of reasons provided by Deschamps J. for her conclusion that the Rule in \textit{Saunders v. Vautier} does not apply to pension trusts, she was also influenced by her perception that applying the rule would have a destructive impact on employer pension interests. She noted that in contrast to a traditional trust in which the settlor abandons his interest in the trust property when he makes a declaration of trust, employers have continuing interests in pension trusts:\textsuperscript{105}

\begin{quote}
\ldots employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.
\end{quote}

Compared to the employer’s on-going business interest, the interest of any individual plan member is “ephemeral”; it is appropriate, then, that “members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust

\begin{footnotes}
\item[101] \textit{Ibid.} at para. 28-29.
\item[102] \textit{Ibid.} Bastarache J. wrote for himself, as well as Charron J. and McLachlin C.J.C.
\item[103] \textit{Ibid.} at para. 99. In Bastarache’s view, the interest of plan members in the surplus did not vest until the plan had been terminated; members could not rely on a ‘merely contingent’ interest in surplus assets to call for plan termination. In addition, he was not persuaded that all beneficiaries were before the court; while all members and designated beneficiaries had consented to the termination of the trust, new spousal interests in the trust might yet be created since not all plan members were retired.
\item[104] \textit{Ibid.} at para. 100.
\item[105] \textit{Ibid.} at para. 30.
\end{footnotes}
Deschamps J. drew particular attention to the level of unilateral control employers typically build into the structure of such plans to protect their business interest:

I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers’ right to terminate is still common.

She was quite uncritical of this self-interest. Indeed, she saw legal rules that prevent employees from prematurely terminating the pension trusts that sustain their pension rights as in the public interest: “The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.” She does not pause to explain why legal rules that leave plan termination decisions solely in the hands of the employer support the broad social purpose of promoting pension security.

This preoccupation with the employer’s side of the pension bargain is even clearer in the minority decision. As Bastarache J. saw it, unilateral employer control is an essential component of the workings of the voluntary system:

The introduction of the Saunders v. Vautier principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests.

In fact, he viewed employer control as built not only into the terms of the plan, but also into the terms of the statute. It is for this reason that he differed from Deschamps on the issue of whether the plan members could have recourse to the Superintendent to get an order

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106 Ibid. at para. 34.
107 Ibid. at para. 34.
108 Ibid. at para. 31.
109 Ibid. at para. 97.
terminating the plan on the circumstances of this case. On Bastarache’s interpretation of the statute, the role of the Superintendent in plan termination is a limited one, restricted to very specific statutory grounds; absent those grounds, the power of termination belongs to the employer. Pointing to “[t]he underlying social policy objective of the legislation”, which he described as promoting “the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement”, he clearly saw any interpretive approach which would strip employers of their traditional level of control as destructive of the “fair and delicate” balance sustaining the system.

Like the dissenters in Schmidt, however, Bastarache J. is more comfortable with this outcome if he can attribute it to the plan members themselves. Accordingly, he too based his ultimate decision on a contract scenario in which there are two “parties”, the employer and employees, both of whom have “reasonable contractual expectations” relevant to the interpretation of the plan documents. Those “reasonable expectations” are to be deduced from the plan documents before him which, in his view, express the contractual agreement of both parties to give one party, the employer, control over termination decisions.

The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of [the employer] or the members that the Trust could be terminated by the members, over [the employer’s] objections, in order that the members might obtain the surplus.

The application of the Rule in Saunders v. Vautier would “permit members of a pension plan to unilaterally vary its terms without the employer's consent”, a complete reversal of what he sees as the “expected” power relationship. Such an outcome cannot be permitted: “the unique role of the employer in respect of the pension plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented.”

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110 Ibid. at para.84.
111 Ibid. at para. 96.
112 Ibid. at para. 97.
113 Ibid. at para. 92.
114 Ibid. at para. 92.
115 Ibid. at para. 94.
While Buschau does not expressly over-rule Schmidt, both majority and concurring judgments effectively restore the primacy of the pension plan, placing it “at the root of the Trust” and promoting a concept of the plan and trust as an “integrated whole” interpreted to give effect to the terms of the plan. Like the Schmidt court, the Buschau court recognized the unique level of historic employer control over the terms of pension plan documents. In contrast to Schmidt, however, which attempted to put some fetters on that control in order to protect the interests of employees, Buschau sees employer control as a natural feature of the pension landscape, so essential to the functioning of the system that standard legal rules – even trust rules – that undermine that control must give way.

3.2.2 The Buschau Sequel: Buschau No. 4

As a result of the decision of the Supreme Court of Canada, the PCI plan members were unable to profit from the judicial suggestion, given to them by Newbury J.A. in Buschau No. 1, that they collapse the trust using the Rule in Saunders v. Vautier. With no other options, the plan members decided to follow up on the suggestion of Deschamps J. that they seek relief from the federal Superintendent of Financial Institutions. They filed an application seeking an order to have the plan terminated and wound up, with a consequent distribution of surplus.116 Rogers countered with a parallel application to the Superintendent seeking her sanction for the reversal of the earlier plan amendments which closed the plan and merged it with other Rogers plans. Rogers now proposed to reopen the plan to new members who were employed by PCI’s successor company, a strategy which would allow it to use the plan surplus to fund benefits for these new members. The Superintendent sided with Rogers and dismissed the members’ application. The Federal Court upheld this decision as reasonable.117 The Supreme Court of Canada denied leave to appeal; as is usual in such applications, it gave no reasons.118

The Superintendent’s decision did not squarely address the debate between Deschamps J. and Bastarache J. as to whether or not the Superintendent had authority under the statute to

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116 Buschau, supra note 85 at 34-59. While Deschamps J. is careful in her judgment not to usurp the jurisdiction of the Superintendent by a too definitive interpretation of the relevant statutory provisions, her review of the relevant provisions strongly signals her belief that on the facts of this case, the Superintendent would order the plan terminated and the surplus from the fund distributed.

117 Buschau No. 4, supra note 85.

deal with the issues which had been before the court in Buschau, or to order an employee-initiated wind-up. I would argue, however, that the decision supports the Bastarache reading of the statute, a reading which does not contemplate employee initiation of termination proceedings and permits the Superintendent to order termination and wind-up only in very limited circumstances relating primarily to solvency.119 The Superintendent’s decision was cautiously worded, based primarily on two findings: that the Rogers proposal did not violate the statute, and that the proposal to continue the plan was a “worthy goal”, consistent with the overall purpose of the statute. Her focus throughout was on whether the plan was solvent and capable of delivering the defined benefits it promised.120 She referred only in passing to Rogers’ consistent history of trust violations with respect to the plan.121 In declining to appoint a replacement administrator, she held that there were no current violations of the plans or the statute, and therefore no basis for finding that the members’ best interests would be served by putting the plan under replacement administration.122 She emphasized that the plan documents give the right to amend the plan to the employer, rather than the employees. Accordingly, the decision to revoke the merger and reopen the plan was a decision to be made by Rogers, with her role limited to determining whether or not that decision contravened the statute.123

In the result, the company was able to achieve its goal: to “get at” the pension surplus. Despite conduct over a quarter of a century which courts at various levels had seen as abusive and in bad faith, Rogers’ corporate strategies for the plan prevailed. It is worth

119 It is not clear that Deschamps’ reading of the statute is really so different from that of Bastarache; her more optimistic view of the outcome for the PCI plan members was ultimately dependent on the Superintendent’s willingness to find that Rogers’ conduct was abusive or in bad faith. The Superintendent was obviously unwilling to do so, although she does not expressly say she has no jurisdiction to do so.
120 The Superintendent does not conduct oral adjudicative hearings; her decisions, issued as letters to the parties, are unpublished, although they can be obtained on request. Key passages from her decision are quoted in Buschau No. 4.supa note 85. Reference here is to the letter version of the decision, a copy of which is in my files (“Superintendent’s Decision”).
121 She notes that while “issues concerning [Rogers’] administration of the Plan in the past have come under question, I do not find that [Rogers]…is currently administering the Plan and the fund in contravention of the terms of the Plan…or the OBSA or acting contrary to safe and sound financial or business practices”:
Superintendent’s Decision, ibid. at 5-6.
122 Ibid.
123 Ibid. at 4.
quoting Rogers’ own defense of its conduct, set out at length and without critical comment in the Bastarache decision in *Buschau*:\(^\text{124}\)

RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plan’s terms. RCI says there is no stratagem, only the exercise of a power to amend in the context -- and this is fundamental -- of a defined benefit plan.

In view of the outcome, such “rationale business decisions” are now sanctioned not just by private law but by public law as well. To further the “worthy goal” of having any employment pension plans at all, decision-makers are prepared to have them entirely on the employers’ terms, subject only to minimum statutory standards.

### 3.3 The Demise of Trust Primacy: Nolan v. Kerry (Canada) Ltd.\(^\text{125}\)

In *Nolan v. Kerry (Canada) Ltd.*, the Supreme Court of Canada again addressed the question of the extent to which trust law limited an employer’s general power to amend an employment pension plan; This time the context was two novel issues: the use of surplus to pay expenses which had previously been absorbed directly by the employer, and the use of surplus, accumulated in a fund for the payment of defined benefits, to pay employer contributions in respect of defined contribution (“DC”) benefits. The court unanimously upheld the employer’s right to amend the plan to make the pension fund liable for plan and trust expenses. In a split decision, it also upheld the employer’s right to draw on plan surplus to fund its DC obligations. Although, once again, it did not expressly over-rule *Schmidt*, the court took a much narrower view than the *Schmidt* court of the meaning of the plan’s “exclusive benefit” provisions. It likewise permitted the employer to ‘cure’ clear breaches of trust through retroactive plan amendments. In doing so, the court arguably took a significant departure from the approach taken in *Schmidt*.

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\(^{124}\) *Buschau*, supra note 85 at para. 102.

step towards removing any trust law fetters Schmidt had imposed on employer discretion to amend on-going plans.

At the centre of the Kerry case was a contributory DB plan first established by Kerry’s predecessor, the Canadian Doughnut Company, in 1954. The plan was initially funded through a trust agreement between the Company and the National Trust Company. Section 1 of that Trust Agreement imposed the basic trust obligation: 

…The Fund shall be held by the Trustee in trust and dealt with in accordance with the provisions of this Agreement. No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons as from time to time may be designated in the Plan.

The trust agreement also contained a general power of unilateral amendment or termination, a power which included the express proviso that:

…unless approved by the Minister of National Revenue no such amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal representatives as from time to time may be included under the Plan, and for the payment of taxes, assessments or other charges as provided in Section 5 and Section 19 herein, provided, it being understood that this proviso is not to be construed to enlarge the obligations of the Employer beyond those assumed by it under the Plan.

The pension plan itself incorporated the trust agreement by reference, and contained standard “irrevocability” and “exclusive benefit” clauses of the type found in the Catalytic plan considered in Schmidt. The plan’s general power of amendment, which did not include a power to revoke the trust, was qualified by an express commitment that “no change or modification will affect any rights which such persons may then have with respect to the terms of payment of, or the amount of, retirement income, which the contributions made by the Member and/or the Company, prior to the effective date of such change or modification,

126 Subsequently, other trust companies took over the role of Trustee: first, Canada Trust and subsequently CIBC Mellon Trust Employer: see Div Ct. Decision, supra note 125 at para. 17.
127 These provisions are quoted from the 1958 Trust Agreement, as fully set out in OFST No. 2, supra note 125. The Tribunal decision does not clearly explain why it cites the 1958 Agreement instead of the 1954 Agreement, but does find that “the same result would pertain if the 1954 Trust Agreement were taken as the benchmark”: OFST No; 2, supra note 125 at para. 3.
128 The irrevocable nature of the trust corpus was reinforced in a 1954 Employee Booklet which stated, according to the Divisional Court’s decision, “that if the Plan is discontinued, all money in the Fund must be used only to provide benefits to members of the Plan”: Div Ct. Decision, supra note 125 at para. 22.
129 Section 11, quoted in Kerry, supra note 125 at para. 51.
will provide.” Article 22 of the plan reinforced the trust nature of the Fund by expressly providing for the distribution of trust assets among plan beneficiaries if the plan were discontinued. Based on the Schmidt precedent, there is little doubt that the original plan documents, like the Catalytic plan documents, would have prevented the employer from amending the plan to claim surplus on plan termination.

Surplus distribution per se was not, however, the issue in Kerry. The Kerry plan was still ongoing, and its surplus was still “actuarial” rather than an “actual”, as those terms were defined in Schmidt. The litigation arose out of steps taken by the employer to draw upon that surplus within the shelter of the plan for a variety of pension-related purposes, including employer contribution holidays, and the payment of administrative expenses both for the plan and the fund. While the courts had already addressed the legality of contribution holidays in Schmidt, the employer in Kerry had taken the contribution holiday issue a giant step further. It was not only using the surplus accumulated in its DB plan to take contribution holidays with respect to its DB liabilities; it was also drawing on that surplus to fund its annual contributions for newly-created DC benefits established under the umbrella of the same plan. The Kerry case thus raised a whole new set of questions about the legal nature of pension surplus, and the scope of the employer’s power to use it for purposes other than to fund defined benefits.

For the first thirty years of the plan, the employer had paid both plan and fund expenses out of operating funds. In the mid-1980s, however, the plan began to accumulate a surplus, and in 1985 the employer began charging expenses to the fund, a practice subsequently reflected in a 1987 unilateral plan amendment providing that the fund could be charged for “all normal and reasonable expenses incurred in the operation of the Plan… unless otherwise paid by the Company.” In that same year, the employer also began to take contribution holidays.131

130 OFST No. 2, supra note 125 at para. 4. An earlier plan amendment addressing the payment of expenses, more narrowly drafted, had been made in 1975, but was apparently not implemented: ibid. at para. 24.

131 In 1965, the employer had amended the plan to describe its contribution obligation in the following terms: The Company shall contribute from time to time but not less frequently than annually such amounts as are not less than those certified by the Actuary as necessary to provide the retirement income accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued as required by the Pension Benefits Act, after taking into account the assets of the
There was no evidence that plan members were made aware of any of these changes in the plan or in the employer’s administrative practices.

Between 1985 and 1999, matters continued on that basis. In late 1999, the employer announced that it was establishing a new DC component to the plan effective January of 2000. The plan would be split into Part 1 and Part 2. Existing members of the plan would be given the option of retaining their DB benefits in Part 1 of the plan, or transferring the commuted value of those entitlements to Part 2, the new DC component. Part 1 would be closed to new entrants; all new employees would now be offered DC benefits only. The employer amended the plan documents in 2000 to reflect the addition of the new DC component, funded under an agreement with an insurance company. It also announced its intention of drawing on the surplus accumulated in the pension trust not just to fund contribution holidays in the DB component, but also to make its required contributions for the DC component. The 2000 plan amendments explicitly sanctioned this practice.

When the employer sought to register the new 2000 Plan text, certain plan members (the “Committee”) opposed the registration, arguing that the employer contribution holidays breached the original 1954 Trust Agreement. They also argued that the employer’s practice of paying expenses out of the trust fund breached the trust. Not surprisingly, given the Schmidt precedent, the Superintendent of Financial Services rejected the Committee’s challenge to the company’s contribution holiday issue in relation to DB portion of the plan. He also rejected the challenge to the payment of expenses out of the trust. However, he upheld the Committee’s challenge to the contribution holiday taken in respect of the DC

Trust Fund, the contributions of Members during the year and such other factors as may be deemed relevant. (OFST No. 1, supra note 125 at 14)

Prior to that date, the Plan’s contribution obligation simply referred to “such amounts as will provide, when added to the Member’s own required contributions, the Future Service retirement incomes referred to [in the Plan]”. Deschamps J. held that notwithstanding the failure in the original formula to refer directly to an actuary, “[a]ctuarial discretion is clearly called for”, and therefore both the original and amended contribution obligations did not provide for a specific contribution, but instead fell into the Schmidt category which permitted contribution holidays: see Kerry, supra note 125 at para. 75.

The Superintendent agreed that most of the challenged expenses were properly paid from the fund, with some minor exceptions. The expenses at issue are itemized in OFST No. 2, supra note 125 at paras. 9-10. They included the fees of the trustee, the fees of the investment manager, the fees of accounting firms which audited the fund, consulting fees for actuarial and other services, legal fees and various unspecified miscellaneous expenses including regulatory filing fees. Prior to the hearing, Kerry had repaid the trustee fees. At the hearing it conceded certain other specific categories of fees relating to the establishment of the DC component.
portion of the plan. Both the Committee and the employer applied for a hearing before the Ontario Financial Services Tribunal.

The Tribunal generally upheld the employer’s right to pay expenses out of the pension trust fund, on the basis that they were for the exclusive benefit of the plan members within the meaning of the plan.\(^\text{133}\) On the contribution holiday issue with respect to DB benefits, it found the plan language indistinguishable from *Schmidt* and dismissed the Committee’s claim. It had more difficulty, however, disposing of the challenge to the employer’s encroachment on the pension trust to make its contributions to the newly-created DC portion of the plan. While the employer had carefully amended the pension plan to ensure that the new plan text was crafted as two parts to a single plan, it had not been so careful when it came to providing funding vehicles for those two parts. The plan clearly contemplated separate funding vehicles: the original trust fund for the DB members (held by CIBC Mellon), and a new insurance funding vehicle separately trusteeed by Standard Life Assurance Company as an umbrella for DC members’ individual accounts. The Tribunal concluded that under the terms of the plan documents, the DB (Part 1) members of the plan were the sole beneficiaries of the trust fund. Use of that trust fund to pay contributions into the individual accounts of the Part 2 members was therefore a breach of trust, because it diverted trust assets to the benefit of persons who were not trust beneficiaries. As the Tribunal pointed out, “[a]ny holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members”\(^\text{134}\).

For the Tribunal, however, this problem was easily remedied. The plan documents gave the employer the right to determine which employees would be beneficiaries of the trust. According to the Tribunal, with slightly more artful drafting, the plan could be amended so that “the Part 2 members could be made beneficiaries of the trust in respect of the Fund (in which case it would seem to follow that the insurance policy that is the funding vehicle for

\(^{133}\) *OFST* No. 2, *supra* note 125 at paras. 31-32. The tribunal found that certain consulting fees were not properly charged to the fund.

\(^{134}\) *OFST* No. 1, *supra* note 125 at para. 32-34.
Part 2 should be held by the trustee). The Tribunal’s order gave the employer an opportunity to amend the plan, retroactive to January 1, 2000, to make both DB and DC plan members beneficiaries of the original trust. Once that step was taken the plan, in the tribunal’s view, would be entirely consistent with the original trust agreement.

The Committee’s appeal from the Tribunal’s decision on both the plan expenses and the contribution holiday issues ultimately made its way up to the Supreme Court of Canada, where it was dismissed on all grounds. The Committee’s general argument was that the impugned amendments to the plan violated the company’s fiduciary obligations because they put plan surplus to uses that were not “for the exclusive benefit” of the plan beneficiaries, as required by the initial plan documents. The court disagreed. On the issue of plan expenses, the issue had been framed before the court simply as an issue of whether the employer had the obligation to pay plan expenses. The argument was that the employer was obligated to pay the expenses, and it was therefore a breach of trust to pay the expenses from the pension fund. Speaking for the whole court on this issue, Rothstein J. was unable to find any such obligation in the common law, in the statutes or in the plan documents. Accordingly, he concluded that no such obligation existed.

In his search for potential sources of employer obligation, Rothstein J. gave no consideration whatsoever to the fact that the plan arose in an employment context. Before the Tribunal, the Committee had placed considerable reliance on the employer’s consistent practice, over thirty years, of paying expenses out of operating funds rather than from the pension trust. It had bolstered its reliance on this consistent past practice by reference to the equally consistent and explicit representations made by the employer to the employees in brochures and booklets describing the pension plan, which advised that "the Company will contribute all additional amounts [beyond the member contributions] that are required to fund the Plan as well as all expenses associated with the Plan". The Tribunal had curtly dismissed the

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135 Ibid. at para.33.
136 Ibid. at paras. 32-34, 44.
137 Ibid. at paras.1, IV.1.
138 Ibid. at paras. 39-40
139 The company had paid these expenses from the inception of the plan in 1954 to the end of 1984: OFST No.2, supra note 125 at paras. 2-4
140 Ibid. at paras.22-23.
employee booklets as mere descriptions of “a practice as to the payment of the expenses of the Plan and not an undertaking by the Company to pay those expenses”. Neither the practice nor the booklets are alluded to in any way in the decision of the Supreme Court of Canada. There is no discussion of the contract of employment as a possible source of the employer’s obligation to pay plan expenses under the circumstances, surely a highly plausible argument under the circumstances.

In the absence of a primary obligation on the employer to pay the expenses, there nevertheless remained an issue as to whether a plan amendment charging the trust with the obligation to fund plan and trust expenses was an amendment “for the exclusive benefit” of the plan members. Rothstein proceeded to explore the meaning of “exclusive benefit”. In his view, “the term ‘exclusive benefit’ [cannot] be construed to mean that no one but the employees can benefit from the use of the trust funds”. After all, he pointed out, “[m]any persons will benefit indirectly from a use of pension funds. Notably, the employee’s family would benefit from the employee’s long-term financial security.” Above all, of course, the employer can and does benefit from a pension plan by “attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily”. The term “exclusive benefit of plan members” must therefore be understood to include side-benefits for the employer. The plan itself benefits the employees, and the expenses must be paid in order for the plan to continue. Accordingly, as Rothstein J. saw it, an amendment which permits those expenses to be paid out of the fund rather than by the employer is “to the exclusive benefit of the employees, within the meaning of [the plan]”. There is no discussion of the obvious fact that employees would benefit more from

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141 Ibid. at para. 23
142 Kerry, supra note 125 at para. 53
143 Ibid.
144 Ibid. at para. 54.
145 Ibid. at para. 55.
the *status quo* prior to the amendment. Likewise the equally obvious fact that this approach strips the word “exclusive” of its plain and ordinary meaning passes without comment.\(^\text{146}\)

There was no dissent to Rothstein J’s disposition of the plan expenses issue. The court was equally unanimous in its conclusion that on the issue of the appropriateness of employer contribution holidays for DB plan members, the Kerry plan language was indistinguishable from the *Schmidt* case. Where the court divided was on the question of whether the company could properly amend the plan to access the surplus in the pension trust to pay its contributions in the DC portion of the plan. Five judges led by Rothstein J. were convinced that it could; Lebel J., joined by Fish J. in a vigorous dissent, expressed an equal conviction that it could not.

The majority judgment on this issue focuses almost entirely on two questions: whether the DB and DC components of the 2000 plan can be properly characterized as a single plan, and whether the employer’s amendment authority is broad enough to permit an amendment making the DC members beneficiaries of the trust which had formerly benefited only DB members. Like the Tribunal, the majority judgment saw the employer’s initial plan to remove funds from the trust fund and transfer them to the DC accounts as a breach of trust. It agreed with the Tribunal, however, that the employer could ‘cure’ the breach by the simple expedient of amending the plan retroactively to bring the DC members within the scope of the original trust. There is no analysis of the implications for trust law of treating breaches of fiduciary obligations as mere technicalities which can be corrected by better drafting.

In addition, and even more fundamentally, there is no *Schmidt*-style analysis of the nature of the company’s defined contribution obligation. Despite its unanimity on the contribution holiday issue, the *Schmidt* court did not give employers *carte blanche* to take contribution holidays if their plans were in surplus. The court held only that where the plan provides for the employer’s annual contribution to be calculated taking into account the size of the existing fund and its relationship to the plan’s liabilities overall, the existence of a plan surplus may mean that the employer may not be required to contribute in any particular year. While pension vernacular has labeled this situation a “contribution holiday”, the term is a

\(^{146}\) The Tribunal had held that “exclusive benefit” really meant “primary benefit”: *OFST No. 2*, supra note 125 at para. 10. Rothstein J. does not put even that limitation on his approach to defining “exclusive”.

misnomer. Under language of this type, the employer is not excused from making a contribution he owes; in actual fact, he owes nothing. In dismissing the Committee’s attempt to distinguish Schmidt with respect to the DB portion of the plan, the Kerry court carefully reviewed the Schmidt reasoning, applying it to the language of the Kerry plan to determine that while actuarial discretion was not expressly provided for in the contribution language of the initial plan text, such discretion was implied.¹⁴⁷

It did not, however, repeat the exercise with respect to the DC portion of the plan. In fact, remarkably, the actual language of the defined contribution obligation is nowhere recited in the decision. An examination of the plan’s DC provisions reveals that the defined contribution language bore no structural resemblance whatsoever to the language in Schmidt.¹⁴⁸ Article 25.02 of the plan provided that:

Subject to this Section 25.02, the Employer shall contribute to the Member’s Account, on behalf of each Active Member, an amount equal to the lesser of:
(a) fifty percent (50%) of the Part 2 Member’s contribution; and
(b) three percent (3%) of the Part 2 Member’s Earnings.
The Employer may use actuarial surplus in the Pension Fund and any amounts in the Forfeiture Account to reduce or eliminate its contribution requirements under this Section 25.02.

The plan also expressly provided in Article 18.08 that:

During the continuation of the Plan, actuarial surplus may, from time to time, in the sole and absolute discretion of the Company, be used under either Part 1 or Part 2 of the Plan, or both, to reduce, in whole or in part, contributions otherwise required to be made by the Company pursuant to this Plan or to fund the cost of benefit improvement under this Plan.

It is clear, of course, that these plan amendments purport expressly to give the employer the right to use the actuarial surplus to reduce its DC contribution obligation. That, however, is arguably not the crucial issue.¹⁴⁹ Under the language in Schmidt, the employer had no

¹⁴⁷ Ibid. at para.76.
¹⁴⁸ The language is not recited in any of the decisions. The plan was filed as an exhibit in the Tribunal proceedings. A copy was obtained from the Tribunal and is in my files. Part 2 members could choose to contribute anywhere from 1-6% of earnings. The Forfeiture Account was an account composed of unvested (employer) contributions left behind in member accounts by departing short-service employees (Article 26.08).
¹⁴⁹ The Schmidt holding can be interpreted in a number of different ways: see Eileen E. Gillese, “Contribution Holidays” (1995-1996) 15 Est. & Tr. J. 136 at 142-147. Cory says in his judgment that contribution holidays are permissible if the plan expressly so provides: Schmidt, supra note 11 at para. 84. While by 2000, the Kerry plan clearly did provide for contribution holidays in the DC component, it did so only because of a plan amendment; I would argue that any such provision would have to be in, or at least be consistent with, the initial
contribution obligation when the plan was in surplus. Under the Kerry DC formula, there is unquestionably a concrete and quantifiable liability to contribute up to three percent of earnings for each DC member. The only question is where that money will come from to make the contribution. The employer’s liability is not actuarially reduced or eliminated because of the existence of plan surplus, as it was in Schmidt; instead the employer is clearly dipping into plan surplus to pay off its liabilities to specific employees.

This point was the essence of Lebel J.’s dissent, although he did not refer to the language of the plan’s DC obligation to make it. Like Rothstein, Lebel J. focused much of his judgment on the issue of whether the plan should be characterized as a single plan, or as two separate plans. He saw the DB and the DC components of the plan as functionally separate, and was unconvinced that they could be converted into a single seamless whole within which the DC members could be made beneficiaries of the DB trust by the retroactive stroke of a pen. He emphasized, however, that he would have come to the same conclusions on the breach of trust issue regardless of whether or not the DC members were properly characterized as beneficiaries of the trust. He pointed out the circularity of the Tribunal’s (and by inference, the majority’s) reasoning that the company’s initial breach of trust could be cured by amendment:

The Tribunal did acknowledge that the employer’s amendments to the Plan seeking to permit contribution holidays in the DC plan violated the terms of the original Trust Agreement entered into in 1954 (the “Trust Agreement”) and constituted an encroachment on irrevocable trust funds. However, it failed to take these very principles into consideration when ordering its remedy of retroactively designating DC members as beneficiaries of the fund. The retroactive amendment would breach the same terms of the Trust Agreement and the Plan’s text that prohibited the DC contribution holidays in the first place. The Tribunal’s failure to take this into account when crafting the remedy cannot be justified and the remedy is therefore unreasonable.

In his view, the employer’s conduct, viewed functionally and not simply through the abstract lens of plan draftsmanship, was indefensible on trust principles, since it would clearly

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150 To use Lebel J.’s own words, “[i]t would make a mockery of the significant protections afforded to trust funds if such entitlement could be granted by the mere stroke of a pen”: Kerry, supra note 125 at para. 179.

151 Ibid. at para. 200.

152 Ibid. at para. 141.
operate to strip monies from the trust fund backing the DB benefits, moving that money into individual DC accounts.¹⁵³

In this case, the DC contribution holidays could only be realized by the withdrawal of funds from the pension trust, which holds the contributions and accrued benefits of the employees of the DB plan (“DB members”), and the subsequent deposit of those same funds into the DC members’ annuity accounts. This is a clear example of the employer’s controlling and encroaching on funds that are irrevocably held in trust for the benefit of DB members. This action violates the general trust principle against revocation as well as the provisions in the Plan’s documentation that expressly prohibit the employer’s revocation of trust funds.

In Lebel’s view, a plan amendment permitting the company to meet its contribution obligations to DC plan members out of the trust fund could not be construed as an amendment for the benefit of plan members:¹⁵⁴

It is hard to see how the DC contribution holidays benefit anyone but Kerry, who is relieved of its contribution obligations to the DC plan. Of what use are the exclusive benefit provisions if they could permit the withdrawal of trust funds for the primary or even exclusive benefit of the employer? Indeed, it is not necessary to find that the members have a vested interest in the surplus to appreciate that the present arrangement violates the exclusive benefit provisions and would continue to do so even if the Tribunal’s remedy were adopted. Every DC contribution holiday leaves the corpus of the trust smaller, whereas a contribution holiday in respect of a regular DB plan simply leaves the trust alone.

As a functional matter, Lebel J. is surely right in this regard. There has been no ‘contribution holiday’ here; contributions for which the employer is liable under the plan have continued to be made. They have simply been made out of trust funds rather than operating funds. This bears no resemblance to the type of ‘contribution holiday’ sanctioned in Schmidt. Under Kerry, however, it is now the law of the land that employers may amend their plans to allow themselves to use trust funds in this way.

3.4  *Burke v. Hudson’s Bay Company: Addendum*

On October 7, 2010, after this Chapter of the thesis had been completed, the Supreme Court of Canada issued a new pension decision, in *Burke v. Hudson’s Bay Co.* ¹⁵⁵ While this decision came down too late to fully inform the analysis in this chapter, I have dealt with it

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¹⁵³Ibid. at para. 144.
¹⁵⁴Ibid. at para. 184.
¹⁵⁵*Burke v. Hudson’s Bay Co.*, 2008 ONCA 394 (C.A.); aff’d 2010 S.C.R. 34
here by way of addendum because it reinforces the central theme of this section: that Canadian pension jurisprudence has promoted and enhanced employer control over employment pension plans. The *Burke* case is further evidence of the court’s reluctance to place trust law fetters on employer power to use pension assets in its own business interests, always provided that the basic ‘pension promise’ is respected.

*Burke*, like the other cases I have discussed in this section, dealt with employee claims to an interest in the surplus in a defined benefit plan. Unlike its predecessors, however, it did not involve a direct claim that the employer had appropriated plan surplus to its own use. Instead, the case involved the question of whether employees whose pension rights had been transferred to a successor employer as part of a sale of business could insist that a portion of the original plan’s actuarial surplus be transferred to their new pension plan as part of an asset transfer. The evidence before the court was that the issue of a potential surplus transfer had been raised by the successor employer as part of the sale negotiations, but that the successor did not pursue the issue after Hudson’s Bay made it clear that the price of the overall transaction would go up if it included a transfer of surplus. The employees affected by the transfer claimed that by retaining the total surplus in the original plan instead of transferring a *pro rata* share to the successor plan, the employer had violated its fiduciary obligation of “even-handedness”. The decision describes this issue as a “novel question of pension law”, in light of the fact that it involved an on-going plan, rather than a terminated or wound up plan.

I have argued above that in its most recent pension judgments, the Supreme Court’s analysis has led to enhanced employer control over employee pension rights. In *Buschau*, the court articulated a version of the common law contract paradigm in which employees are deemed to have agreed to employer control. In addition, it found that the regulatory framework trumped the common law in the situation before it, with the result that the plan was immunized from the application of inconvenient trust law doctrine that would have given the employees control over a critical pension decision notwithstanding the language of the plan.

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157 *Ibid.* at para. 36. The case also involved a claim that the company had improperly paid plan expenses out of the plan surplus, a claim that the court swiftly dismissed on the basis of its holding in *Kerry*: see *ibid.* at para. 28-35.
158 *Supra* note 85.
before it. In *Kerry*,\(^\text{159}\) the court interpreted the plan documents to give the employer generous capacity within the scope of its general amendment power to redefine the nature of its trust obligations to plan members.

The *Burke* court took the *Kerry* approach, focusing on the plan documents rather than on the statutory context. It was clearly open to the court to defer, as it had in *Buschau*, to the statute. The *Pension Benefits Act* and regulations explicitly address in some detail the issue of asset transfers in circumstances like those in the *Burke* case. The employer had argued strenuously that the case was analogous to *Buschau*: that the statute should be seen as a “complete code” on asset transfers which excluded the application of common law trust doctrine.\(^\text{160}\) The court rejected that argument, on the grounds that the legislation imposes minimum standards only; there may well be higher standards imposed by the terms of the plans and related trust documents.\(^\text{161}\) The court refused to interpret *Buschau* as holding that trust principles have no application to matters dealt with by the statute; it saw that decision as excluding the application of the common law only where there is a clash between trust principles, and statutory procedures and objective.\(^\text{162}\) In the case before it, the court found no clash.

The court nevertheless dismissed the employee’s claim. It found trust principles applicable; indeed, it was common ground between the parties that the plan and fund were subject to a declaration of trust and must be administered in accordance with trust principles.\(^\text{163}\) The court clearly accepted the proposition that the employer had fiduciary duties in administering the plan.\(^\text{164}\) However, the court interpreted those fiduciary duties as extending only to respect for the rights of the employees under the plan. As the court interpreted the plan, since the employees had no right to surplus, either in the on-going plan or on plan termination, “there is no duty of even-handedness applicable to the surplus”.\(^\text{165}\) In arguing for an interest in the entire fund despite the absence of a valid claim to plan surplus, the employees had relied heavily on the *Schmidt* dictum that “employee beneficiaries have an equitable interest in the

\(^{159}\) Supra note 125.

\(^{160}\) *Burke*, supra note 155 at paras. 42-45.

\(^{161}\) Ibid. at para. 45.

\(^{162}\) Ibid. at para. 46.

\(^{163}\) Ibid. at para. 49.

\(^{164}\) Ibid. at para. 85.

\(^{165}\) Ibid. at para. 85.
total assets of the fund while it is in existence”.\textsuperscript{166} The court gave that dictum a very narrow interpretation, interpreting it as applicable only to plans where the employees could establish a claim to surplus entitlement; the equitable interest of employees who did not own the surplus, held the court, was limited to that portion of the fund necessary to fund their benefits.\textsuperscript{167} The company’s decision to transfer the assets without any share of the surplus was a “legitimate commercial transaction”; as long as the employees’ defined benefits were protected, fiduciary obligations were not breached.\textsuperscript{168}

As a matter of pension law,\textsuperscript{169} this decision resolves the question of whether an employer has a trust-based obligation to transfer a \textit{pro rata} share of surplus in an asset transfer to a successor pension plan in situations where the plan documents do not give the employees ownership rights to plan surplus: the answer is clearly no. The decision does not answer the question of whether such an obligation arises where the plan documents do give the employees some ownership claim to plan surplus; that question is left for another day.\textsuperscript{170}

What is clear, however, is that questions about whether trust principles are applicable to pension rights are governed entirely by the language of the plan documents. The \textit{Kerry} and \textit{Buschau} decisions had already established that from the perspective of contract analysis, employers write the script; the “intention of the parties”, which defines contract rights, is to be deduced from the terms of the plan documents unilaterally drafted by the employer. The \textit{Burke} decision appears to come to the same conclusion from the perspective of trust analysis. The court makes it clear that “[t]he employer’s and employees’ respective rights and obligations with respect to the defined benefits, contributions and surplus are set out in the pension plan documentation”.\textsuperscript{171} If fiduciary obligations are triggered only in situations in which legal rights are at stake, whether and when employers will have trust-based obligations

\textsuperscript{166} \textit{Schmidt, supra} note 11 at para. 89.
\textsuperscript{167} \textit{Burke, supra} note 5 at paras. 51-60.
\textsuperscript{168} \textit{Ibid.} at para. 91.
\textsuperscript{169} As a matter of trust law, the \textit{Burke} case raises more questions than it answers. On a broad reading, it appears to adopt the proposition that the fiduciary principle of even-handedness does not apply to discretionary decisions which do not violate the legal rights of trust beneficiaries. This creates a fundamental problem for trust law, which has to date seen fiduciary obligations as separate from strict legal obligations, and designed for the specific purpose of controlling exercises of trustee discretion, which by definition do not violate strict legal rights. For a discussion of the duty of even-handedness, see Waters, Gillen & Smith, \textit{Waters’ Law of Trusts in Canada}, 3d ed., \textit{supra} note 71 at 967.
\textsuperscript{170} \textit{Burke, supra} note 155 at para. 96.
\textsuperscript{171} \textit{Ibid.} at para. 6.
to their employees will depend entirely on the language of the documents which govern the pension plan. These documents must, of course, meet minimum regulatory standards. To the extent that they establish any employee rights in excess of minimum standards, however, they are typically under employer control. The employer has drafted them, and under the rules in Kerry and Buschau, there are very few limitations on the scope of the employer’s power to change them.

4.0 WHAT'S LEFT OF FIDUCIARY PRINCIPLES?

4.1 The ‘Two Hats’ Doctrine

The decisions of the Supreme Court of Canada in Buschau, Kerry and Burke leave very little scope for Schmidt-based trust doctrines to inform the construction of employee pension rights. The court has never formally repudiated the proposition established in Schmidt that pension trusts are “true” or “classic” trusts, subject to “all applicable trust rules”. In the Buschau decision, however, the court placed its emphasis on the word “applicable”; it was prepared to find inconvenient trust doctrine “inapplicable” when it became necessary to avert serious threats to employer control of pension plans. The facility with which the Kerry court placed form over substance, permitting retroactive plan amendments to cure clear breaches of trust, leaves trust principles with little effective purchase in the pension context. The court’s gloss on the meaning of “exclusive benefit” clauses leaves employees further exposed to employer self-interest. By determining that fiduciary obligations attach only to strict legal rights as set out in the plan documents, the Burke court has moved further even towards employer hegemony. Furthermore, the narrow reading given by the Burke court to the statement in Schmidt that employees have an equitable interest in the pension fund offers little hope that this important (if obiter) observation will yet become the foundation for a doctrine of employee control of pension funds. In the wake of this direction from the Supreme Court of Canada, lower courts have shown increasing reluctance to fetter employer autonomy. Provided that pension plans deliver on vested commitments to pay pensions, as they are required to do by regulatory statutes, trust law places few if any material impediments in the way of employers who seek to use plans assets or amend plan documents to suit their own interests.
However, the problem which attracted trust scrutiny in the first place – the problem of employer conflict of interest – remains at the core of employment pension plans. The law permits employers to play conflicting roles in the employment pension system. As we have seen in previous chapters, employers are almost always the initiators, or sponsors, of employment pension plans. As plan sponsors, 21st Century employers, like 19th and 20th Century employers before them, typically control the drafting of plan documents. They use that control to determine whether plans will be contributory or non-contributory. They use it to establish benefit and contribution levels, either unilaterally or through the process of collective bargaining. They also use it to furnish themselves with broad powers to amend and terminate plans.

In addition to their role as employer/sponsor, employers also typically play another key role in the system: the role of plan administrator. Plan administrators wield significant power to make discretionary decisions. They retain and instruct plan actuaries – a power that may have significant impact on plan funding levels. They often have direct and indirect decision-making authority over contribution levels. They make decisions about plan investment policies and plan investments, and about whether to adopt conservative or aggressive actuarial assumptions, decisions which have direct impact on employer contribution requirements in DB plans, as well as on the level of risk to which member benefits are exposed. As plan administrators, employers make important discretionary judgments about individual or group benefit entitlements. Many plan administrator functions meet standard legal tests to identify fiduciary responsibilities at common law. In addition, trust and trust-like obligations have been imposed on plan administrators by regulatory statutes. For

172 See Chapter 1 for a discussion of the meaning of the term ‘plan sponsor’.
173 The role of “administrator” as that term is used in the regulatory statutes encompasses the governance role as well as strictly ‘administrative’ functions; pension administrators within the meaning of the pension statutes bear responsibility for ensuring compliance both with plan documents and with the regulatory statutes themselves.
174 In Morneau Sobeco Limited Partnership v. Aon Consulting, [2008] O.J. No. 1022 (leave to appeal to the SCC refused, Mary 20, 2008 sub nom Rogers v. Morneau Sobeco Limited Partnership) the Ontario Court of Appeal explicitly held that decision-making by a plan administrator about contribution levels was a fiduciary duty, and that in the case before it, “fulfillment of that duty would have led to maximizing the contributions that [the company] would make to the Plans as that would best protect the Plan members’ pensions” [para. 34].
175 The conventional common law test for identifying a fiduciary relationship has three components: the fiduciary has scope for the exercise of discretion or power; the exercise of the power will affect the beneficiary’s legal or practical interests; and the beneficiary is peculiarly vulnerable to the exercise of the fiduciary’s power: see Waters, Gillen & Smith, Waters’ Law of Trusts in Canada, 3d ed., supra note 71 at 42.
example, the federal *Pension Benefits Standards Act* explicitly provides that a plan administrator must “administer the pension plan and the pension fund as a trustee”.¹⁷⁶ Quebec’s regulatory statute is equally explicit: “Except in the case of an insured plan, the pension committee shall act in the capacity of a trustee.”¹⁷⁷ Even those provincial statutes which do not impose explicitly fiduciary duties require enhanced duties of care from plan administrators.¹⁷⁸ Under conventional trust law principles, fiduciaries are required to act exclusively in the best interests of beneficiaries, and not in their own interest.¹⁷⁹

How have these principles been applied in the context of employment pension plans where employers play roles both as interested parties and key fiduciaries, roles which are arguably incompatible at their very root? The conventional solution to fiduciary conflicts of interest is to require the trustee to act exclusively in the interests of the beneficiary or to resign the role of trustee. It is clear, however, that the application of this approach to employer/fiduciaries would frustrate employer pension objectives. Accordingly, courts and tribunals have accommodatingly developed what has come to be known as the ‘two hats’ doctrine, a flexible approach permitting an employer to defend against conflict of interest allegations by demonstrating that when it pursued a particular course of action damaging to the interests of plan members, it was acting in its role as *employer* rather than in its role as *administrator*.

The first explicit Canadian reference to the ‘two hats’ doctrine is found in *Imperial Oil v. Superintendent of Pensions*¹⁸⁰, a decision of the Pension Commission of Ontario (“PCO”). In that case, the PCO was considering the question of whether the employer had violated its

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¹⁷⁶ *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c.32 (2nd Suppl.), s.8(3): “The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.”

¹⁷⁷ *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s.150. Quebec’s statute requires that in all cases pension plans must be administered by a “pension committee” which includes at least one active member and one non-active member representative: s.147. The majority of committee members may be employer appointees, however, which gives employers *de facto* control of pension committees and raised the same conflict of interest issues for Quebec as arise in other jurisdictions: s.150.

¹⁷⁸ For example, s. 22(1) of Ontario’s Pension Benefits Act, 1985, R.S.O. 1990, c.P.32 provides as follows: “The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.”


¹⁸⁰ *Imperial Oil v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198. The PCO was the predecessor of the current Financial Services Tribunal in adjudicating pension disputes under Ontario’s *Pension Benefits Act*. Eileen Gillese, then chair of the PCO, chaired the panel that decided this case.
statutory duty as a fiduciary when it exercised its power of plan amendment to increase the eligibility requirements to qualify for early retirement pensions. The PCO concluded that in passing the plan amendment, the employer had not been acting in a fiduciary capacity.\textsuperscript{181}

The Act recognizes that an employer may wear "two hats" in respect of pension plans. Indeed, s. 8 specifically states that an employer may be an administrator. In that way, it acknowledges that an employer may play two roles and it is self evident that the two roles may come into conflict from time to time.

We are of the view that an employer plays a role in respect of the pension plan that is distinct from its role as administrator. Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. \textit{If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees} [emphasis added].

Accordingly, the Tribunal found that in passing the amendment, the employer was not subject to the statutory prohibition against conflict of interest.\textsuperscript{182}

While the \textit{Imperial Oil} case was decided in the context of a statutory fiduciary obligation, courts considering the related question of whether employers are under a fiduciary obligation at common law to exercise their powers of plan amendment in the best interests of plan beneficiaries have come to the same conclusion; in amending pension plans employers are wearing their sponsor/employer hat, and are free to pursue their own self-interest, even where it conflicts directly with the interests of plan beneficiaries.\textsuperscript{183} Subsequent cases in Ontario and in other jurisdictions have applied the ‘two hats’ doctrine to sanction a variety of employer initiatives which would have been unlawful if fiduciary standards had been applied. In \textit{OMERS Sponsors Corporation v. OMERS Administrative Corporation}, the

\textsuperscript{181} \textit{Ibid.} at paras. 30, 33.

\textsuperscript{182} \textit{Ontario’s Pension Benefits Act} provides that an administrator “shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund”: s.22(4). In its decision, the Tribunal also pointed out that this statutory prohibition applied only to management of the fund, and not to the plan.

\textsuperscript{183} In addition to the cases discussed below, see \textit{Lloyd v. Imperial Oil}, [2008] A.J. No. 695 (Q.B.). This case constituted an attempt to re-litigate the validity of the same set of plan amendments considered by the PCO in \textit{Imperial Oil v. Superintendent of Pensions} (supra, note 180), the case that gave birth to the ‘two hats’ doctrine. The Alberta court found that the plaintiffs were barred by the doctrine of issue estoppel from re-litigating the issue of fiduciary breach, but also dealt with the issue on the merits, coming to the same conclusion as the PCO in the prior case, that the employer had not been acting in a fiduciary capacity as plan administrator when it amended the plan to limit eligibility for early retirement benefits: see para. 58.
Ontario Superior Court, considering generally the relationship between the employer as plan sponsor and the employer as administrator, gave explicit recognition to the ‘two hats’ doctrine: 184

In its role as plan sponsor, the employer decides whether to establish a plan and on its funding design. As plan sponsor, the employer owes no fiduciary duties to the plan members. In deciding whether to establish or terminate a plan, in defining the categories of employees who are eligible for membership, and in determining what benefits will be offered, the sponsor may act in its own interests and may prefer the company’s interests over those of the employees.

That same court applied the ‘two hats’ doctrine in Sutherland v. Hudson’s Bay Co. to problems very similar to those dealt with in Buschau and Nolan v. Kerry, holding that where an employer re-opened a closed pension plan for the purpose of accessing plan surplus, and where it amended the plan to allow it to take contribution holidays and to pay plan expenses out of the pension fund, it was not acting as a fiduciary and was free to pursue its own interests at the expense of plan beneficiaries. 185

The ‘two hats’ doctrine has also been applied in situations where the employer has drawn on pension surplus to fund pension enhancements for active employees. In Lieberman v. Business Development Bank of Canada, 186 the employer gave active employees a contribution holiday without providing any corresponding benefit to retired and deferred members. The retired and deferred members launched a class action, arguing that the employer had violated the recognized trust duty of even-handed treatment for trust beneficiaries. 187 The court characterized contribution holidays for active employees as an enhancement to their contract of employment; active employees were now required to pay less for their pension benefits. 188 In thus improving contracts of employment, the court held the employer was acting in its capacity as employer, and not as plan administrator;

187 Ibid. at para. 3. The plaintiffs also challenged certain plan amendments, including an amendment purporting to give the employer ownership of plan surplus, and to pay plan expenses out of the trust, arguing that the employer had acted “in its own corporate interest, acting in conflict with the interests of Plan Members and beneficiaries, and unjustly enriching itself to the detriment” of plan members. On this issue, the court found that the original plan was silent on the surplus ownership issue, and accordingly, the employer was entitled to surplus reversion on the principle of resulting trust, despite the fact that the plan was contributory. The court also found the plan silent on the issue of administrative expenses; applying Kerry, it held the employer entitled to amend the plan to pay administrative expenses.
188 Ibid. at para. 85.
accordingly, no fiduciary obligations were involved.\footnote{Ibid. at paras. 78-80. The court reasoned that use of surplus to provide contribution holidays in this context did not enhance the employees’ benefits at the expense of other plan members; their benefits remained unchanged, although “the reduction in the obligation to contribute increased the value of the active employees' compensation package and increased their take home pay.”} The ‘two hats’ doctrine has likewise been used to protect benefit enhancements obtained by active employees in collective bargaining. In \textit{Association provincial des retraités d’Hydro-Québec v. Hydro-Québec},\footnote{[2005] Q.J. No. 1644.} the Quebec Court of Appeal reasoned that “when sitting around the negotiating table with the unions representing 95\% of its employees, [the employer] acts in its capacity as employer, not as trustee of the fund…”\footnote{Ibid. at para. 88.} and applied the doctrine to dismiss claims from retired employees that a plan administrator who drew on plan surplus to enhance the benefits of active employees violated its fiduciary duties to deferred and retired members.\footnote{The court also rejected the claim of retired members that the plan could not be amended without their consent as a matter of contract: see discussion in Chapter 3 at 6.2.2.}

4.2 An Emerging Duty of Good Faith?

Despite the promise of \textit{Schmidt}, trust principles have been applied quite sparingly to employers exercising discretionary powers in connection with pension plans, leaving them with wide latitude to create and terminate plans, to amend them and to negotiate or establish benefit and contribution levels in their own self-interest, unfettered by fiduciary duties. The consequences of this approach have been both clear and stark; as long as they comply with the bare-bones protections offered by regulatory statutes, employers have been left free to control pension plans and funds in their own interests, regardless of the impact on beneficiary interests. While courts have been content to live with this outcome in particular cases, they have shown some discomfort with a legal doctrine so one-sided. In rejecting the application of fiduciary principles to specific employer conduct, courts up to and including the Supreme Court of Canada have suggested that there may be some lesser but still meaningful limitation on employer pursuit of self-interest: a duty of ‘good faith’. Unfortunately, the courts have not elaborated in any very satisfactory fashion on either the source or the substantive content of this duty of good faith. Nor has it ever been applied to overturn an employer action.
Explicit references to an employer duty of good faith in the pension context have only recently begun to appear in the case law. In *Buschau No. 2* the British Columbia Court of Appeal opined that:\(^{193}\)

> The powers of amendment and termination given to the employer… must be exercised in good faith. This is certainly true of [Rogers’] power … to re-open the Plan to new Members. Although the power may not be a fiduciary one, it is one that must be exercised by the employer in good faith vis à vis the existing Members.

The court took the view that this duty of good faith would prevent Rogers from exercising its power of amendment to reopen a closed plan simply for the purpose of depriving existing plan members of a right to surplus on termination. For the proposition that such a duty existed, the court relied both on language of the federal pension statute, and on British common law authority.\(^{194}\)

As we saw in section 3.1.2, above, however, the Supreme Court of Canada reversed this decision. The majority judgment in *Buschau* did not directly comment on the ‘good faith’ issue. In his concurring judgment, Bastarache J. gave explicit recognition to an employer duty based on statute, although he fell short of labeling it a duty of ‘good faith’:\(^{195}\)

> The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees’ pension benefits, not in a way that would reduce, threaten or eliminate them ….

It appears that the substance of any such duty does not, however, extend beyond the protections already found in plan documents and regulatory statutes.\(^{196}\)

Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the *PBSA*. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(b) of the *PBSA* which states that "[w]here the employer is the administrator pursuant to paragraph 7(1)(c), if there is a material conflict of interest between the employer's

\(^{193}\) *Buschau No. 2*, supra note 85 at para. 60.

\(^{194}\) *Ibid.*. The court relied on s.10(b) of the *Pension Benefits Standards Act,1985*, R.S.C., 1985, c.32, 2\(^{nd}\) Suppl. s.2(1), P-7.01, the text of which is set out in Bastarache’s judgment, quoted in the paragraph below.

\(^{195}\) *Ibid.* at para. 102.

\(^{196}\) *Buschau*, supra note 85 at para. 103.
role as administrator and the employer's role in any other capacity, the employer ...
(b) shall act in the best interests of the members of the pension plan."

In the wake of Buschau, other courts have considered the nature and scope of the employer’s
duty of good faith in dealing with employment pension plan issues. For example, in Lloyd v. Imperial Oil,197 the plaintiffs argued that the employer had tightened up the pension plan’s eligibility rules for early retirement because it foresaw significant employee terminations in the immediate future; its purpose in amending the plan, to save itself the cost of paying early retirement benefits in the impending layoffs, was “bad faith”. The court, while expressing some puzzlement about the source of any employer duty of good faith,198 nevertheless considered the argument. It was ultimately rejected on the facts, the court holding that “Imperial's motive in making the Amendment was to provide certainty as the restructuring process went forward and address the removal of Imperial's discretion as a result of changes to the Plan in 1990.”199 The court went on to make it clear that even if it had accepted the plaintiffs’ view of the facts, bad faith would not have been established. Mere “financial self-interest” is not bad faith; to ground a finding of bad faith, there would have to be evidence of conduct “in an underhanded manner or for some collateral purpose”.200 An employer “acting in its capacity as employer and exercising its right to amend in accordance with the terms of the Pension Plan and the applicable legislation”201 cannot be said to be acting in bad faith.

In Sutherland v. Hudson's Bay Co. Wilton-Siegel J. took a similar approach. While he was persuaded that a duty of good faith did exist, 202 he concluded that it consisted of: 203

... an implied duty not to act with a view to furthering an improper purpose. The plan sponsor must act with a view to preserving the trust fund for the benefit of the persons for whose benefit it was established, or, more generally, must act with a view to furthering the original purposes of the Trust Fund and not for any other purpose which is, by definition, an improper purpose.

197 Supra note 183.
198 Ibid. at para. 62. The court commented:
...the breach of a duty of good faith is a somewhat idiosyncratic cause of action in the pension context, but the duty has been recognized in more than one jurisdiction and it has been distinguished from the more frequently considered fiduciary duty arising under the statute and principles of equity...; it is difficult to see what common law or statutory source such a duty would have.

199 Ibid. at para. 113.
200 Ibid. at para. 114.
201 Ibid.
202 Supra note 185.
203 Ibid. at para. 317. Wilton-Siegel J. cited U.K. cases in which an improper purpose was found: see paras. 317-320.
He squarely rejected the argument that the duty of good faith required the employer to interpret plan provisions in favour of plan members.\textsuperscript{204} He found the duty imposed obligations no broader than the “contractual obligations constituted by the Exclusive Benefit Provisions”.\textsuperscript{205} Even where the intention of the employer is to subvert employee interests, such conduct may not constitute an improper purpose if it is within the contemplation of the plan.\textsuperscript{206} Accordingly, he found a decision by an employer to re-open a closed plan for the purpose of accessing a surplus that would otherwise belong to the plan members a perfectly proper and \textit{bona fide} decision, since the re-opening of the plan did not violate the terms of the plan and the regulatory statutes.\textsuperscript{207}

It would appear, then, that any duty of good faith which attaches to employers acting in their capacity as employers pursuant to the ‘two hats’ doctrine does not provide any additional protection for plan members, since it imposes no obligation not already imposed by the plan itself or by statute law.

\textbf{5.0 \ THE PRINCIPLES OF ‘PENSION LAW’}

Until recently, the Supreme Court of Canada was confident in viewing pension rights issues through common law prisms, although trust and contract paradigms competed for primacy. By the time the Supreme Court heard \textit{Buschau,}\textsuperscript{208} however, the Court saw grave hazards to the sustainability of the system in subjecting pension plans to the common law without modification. In \textit{Buschau} itself, the courts openly articulated its concern that the application of “classic” trust law to pension plans would, by eroding employer autonomy, erode also the foundations which underpin the voluntary system. In order to maintain that system, legal orthodoxy must give way to a set of more ‘balanced’ rules in which efforts to define and enforce employee pension rights are tempered by the reality that in a voluntary system, employers must have the scope to maximize their own pension goals.

\begin{itemize}
  \item \textsuperscript{204} \textit{Ibid.} at para. 322
  \item \textsuperscript{205} \textit{Ibid.} at para. 321
  \item \textsuperscript{206} “I also do not see any basis for the plaintiffs’ position that the intention of [the company] in making an amendment will, on its own, give rise to a breach of the duty of good faith in circumstances where the result of the proposed action is otherwise consistent with the scope and purposes of the Plan”: \textit{ibid.} at para. 325
  \item \textsuperscript{208} [2006] 1 S.C.R. 973
\end{itemize}
This new functional equilibrium has been tentatively labeled ‘pension law’, a hybrid described by Deschamps J. in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* as located “at the intersection of contracts, trust law, and statute law.”

In *Buschau*, Deschamps J., appeals generally to the “principles of pension law” in arriving at the conclusion that the time-honoured Rule in *Saunders v. Vautier*, is inapplicable to pension trusts. She does not, however, tell us what those principles are. In *Nolan v. Kerry*, Lebel J. tells us that “[p]ension law is governed first and foremost by provincial legislation.” With that scant guidance, the lower courts have been left to their own devices in attempting to develop a pension law framework.

How far have the courts advanced in building a pension law framework? It is now incontestable that pension law recognizes concrete employee pension rights. It has not gone far, however, in defining the precise nature and scope of those rights, or how they might be enforced. For a brief period, it appeared that pension rights were protected by the high principles of trust law. Cory J.’s dicta in *Schmidt* suggested that trust law was a legal bulwark standing firm against employer self-interest. The trust agreement and trust principles have now decisively been moved off centre stage. While *Schmidt* has never formally been repudiated, by the time the Supreme Court decided *Buschau* the trust agreement was losing its pre-eminence. In its 2009 decision in *Dinney v Great-West Life Assurance Co. (“Dinney No. 2”)*, the Manitoba Court of Appeal unhesitatingly concluded that “the pension plan document is the paramount or dominant legal document and the trust deed is secondary,” an observation which, despite its inconsistency with *Schmidt*, did not concern the Supreme Court of Canada sufficiently to grant leave to appeal.

While accepting a general contract paradigm, however, courts continue to have serious difficulty in identifying and specifying the pension contract. Courts asked to identify and

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209 *Supra* note 7 at para. 1.
210 *Supra* note 85 at paras. 11, 20, 29.
211 *Supra* note 125 at para. 152. Lebel was dissenting, although not on this point.
212 *Supra* note 207 at para. 55. The court makes no mention of *Schmidt*, although it does cite a post-*Schmidt* article by Eileen Gillese, "Pension Plans and The Law of Trusts" (1996) 75 Can. Bar Rev. 221 at 236, for the proposition that “the pension plan document is the paramount or dominant legal document and the trust deed is secondary”: para. 55. The court wrongly attributes this proposition to Gillese herself; in this article, she was merely reciting a set of arguments made by employers. In her incarnation as Madame Justice Gillese of the Ontario Court of Appeal, however, she does appear to espouse this view: see *Burke v. Hudson’s Bay*, infra note 211 at para. 52.
enforce employee pension rights are invariably faced with a variety of pension plan documents which have shifted and changed over time. These documents have almost never been generated out of identifiable negotiations producing signed agreements, and the application of orthodox techniques for pin-pointing bilateral contract obligations is rarely helpful in these cases. In *Burke v. Hudson’s Bay*, Gillee J.A. attempted to clarify the locus of the employer’s pension obligations to employees; in her view, “[t]he pension plan text is a contract between the employer and the employee”, while the parties to the “fund management agreement” are “the employer and the person charged with the obligation of holding and managing the pension funds”. Presumably this means, although Gillee J. does not spell this out, that courts should no longer be looking to pension funding agreements as a source of employment obligations. While this approach has the merit of clearing away the funding underbrush to focus courts on the core obligations flowing directly between employer and employees, it reflects a considerable oversimplification of the nature and range of documentation surrounding Canadian employment pension plans. Employers construct their plan documentation to suit their own needs, and do not always break down the content of plans and funding agreements into separate documents. In addition, pension plan texts frequently incorporate funding agreements by reference and *vice versa*; in those cases, ordinary principles of contract interpretation demand that the funding agreement be given the same ‘contract’ status as the plan text *per se*. Furthermore, Gillee J.’s approach does not solve the core problem that neither the pension plan nor the trust agreement is generated through any process cognizable by the orthodox law of contracts. A search through the entrails of plan documents of any description for ‘the intentions of the parties’ is more futile even than the proverbial search for a needle in a haystack; in most cases, there is simply no needle there.

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[2008] O.J. No. 1945 at paras. 35-6. In the Supreme Court of Canada, Rothstein J. adopted part of this language (“the pension plan text is a contract between the employer and the employee”), although he does not suggest that obligations to employees cannot be found in the trust agreement: see *Burke v. Hudson’s Bay Co.*, supra note 5 at para. 6. He makes a clear finding, however, that in the context before him, the pension plan is the “dominant document”, rather than the trust agreement: *ibid.* at para. 79;
With the apparent restoration of the pension plan to primacy, courts have returned to the contract paradigm as the key organizing principle for employee pension rights. Lower courts have begun to develop (or discover) principles of contract interpretation peculiar to the pension context. These principles are extremely employer-friendly. In Sutherland v. Hudson's Bay Co., Wilton-Siegel J. opined that in the context of pension plans, there should be what amounts to a presumption that employer flexibility is contemplated:

I think that the Plan documentation should be interpreted on the basis that the governing principles of the Plan were intended to be sufficiently flexible to accommodate substantial change to the pension arrangements from time to time. To this end, I think the Court should infer from the general language in the Plan documentation an intention to provide flexibility to the Plan sponsor to amend or alter the Plan provided the original purposes of the Plan - to provide pension benefits to its employees - are satisfied.

The list of interpretive principles for pension plans found by the Manitoba Court of Appeal in Dinney No. in the case law similarly promotes employer flexibility:

1. the provisions of a pension plan should wherever possible be construed to give reasonable and practical effect to the scheme, mindful that it will operate over a lengthy period of time and against a constantly changing commercial background;

2. the approach to construction should be practical and purposive, not detached and literal;

3. the plan is to be construed in light of the surrounding circumstances when it was created or when an amendment was adopted;

4. if there is a choice of possible constructions, they must be tested against the consequences they produce in practice; and

5. a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses.

In its submissions to the court in this case, Great-West Life had boldly suggested an additional interpretive principle:

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214 See, for example, ibid. at 55: “Pension rights are in the nature of contractual rights. Hence, the use of contractual principles and the rules of interpretation of contractual documents are resorted to for the purpose of determining what rights exist under a pension plan”.

215 Supra note 185.

216 Ibid. at para. 165.

217 Supra note 207 at para. 61.

218 Ibid. at para. 61.
Where the plan gives the employer the authority to interpret the plan provisions, the *contra proferentem* rule does not apply and the court is required to adopt the employer's interpretation if reasonable and even if a member proposes another reasonable interpretation. Where it applies, the *contra proferentem* doctrine is a secondary rule of interpretation, or a "last resort" to be invoked when ordinary interpretation guides have been exhausted and two or more reasonable interpretations remain.

While the court did not explicitly embrace this approach as a principle of construction, neither did it reject it. Indeed, it arguably applied it in the course of holding that the trial judge should not have usurped the discretion of the plan administrator in determining the indexation formula to be applied even after he had ruled that the employer’s chosen formula violated the plan, but should instead should have remitted that question back to the employer to make a new discretionary decision.220

What is largely absent from the judicial exercises in retroactive contract formation I have examined in this chapter is any recognition that the contracts in question are *employment* contracts. There is little evidence in the case law that courts have taken at all seriously the kinds of extrinsic evidence that feature in arbitration decisions constructing bilateral employment commitments. In general, courts have shown little interest in what plaintiff employees were told about their pension benefits at the time they were hired and throughout their employment. Evidence of explicit employer representations about the payment of plan expenses, or the irrevocability of contributions is dismissed as irrelevant if it does not meet conventional common law standards for the formation of contractual obligations. This pattern of ignoring or minimizing the possible legal implications of documents which are critical from an employment law perspective, such as employer booklets and brochures, is evident as early as the *Williamson-McDougall* line of cases discussed in Chapter 2.221 As the *Kerry* case makes clear, it has clearly continued.222

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219 *Ibid.* at para. 41. At the first trial of the matter, reported in *Dinney v. Great West Life Assurance Co.*, [2005] M.J. No. 537, (“Dinney No. 1”), the Queen’s Bench had applied the *contra proferentum* rule against Great West Life in concluding that the clause in the pension plan linking indexing to investment performance should not be interpreted, as the company argued, to mean that indexing need only be provided if the plan could afford it, but actually obliged the company to index to a formula which took into account investment performance: see paras. 34-36.

220 *Dinney No. 2, ibid.* at paras. 100-103.

221 See discussion in Chapter 3 at section 3.5.

222 See also the Supreme Court of Canada’s decision in *Burke, supra* note 5 at para. 34.
In other words, there is little judicial effort to ascertain the *real* pension deal between the company and its employees; the courts have preferred their own imaginary contract constructions, reflecting their own notions of fairness and efficient policy. The search for the ‘real deal’ in the employment relationship is never an uncomplicated exercise. In the pension context, where the employer’s critical need for control is compounded by the complex nature of the ‘pension promise’, and the often convoluted history of plan documentation, the search for the ‘real deal’ is even more challenging. In many of the cases which have come before the courts, the employment law facts are simply not addressed either as part of the evidence or part of the analysis. We cannot therefore predict how different the results might have been if they had been.

There is no doubt, however, that the absence of employment law analysis favours the employer. The recent decisions of the Supreme Court of Canada as well as the lower courts in pension cases fail to give employees any meaningful role in the construction of the pension contract. They have taken an approach to plan interpretation which is quite extraordinarily deferential to the interests of one party, the employer. This extreme deference is all the more remarkable because it comes from a court that recognizes both the reality and the negative consequences of inequality of bargaining power in the employment relationship. In other contexts, the court has clearly acknowledged that the contract of employment is not just an ordinary commercial contract.\(^\text{223}\) It has “unique characteristics”, one of which is that it evolves out of a relationship of inequality, and its terms “rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does.”\(^\text{224}\) The Supreme Court of Canada has explicitly recognized, quoting Otto Kahn-Freund, that “the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.”\(^\text{225}\)


\(^\text{225}\) *Wallace*, *ibid.* at para. 92.
Employees have been clearly recognized as a “vulnerable group in society”, worthy of judicial solicitude and protection. It is likely, however, that the court would see no contradiction between its recognition of the vulnerability of employees and its current pension jurisprudence. It has clearly concluded that it is in the best interests both of employees and of public policy to make sure that employer interests are given paramountcy. In a voluntary system, employers who do not ‘get their own way’ will simply terminate their pension plans, or refuse to establish them in the first place. As the courts see it, tilting the balance towards employers in the employment pension context is the only way to keep the system alive.

The effect of the Buschau series of cases is to close the courthouse door on employees seeking direct aid from the courts in contests with employers over control of pension plans. In effect, the courts have passed this hot potato to the regulators. Unfortunately for employees, regulatory statutes were not designed for this purpose. As we saw in Chapter 4, those statutes recognize no real role for employees or their representatives. The outcomes in Kerry and Buschau No. 4 reflect the futility of seeking to shape and enforce individual employee pension rights through existing regulatory channels when those rights claims challenge employer control. In both these cases, the decisions of the regulators and regulatory tribunals reflect the same degree of deference to employer autonomy as we have seen in the court decisions reviewed in this chapter, and with the same rationale: aggressive regulatory interference with employer decisions will hasten the collapse of the system. In Kerry, the Ontario Financial Services Tribunal laid out a road map for the employer to make retroactive amendments to utilize plan surplus to fund its own contributions, despite its finding that the employer’s original strategy violated trust obligations to existing plan members. In Buschau No.4, the federal Superintendent of Financial Institutions appeared to see her primary mandate, not as protecting existing plan members against the employer’s sustained campaign to expropriate surplus, but simply as keeping the plan alive as a possible source of pension benefits for future plan members. In neither case was there any suggestion that the employer’s past breaches of trust made it unsuitable as a continuing administrator of

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226 Ibid. at para. 93, quoting Dickson C.J. in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038
the plan; indeed, under existing Ontario legislation, there is no provision for removing an administrator who has been found in breach of trust except in the case of insolvency.

‘Pension law’, then, has become a body of law sustaining employer control of employment pension plans. Despite clear recognition that employee pension rights are anchored in contract law, those rights have largely been reduced to the minimum standards guaranteed in regulatory statutes. These minimum standards are important protections for employees, both in terms of their substantive content, and as protections for accrued rights. To the extent that they bind employers to the promises they are unilaterally prepared to make, they are a significant advance on ‘gift theory’. Efforts to supplement those standards with the common law, however, have largely reached a dead end.

6.0 CONCLUSION

The contract paradigm left pension rights vulnerable to self-interested employer conduct, a vulnerability courts initially sought to remedy. The 1995 decision of the Supreme Court of Canada in *Schmidt v. Air Products Canada Ltd*\(^{227}\) stands as the high-water mark of the court’s willingness to place trust fetters on employers who over-reach in conscripting pension plans to their own business interest. To adapt the words of Lebel J., dissenting in the *Kerry* case, the promise of the *Schmidt* case was that “the law of trusts [would] provide [employees] with an added layer of protection” against employer abuse of their powers.\(^{228}\) In their recent pension decisions, however, courts have been retreating from that promise. The Supreme Court of Canada has explicitly acknowledged that pursuit of employer self-interest lies at the core of a voluntary employment pension system. The court’s “purposive” interpretation of pension regulatory statutes is informed by its apprehension that in a voluntary system, any move in the direction of more robust employee rights will be self-destructive; employers who cannot shape employment pension plans as they see fit will decline to participate in a system which depends for its efficacy on their willingness to participate. The result is a common law which, while it continues to pay lip service to contract and trust templates for employee pension rights, has essentially washed its hands of

\(^{227}\) *Supra* note 11.

employee pension rights, leaving the content of those rights to be defined almost entirely by employers, constrained only by regulatory minimum standards.

There may be little to mourn in the loss of the trust law paradigm for employment pension plans. The Schmidt case has been a very mixed blessing for plan members. The case established an arcane distinction between pension funds created by contract and those created by declaration of trust, based on differences between the language of plan documents drafted unilaterally by employers and financial institutions, many years prior to employees joining the plan, and based on plan structures quite different from those in existence at the time the employees litigating the issue raised any challenge. From an employment law perspective, the distinctions upon which the trust cases turn are purely arbitrary, with outcomes dependent on accidents of plan drafting and choice of funding instrument into which employees normally have had no input, and of which they may even have no knowledge. For employees lucky enough to belong to plans constituted as trusts before the tax rules changed in the 1980s, the Schmidt decision has been beneficent. Those employees are a decreasing minority, however, and subsequent applications of trust law to pension plans have been much less beneficent. Arguably, the trust jurisprudence of the Supreme Court of Canada has done little more than provide a road map for employers determined to strip pension plans of surplus; cases like Buschau, Kerry and Burke make it clear that the law places very few material obstacles in their way.

As an alternative to trust principles, courts have evolved a highly attenuated version of contract law that allows employers virtual free reign, subject only to regulatory standards. The case law continues to characterize pension plans as part of the contract of employment. Since pension obligations are not typically generated through any process resembling conventional contract formation, however, courts have attempted to locate the “intention of the parties” simply by construing the documents before them. The wholly circular results are evident in the imagined pension contracts discussed by the Supreme Court of Canada in Schmidt and Buschau, in which judges determine what they think the pension bargain should be, read it back into the pension plan, then extract it again as the ‘intention of the parties’, to which the employees are then said to have consented. In general, the pension model to which employees are said to have consented bears a remarkably close resemblance to the pre-
contract model, in which employers have the power to create, amend and terminate employment pension plans to suit their business needs.

Even where trust law continues to have some salience, courts have evolved a ‘two hats’ doctrine which allows employers to compartmentalize their functions, applying fiduciary obligations to employers in their capacity as plan administrators while leaving them relatively free in their capacity as plan sponsors to pursue their own interests as long as they comply with regulatory statutes, and with collective bargaining norms where applicable. In their capacity as plan sponsors, employers are subject only to a ‘duty of good faith’ so nebulous that no employer has ever been actually found to have violated it.

As we saw in Chapter 3, where there is a collective agreement, courts have sent pension enforcement issues back to grievance arbitrators. As we also saw in the same chapter, grievance arbitrators have been reluctant to accept the task. The recent case law reviewed in this chapter contains some evidence that courts may also be opting out of the civil enforcement of pension plans. In *Buschau*, the courts sent employees to the regulator. While the court did not adopt the same course of action in *Burke*, lower courts have certainly followed *Buschau* in declining jurisdiction in cases where the statute may overlap common law rights. Even in cases where courts are prepared to adjudicate, there is a clear tendency in the decisions to give employers broad scope to exercise the powers they have given themselves in plan documents, as long as their conduct does not encroach on regulatory minimum standards. Despite their formal contractual basis, therefore, employee pension rights are increasingly defined solely by minimum standards legislation. Such an outcome has important implications for the state’s decision, examined in Chapter 4, to take a minimalist approach to the employment pension system, leaving it largely to the market to supply pensions, and largely to private law to regulate pension rights between employers and employees.

In the concluding chapter of this thesis, I will explore some of these implications. Before doing so, however, I will complete my survey of the legal framework within which the

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229 In addition to *Buschau*, see *Lomas v. Rio Algom Limited* (2010), 99 O.R. (3d) 161 (C.A.) at para. 55, in which the court (per Gillese J.A.) took *Buschau* one step further by holding not only that courts have no jurisdiction to order the wind up of a pension plan, but that they also lacks jurisdiction to order an employer to apply to the regulator for a wind up order.
employment pension system functions by looking in Chapter 6 at three remaining issues: the
distribution outcomes of the existing system, alternative benefit and governance structures
within the existing system, and some of the current proposals on the table for employment
pension reform.
CHAPTER 6

PENSION OUTCOMES, AND THE CHANGING RISK CALCULUS WITHIN THE EMPLOYMENT-BASED SYSTEM

1.0 INTRODUCTION

In the preceding chapters, I have examined all three legal regimes that govern employment pension rights in Canada: the common law, labour law and statutory law. I have argued that within all three regimes, law-makers have constructed employee pension rights according to rules that leave decisions which are crucial to the ability of the system to deliver good pensions – decisions about whether there will be a plan for employees, which employees will be governed by that plan, what types of benefits will be offered and at what level, how those benefits will be structured and how long that plan will continue – in the hands of employers, subject only to regulatory controls. The willingness of employers to provide employment pension plans underpins the critical ‘third pillar’ of Canada’s national retirement income system. Rules which allow employers to maximize their business interests, even where doing so clearly clashes with the interests of their employees in retirement income security, are seen as essential to the survival of the system. Such rules are seen as the *quid pro quo* for the willingness of employers to take on the costs and risks of pension provision, an argument understood to be particularly compelling when focused on the dominant pension model in Canada, the single employer defined benefit plan (“DB SEPP”),¹ a model under which employers guarantee a specific pension benefit for life to their employees, and take on the risks and attendant costs associated with such open-ended promises.

The DB SEPP model emerged as the dominant model in the employment pension market place because it served important mid-20th Century business imperatives. As employer

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¹ See Morley Gunderson, *Incentive Effects of Occupational Pension Plans: A Report Prepared for the Ontario Expert Commission on Pensions* (Ontario Expert Commission on Pensions, October 2007) (“*Incentive Effects*”) Table 1 at 45. This table shows that in 2006, over 80% of Canadian pension plan members were in DB plans. [General Note: This is the first of several research reports cited in this chapter that were prepared for the Ontario Expert Commission on Pensions (the “Arthurs Commission”). The research reports are available on CD ROM packaged with the Commission’s report, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (Queen’s Printer for Ontario, 2008) (“*Arthurs Report*”)]
business needs have changed over the latter part of the 20th Century and into the 21st Century, that model has waned in popularity. Employers are less and less willing to take on the risks posed by DB benefits; those who are still willing to maintain pension plans at all are turning to other benefit models and governance structures under which employers take on much less risk on behalf of employees. Many of these models involve joint governance structures. It is ironic that, at the same time as the law is embracing legal rules that foster ever more employer control in the interests of saving the system, employers themselves are voluntarily ceding control where it is necessary to do so to off-load the types of pension guarantees that sustain the legal rules currently structuring the system.

In this chapter, I will look at the employment rationale for why the DB SEPP emerged as the dominant employment pension model. I will explore the employment-based pension models which have emerged parallel to the DB SEPP, including multi-employer (“MEPP”) structures, as well as defined contribution (“DC”) and ‘target’ benefits. I will attempt to identify the pension-related characteristics of the workplaces within which these plan and benefit structures evolved, in order to understand better why they did not displace the SEPP as the dominant model, and why MEPP structures are not likely to become more widespread or to improve pension outcomes for Canadians. I will also explore emerging models such as jointly-sponsored pension plans (“JSPP”), and Quebec’s member-sponsored pension plan (“MSPP”), in which risks formerly borne by employers are explicitly shifted to employees in whole or in part.

I will then attempt, within the confines of available data on pension outcomes, to identify how well the current system is serving Canadians. I will review current research on the factors that determine good and bad pensions under the current Canadian system, and how the benefits and burdens of the system are distributed across the Canadian workforce, with a close look at the specific issue of gender. I will show that the current system produces a pattern of coverage and benefit distribution which favours those workers who were the primary beneficiaries of the organization of work in the old industrial economy. Predictably, the system is now producing an uneven and ever-shrinking patchwork of plan coverage and distribution of benefits that replicates, reinforces and compounds existing inequities in the
labour market. I will argue that in view of current labour market trends, these problems are likely to worsen rather than ameliorate.

Finally, I will examine briefly the direction of current reform proposals in the third round of pension reform on which Canada has now embarked. I will argue that third round reform proposals recognize that the system is on ‘life support’. Accordingly, these proposals have to date been focused not on expanding the system or improving its benefits, but simply on stemming the tide of its decline. New proposed voluntary models continue the trend of relieving employers of pension risk. In general, reform proposals support more autonomy for the ‘parties’ to employment pension plans, without necessarily requiring any meaningful trade-offs in terms of shared control. As we have seen in previous chapters, autonomy for the ‘parties’ has largely meant autonomy for the employer, an autonomy employers have clearly been using to date to reduce the quality and quantity of employee pension benefits. In light of the jurisprudential trend identified in Chapter 5 towards reducing employee pension rights to the ‘barebones’ minimum standards reflected in regulatory statutes, less regulation bodes ill for the quality of benefits in remaining plans. Accordingly, I will argue both in this chapter and in the concluding chapter to follow that these new reform proposals are unlikely to offer solutions to the problem of retirement income security for Canadians.

2.0 THE LOGIC OF THE DB SEPP

As we have seen in Chapter 2, the ability to use employment pension plans as a human resource management tool was a critical motivator for employers in establishing these plans. Such plans were designed to give employers a competitive advantage by virtue of their function in the recruitment, retention and discipline of a more productive workforce. Their effectiveness was significantly enhanced by the fact that their benefits were not ‘portable’. Employers deliberately chose benefit formulae that operated as ‘golden handcuffs’ to reduce labour mobility, ensuring loss of pension value in whole or in part for employees who left their jobs prior to retirement. Benefit design bolstered the incentive structures within internal labour markets and increased employer control over employee tenure, including mandatory retirement. The fact that the boundaries of employment pension plans were coextensive with the boundaries of the workplace was an important design feature enabling employers to achieve their pension goals. Accordingly, it is no mystery why most employment pension
plans evolved as SEPPs in individual workplaces, rather than on a multi-employer or industry-wide basis.

What is more difficult to explain is why the defined benefit became the dominant benefit model. The standard DB model requires the employer to guarantee the payment of a specific benefit, usually for life. Even in simple pay-as-you-go DB models, pension costs are driven primarily by a factor beyond the employer’s control: employee life-spans. In more complex funded models, costs depend on a wide variety of micro- and macro-economic performance factors that are equally unpredictable and largely beyond the employer’s control. In addition to longevity risk, which in funded plans takes the form of risk that individual employees will outlive the lump sum that has accumulated within the plan to fund their benefits, key DB risks include risks associated with global financial markets: investment risk (the risk that plan investments will not produce enough income to meet the liability for the necessary income stream) and interest rate risk (the risk that market interest rates at the time of retirement will not be high enough to purchase an annuity that will pay the necessary pension income). Accordingly, even with the help of skilled actuaries, the cost of defined benefits cannot be predicted with certainty in advance.  

Why did employers voluntarily take on the unpredictable costs associated with these risks? The answer is that the DB model served employer interests much more effectively than its principal competitor, the DC (or “money purchase”) model for critical periods in the evolution of Canadian employment pension plans, both from a financial and an operational perspective. This was true for a number of important reasons. First, in the days before pension statutes required plans to be pre-funded, DB plans did not require any immediate expenditure for active employees. All DB plans offered was a promise to pay a pension on

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3 Richard Ippolito argues that “[t]o people who believe in the efficiency of competition in markets, the pervasive adoption of defined benefit plan varieties signals their superior economic traits over defined contribution plans. If they were not superior, they would not have evolved as the premier form of pension plan”: Richard A. Ippolito, Pensions, Economics and Public Policy (Homewood, Ill: Dow Jones-Irwin, 1986) at 103.
retirement, whereas DC plans required an annual outlay of funds. Second, as we have seen, a promise to pay under a DB plan was usually a highly qualified one; delayed vesting meant that real pension costs were limited only to those employees who stayed with the employer until retirement, whereas contributions to DC plans were difficult or impossible to retrieve when employees left the company early. Third, benefit formulae often interacted with salary formulae to make pension payments cost-neutral; since pensioned-off senior employees could typically be replaced by less highly paid junior employees, pensions could be paid out of salary savings. Fourth, even in funded plans with relatively generous early vesting, actuarial approaches to the calculation of employer liabilities often meant that in contributory plans, the benefits of more junior employees were fully or largely funded by the employee’s own contributions.

These cost considerations were very closely linked to functionality. A DB benefit was more useful for employers than a DC benefit as an employee discipline and retention device. DB plans allowed employers to hold the loss of accrued pension benefits over the heads of employees who might wish to leave prior to reaching retirement age; DC benefits were much more likely to vest early and lacked the critical ‘compounding’ features that made DB benefits so valuable for long-service employees. It is for these same recruitment/retention reasons that employers chose potentially more expensive ‘final average earnings’ formulae over ‘career earnings’-based and flat rate formulae. For pension benefits to be attractive to employees and solve the reputational problems associated with dismissing ‘worn out’ employees, pensions had to be high enough to allow employees to maintain pre-retirement standards of living; for long-service employees, this meant that pensions had to be pegged to income immediately prior to retirement. Combined with credit for past service, DB formulae produced attractive pensions for older employees even in the early stages of plan implementation. DB formulae were also effective instruments for skewing benefits in favour

4 DB plans might also require an annual outlay if they were funded by insured annuity contracts. This was one reason why insured plans became less popular than trustee plans, at least with large employers: see discussion of funding models in Chapter 2 at section 2.3. See also D.C. Bjarnason, Private Pension Plans as Enforceable Contracts (LLM Thesis, University of Manitoba, 1966) [unpublished] for a discussion of the role of insurance contracts.


6 This is the problem that was addressed by the ‘50% rule’ introduced in second generation regulatory statutes: see discussion in Chapter 4 at section 6.02.
of more highly-skilled and highly-paid employees, who were more likely to be earning higher salaries at career end than at career beginning, and enhancing the ability of employers to target pension plans to their most valuable employees. In general, DB formulae greatly enhanced the role of pension benefits as the ‘carrot’ in the ‘carrot and stick’ package composed of pension benefits and mandatory retirement policies.\(^7\)

The logic of the DP SEPP clearly reflects the interests of the employers who created and controlled these plans. The DB SEPP model provided employers with maximum control over employee behaviour while in the workforce, at a minimum overall cost both in the shorter term and in the longer term. However, not all employers operated on a business model in which pensions produced those benefits. Many employers chose not to participate in employment pension plans in any way. Some of them adopted pension models which differed in important respects from the DB SEPP.

### 3.0 MULTI-EMPLOYER PENSION PLANS (“MEPPs”)

#### 3.1 Introduction

While the SEPP model has predominated in the Canadian pension marketplace because of its important contribution to the needs of many Canadian business enterprises, by no means all Canadian pension plans are constructed on this model. About three percent of Canadian plans are organized as MEPPs.\(^9\) This figure considerably understates the importance of MEPPs on the Canadian pension landscape; while MEPPs range considerably in size,\(^10\) they tend to be very large plans, and more than one-third of pension plan members belong to plans classified by pension regulators as MEPPs.\(^11\)

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\(^7\) These issues are discussed generally in Chapter 2. See also generally Sass, *The Promise of Private Pensions*, supra note 5 at 1-55; Leslie Hannah, *Inventing Retirement: The Development of Occupational Pensions in Britain* (Cambridge: Cambridge University Press, 1986) at 105-121.


\(^9\) *Ibid.*: calculations based on data in Appendix A, at lvii.

\(^10\) The smallest registered MEPP in Ontario in 2007, the Joint Retirement Board for Conservative Judaism, had seven active members, while the largest, the Ontario Municipal Employees Retirement System (“OMERS”) had 230,736: *Ibid.*, Appendix B at lviii.

In theory, the MEPP approach to supplying employment pension benefits represents more than a different method of plan administration. It represents a different philosophy about the purpose and function of employment pension plans than the philosophy driving the DB SEPP plan. The MEPP structure implies that individual employers have eschewed the competitive advantage over other employers to be derived from offering employment pensions, ceded a measure of control to other employers, and abandoned at least some of the flexibility over the shape, cost and continuance of benefits that was historically so important in motivating employers to adopt employment plans. In practice, MEPPs come in a variety of different forms, and the extent to which they are functionally different from SEPPs in relation to the issues of employer control and risk distribution relevant to this chapter depends very much on what kind of MEPP is being discussed.

In *Current Issues Concerning Multi-Employer Pension Plans in Ontario*, a research report I prepared in 2007 for Ontario’s Expert Commission on Pensions, I divided MEPPs into three broad sub-categories. MEPPs in the first category, ‘classic’ MEPPs, were characterized by the essential role of trade unions in their governance, the mobility of plan members among a shifting group of employers in the same industry, and the role of broad-based collective bargaining in obtaining the participation of employers and in establishing contribution levels. In the second category were public sector MEPPs, which I defined as MEPPs involving employers substantially or totally publicly funded. The third category I labeled ‘co-operative MEPPS’, a residual private sector category without a basis either in formal multi-employer collective bargaining structures or in statutes. This residual category earned its label because it tended to involve employers who had grouped together for pension purposes largely to achieve administrative efficiencies and economies of scale.

A three-category system remains useful, but requires some reconfiguring for purposes of exploring the issues discussed in this chapter. I have retained the category and the label ‘classic MEPP’ to describe the model which evolved in tandem with multi-employer collective bargaining structures. I have also retained the label ‘public sector MEPP’ but have refined the defining characteristics of this group: in this chapter, that label is restricted to MEPPs established by statute. I have now relabeled the third category ‘atypical MEPPs’; the defining characteristic of these plans is not the ‘co-operative’ basis of their formation, but the
fact that they have no statutory or collective bargaining base, and therefore, unlike the other two categories, have no coherent external legal framework upon which they can draw to determine governance structures, contribution levels or benefits.

In this section, I examine the genesis of these multi-employer models. The discussion below focuses on the law of Ontario, although I have drawn attention to relevant differences in other jurisdictions. I will argue that most successful MEPPs grow from different workplace roots, and respond to different incentives than the SEPPs we have explored to date in this thesis. While the MEPP model has been useful in sustaining employment-based plans in specific sectors of the economy and may continue to do so, the model has not attracted adherents outside those sectors and is not readily portable to the rest of the Canadian economy.

3.2 Classic MEPPs

As we have seen in Chapter 3, many of the American and Canadian unions which took up pensions in the early days of collective bargaining represented workers in large manufacturing enterprises in which the utility of pension plans was already accepted even if no pension plan was already in place. These unions did not challenge the prevailing model of pension provision, the employer-sponsored plan in which employers initiated, designed and administered the plan. In general, they did not seek to dispute employer control over pensions. Important issues of plan design and governance, and the administration of the pension funds now beginning to accumulate, were left in the hands of the employers. Union bargaining strategies were largely confined to efforts to secure pension coverage for the blue-

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collar workers they represented, and to improve benefits and pension security for those employees.¹³

Outside large manufacturing enterprises, unions evolved different approaches to collective bargaining which were ultimately reflected in different pension structures. Unions in the building trades organized on a ‘craft’ or ‘trade’ basis in which workers grouped themselves according to their skills rather than their employers; for example, plumbers, carpenters and ironworkers belonged to different unions. The workers in these trades typically had much more transient working relationships with employers, and relied for income security on their union membership rather than on individual employers. Likewise workers in such industries as garment manufacturing and trucking were often employed by small, unstable employers that regularly went out of business. They earned a livelihood through a series of short term contracts often obtained through union ‘hiring halls’ rather than through the ‘career job’ arrangements more typical of unionized workers in large manufacturing enterprises or the public sector. Employers whose business model thrived on a transient workforce had no business incentive to establish pension plans on their own. In addition, as we have seen, the conventional employment pension plan model delivered meaningful benefits only to long-term employees; workers in industries with transient and short-term work patterns would have failed to qualify for adequate benefits even if their employers could have been persuaded to offer conventional plans. Like those employed in more stable industries, workers in these industries had a strong interest in retirement income security. Craft-based unions and other unions representing employees with transient work patterns responded to their members’ needs by establishing their own pension plans for their members. Unlike the previous generation of union-sponsored pension plans discussed in Chapter 3, however, these plans were not funded by member dues; instead, they were funded by employer contributions established through collective bargaining. This model for pension provision, which first emerged in tandem with the Wagner Act in the U.S., established itself seriously in the 1940s, and has continued to prevail in those industries in which unionization co-exists with transient individual employment relationships.

¹³ See discussion in Chapter 3 at section 6.3.
Classic MEPPs, by definition, involve unionized workplaces. They typically track formal multi-employer collective bargaining structures, most often found in the construction industry where union certification takes place regionally or province-wide on a multi-employer basis within certain industries or trades. Under the basic model, the initiative in establishing the plan comes from the union. Each individual union (or union local) establishes its own separate plan; employers who have collective bargaining relationships with that union become ‘participating employers’, and pay into a common fund, typically on a ‘cents per hour worked’ formula, whenever a union member performs work for that employer. Members thus accumulate pension credits which are fully ‘portable’ (i.e. a member gets full value for her pension credits) as long as the member continues to work in the trade or industry. Under this approach, a skilled worker who remains employed in the same industry and retains membership in the same union throughout a career can accumulate enough credits to earn a ‘full’ pension benefit.

Classic MEPPs operate on a different governance model than conventional SEPPs. Initially many were governed solely by unions, with the union in control of plan design, benefit levels, plan continuance and the investment of funds accumulated to pay benefits. In the late 1940s, the U.S. amended its National Labor Relations Act to outlaw pension plans solely governed by unions; the new rules required union pension plans to be governed by boards of trustees of whom at least 50 percent represented the employer.14 No similar laws mandating employer participation on the governing bodies of MEPPs made their way generally into Canadian law. In fact, the opposite is true; current regulatory laws for MEPPs in Canada focus primarily on employee representation, and Canadian law generally permits the boards of trustees of private sector MEPPs to be composed entirely of member representatives.15

The employer-union joint governance model is the norm in this country as well as in the

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14 These restrictions on union governance of pension plans were an important component of the bill that subsequently became known as the Taft-Hartley Act, and these jointly-governed plans are often known in the US as Taft-Hartley plans: see Sass, supra note 5 at 289, note 29; Jennifer Klein, For All These Rights: Business, Labor and the Shaping of America’s Public-Private Welfare System (Princeton: Princeton University Press, 2003) at 246 ff.; Beth Stevens, “Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector” in Margaret Weir, Anna Shola Orloff & Theda Skocpol, Politics of Social Policy in the United States (Princeton: Princeton University Press, 1988) at 139 ff..

15 See, for example, Pension Benefits Act, R.S.O. 1990, c.P-8, s.8(1)(e). In Money on the Line: Workers’ Capital in Canada. (Toronto: Canadian Centre for Policy Alternatives, 2003) at 16, editors Isla Carmichael and Jack Quarter cite figures indicating that 14 percent of Canadian plan members belong to union-sponsored plans.
U.S., however, due in large part to the influence of U.S.-based building trades unions who imported the model into Canada. Classic MEPPS normally establish their governance structures under formal trust agreements between unions and employer organizations which identify selection mechanisms for trustees, detail the powers and duties of trustees, and establish decision-making mechanisms.

Classic MEPPs also take a different approach than SEPPs to establishing defined benefits. As we have seen, a DB SEPP plan typically provides a defined benefit calculated according to a formula based on average salary and years of service. The classic MEPP benefit is more often based on the total number of hours worked in the industry for participating employers, multiplied by a flat rate. The employer contribution level required to fund this flat rate is negotiated at the collective bargaining table, and fixed for the life of the particular collective agreement. In such a system, funding shortfalls are always a possibility. Accordingly, such plans are normally drafted to permit the trustees to amend the plan to reduce not just future, but also accrued benefits, if the trustees determine that such a step is necessary to keep the plan solvent. Therefore, although regulators often classify these plans as DB plans and require benefit levels to be spelled out in the plan with some precision, they are more properly described as ‘target benefit’ plans, since they aspire to pay a specific defined benefit but do not come with employer-backed guarantees.

3.3 Public Sector (Statutory) MEPPs

Public sector MEPPs established by statute fall into a unique category. As we have seen in Chapter 2, many such plans started out as SEPPs providing benefits to the government’s own employees. As these plans evolved, however, they began to offer benefits to related governmental entities such as Crown agencies. In addition, in many Canadian jurisdictions the government created statutory umbrellas which establish and/or facilitate MEPPs in the broader public sector, including school boards and municipalities, where government has traditionally had a significant, if not exclusive role in funding employee terms and conditions of employment.

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16 In Johanna Weststar & Anil Verma, “What makes for Effective Labor Representation on Pension Boards?” (2007) 32 Lab. Studies J. 383, the authors point out the difficulties in getting data on plan trustees.
17 Flat benefit formulae of this sort are typical of the construction industry: Hubert Frenken, “Pension Plan Potpourri” (1995) (Summer) Perspectives on Labour and Income 24.
The range of different types of statute-based public sector plans is well illustrated by the four largest such plans in Ontario. Two of them, the Ontario Public Service Employees Union (“OPSEU”) Pension Plan\textsuperscript{18}, and the Public Service Pension Plan of Ontario\textsuperscript{19} are the 1994 offspring of Ontario’s venerable plan for civil servants dating back to the early 20\textsuperscript{th} Century.\textsuperscript{20} As discussed in Chapter 2, governments established civil service plans for very much the same ‘efficiency’ reasons as employers in the private sector. The Ontario plans, like their public service counterparts in most other provinces, offer traditional defined benefits, with formulae based on 2 percent of the average of the employee’s best five years’ salary, multiplied by years of service and indexed to inflation. While Ontario’s two plans continue to cater primarily to employees classified as public servants and employed by the government, they are now (in fact if not in law\textsuperscript{21}) multi-employer plans because their governing statutes embrace the employees of certain “scheduled” Crown agencies, boards and commissions, as well as certain other small and miscellaneous entities connected loosely with and funded by government.

One variation on the civil service model is the Ontario Teachers’ Pension Plan (“OTPP”)\textsuperscript{22}, constituted by statute in 1917 as the Teacher’s Superannuation Fund.\textsuperscript{23} This plan covers all teachers in publicly-funded elementary and secondary schools in Ontario. Ontario teachers in the public system are generally employed by individual school boards. Despite the fact that the government is not formally the employer, however, the government has always paid the ‘employer’ portion of the pension contribution on behalf of those plan members

\textsuperscript{18} Ontario Public Service Employees Union Pension Act, 1994, S.O. 1994, c.17, s.143, Schedule.
\textsuperscript{19} Public Service Pension Act, R.S.O. 1990, c.P.48.
\textsuperscript{20} See, for example, An Act respecting Superannuation and Retiring Allowances of Civil Servants, S.O. 1921, c.4.
\textsuperscript{21} The OPSEU plan is deemed by its home statute not to be a MEPP under the PBA: see Ontario Public Service Employees Union Pension Act, 1994, S.O. 1994, c.17, s.143, Schedule, s.4(6). Canadian jurisdictions take a variety of approaches to the regulation of their public sector MEPPs. British Columbia’s Pension Benefits Standards Act, R.S.B.C.1996, c.352 gives the Superintendent the power to exempt a pension plan from the definition of MEPP “if the superintendent considers that an exemption is in the best interest of the plan members”, a power which has been exercised to exempt nine specified pension plans (Pension Benefits Standards Regulation, B.C.Reg.433/93, s.3(11), all of them in the public or broader public sector. Alberta’s general regulatory statute, the Employment Pension Plans Act R.S.A. 2002, c.E-8, has only limited application to its public sector plans: see ss.3-4.
\textsuperscript{22} Teachers’ Pension Act, R.S.O. 1990, c.T.1.
\textsuperscript{23} The Teachers’ and Inspectors’ Superannuation Act, S.O. 1917, c.58. Many provinces, including Ontario, established pensions for teachers even earlier than for civil servants. For some of the background on the teachers’ plan, see Elizabeth J. Shilton & Karen Schucher, Education Labour and Employment Law in Ontario, 2d ed. (Aurora: Canada Law Book, looseleaf) at 13.10.10 (now Faraday, Réaume and Turkington).
employed in public education. Up until recent structural changes which converted OTPP into a jointly-sponsored pension plan (“JSPP”), discussed in section 4.3.1 below, the government maintained direct control through its legislative authority, not only over the structure of the plan but also over contribution and benefit levels, although for many years it held regular pension consultations with the Ontario Teachers’ Federation, the professional umbrella body representing teachers in public education. A small number of employee groups working for other employers in the education system are also permitted to participate in the plan; employers of such groups of employees pay their own employer contributions, but play no role in plan governance. The plan allows teachers to accumulate credit for service throughout the public education system over an entire career, and pays out defined benefits based on accumulated service and best five years salary, similar to the public service plans.

Another variation on the public sector model is reflected in the Ontario Municipal Employees’ Retirement System (“OMERS”). This plan grew out of the many small plans established by municipalities and municipal public services which were early entrants into the employment pension field in the first half of the 20th Century. In order to achieve more efficient administration and economies of scale, OMERS was established by statute in 1962 as an umbrella for these plans. The OMERS model differs from the OTPP model in that the government does not make direct employer contributions, and membership is not compulsory for the municipalities and related public and quasi-public entities who are serviced under the OMERS plan.

3.4 Atypical MEPPs

Atypical MEPPs are a much more heterogeneous group than either classic MEPPs or public sector MEPPs; indeed, their common feature is simply that they do not fall into either of the other two categories. They have no common history; the reasons for their evolution are as various as the plans themselves. Some started life as employer-sponsored plans which evolved into multi-employer structures. Some arose in the non-profit sector, or in connection with religious groups or networks. They have a variety of different benefit structures; many of them are DC plans, a few are classic DB plans, and others have adopted the target benefit

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structure typical of the classic MEPP. Their members often have the longer-term employment relationships with participating employers more typical of SEPP members, in contrast to the nomadic employment relationships of classic MEPP members. Unlike the public sector MEPPs described above, these plans have no statutory basis. Unlike classic MEPPs, they do not mirror formal multi-employer collective bargaining structures, although their employees may be unionized by a common union, and they may participate in some form of joint bargaining on a consensual basis.  

3.5 MEPPs and the Regulatory Framework

The Canadian regulatory framework has had some difficulty from the outset in adapting to MEPP structures and MEPP cultures. The standard first generation regulatory statute was designed for single-employer plans offering defined benefits. While there were certainly MEPPs as well as single-employer plans in the mid-1960s when Ontario first began to regulate occupational pensions, the original Pension Benefits Act ("PBA") did not grant them any visibility, or any exemption from a set of regulatory rules which fit poorly with the two features that distinguish classic MEPPs most visibly from typical SEPPs: their joint governance structures and their unique ‘target benefits’. The 1980 Report of the Royal Commission on the Status of Pensions in Ontario recognized that MEPPS raised distinct policy issues not addressed in the PBA.

Ontario’s creation in the early 1980s of a Pension Benefits Guaranty Fund (“PBGF”) was the catalyst for the province’s first legislative recognition of MEPPs as a separate legal category of pension plans. The PBGF provided a state-guaranteed backstop for DB plans unable to

26 The distinction I make here is between the joint bargaining structure established by law in the construction industry, and consensual joint bargaining of the type which has emerged in the health care industry, and produced such atypical MEPPs as the Nursing Homes and Related Industries Pension Plan, established in 1989 as the result of an arbitrated settlement of the nursing homes collective agreement: see http://www.nursinghomespension.com.

27 In its 2005 Consultation Paper, “The Funding of Jointly Sponsored Defined Benefit Pension Plans”, the Ontario Ministry of Finance noted that “[the PBA] was written with traditional employer-sponsored defined benefit pension plans in mind where the employer or a person who makes contributions on behalf of an employer is the sole sponsor of the plan”: Ontario. Ministry of Finance, The Funding of Jointly-Sponsored Defined Benefit Pension Plans (August, 2005) at 4.

28 See Ontario Committee on Portable Pensions, Second Report (Toronto: Queen’s Printer, Aug. 1961) 62-63 for a discussion of broad-based plans then in existence, which included MEPPs from all three categories.

pay benefits because of the insolvency of their sponsoring employers. Such a guarantee was not deemed appropriate for MEPPs, for reasons that are not entirely clear, although it is likely that the legislature had in mind the “classic” MEPP in which employees are represented by a trade union, contributions are negotiated and the plans explicitly reserve the power to reduce benefits if the plan is underfunded. In order to exempt such plans, however, it was necessary to define them. Accordingly, in 1983 the regulation under the *Pension Benefits Act* was amended to recognize MEPPs for the first time as a separate class of pension plans.

Second generation regulatory statutes took a more comprehensive approach, introducing a statutory definition of MEPPs and a set of special rules governing such plans. In most jurisdictions in Canada, “multi-employer pension plan” is a defined term under the regulatory statutes. Typical is the definition in the *PBA*:\(^{30}\)

For the purposes of this Act, a pension plan is a multi-employer pension plan if it is established and maintained for employees of two or more employers who contribute, or on whose behalf contributions are made, to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is determined by service with one or more of the employers.

On its face, this definition does not address how MEPPs are constituted. It does, however, contemplate three different types of legal instruments for establishing contributions to the pension fund: agreement, statute or municipal by-law. The latter two categories are self-explanatory. The term “agreement”, however, is not self-explanatory, and has been left undefined.

MEPP regulation in typical Canadian jurisdictions differs from SEPP regulation in two key areas. The first of these relates to plan governance. Unlike SEPPs, which are almost invariably governed solely by the sponsoring employer,\(^ {31}\) many MEPPs are required to be

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\(^{30}\)*Pension Benefits Act*, R.S.O. 1990, c.P-8, s.1(2). Subsection (4) goes on to say:

Despite subsection (3), a pension plan is not a multi-employer pension plan for the purposes of this Act,

(a) if all of the employers who contribute, or on whose behalf contributions are made, to the pension fund are affiliates within the meaning of the *Business Corporations Act*; or

(b) if the regulations specify that the pension plan is not a multi-employer pension plan.

\(^{31}\) In Ontario, other options are available but rarely used: see *Pension Benefits Act*, R.S.O. 1990, c.P-8, s.8(1). As noted in Chapter 4, Quebec is exceptional in that it requires all plans to be governed by a pension committee which has member representation.
governed by a board of trustees containing representatives of the plan. Section 8(1)(e) of Ontario’s *Pension Benefits Act* provides as follows:

A pension plan is not eligible for registration unless it is administered by an administrator who is, ...

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants.

The second relates to the critical issue of security for accrued benefits. In Chapter 4, I discussed the evolution of regulatory standards requiring the vesting of pension benefits prior to retirement. While regulatory statutes left employers generally free to amend or terminate pension plans, they protected accrued benefits against encroachment either during the life of the plan or on plan termination, and prohibited plan amendments which would have the effect of reducing their value. However, the act exempts MEPPs “established pursuant to collective agreement or a trust agreement” from the prohibition against reduction of accrued benefits, and establishes a complementary and more flexible funding regime for those plans. Like the regime for DB SEPPs, the special MEPP funding rules require plans to maintain equilibrium between assets and liabilities. Unlike the DB SEPP regime, however, which enforces that equilibrium by requiring employers to make up funding shortfalls, these special rules allow qualifying MEPPs to restore equilibrium by cutting accrued benefits.

Neither set of special rules applies to all plans that fall within the definition of “multi-employer plan”; both apply only to MEPPs “established under a collective agreement or trust

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32 See *Pension Benefits Act*, R.S.O. 1990, c.P-8, s.14:

(1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

(2) Subsection (1) does not apply in respect of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement.

Subsection (3) of s.14 likewise exempts any defined benefit plan where employer contribution obligations have been established by collective bargaining. This exemption is somewhat mysterious, since there is no history in Ontario of target benefits outside of MEPPs.
agreement”. They clearly do not apply to MEPPs established by statute or municipal by-law. It is also arguable that they were not intended to apply to atypical MEPPs. When the issue of the scope of s.8(1)(e) first came before the Pension Commission of Ontario (“PCO”)33 in Canadian Union of Public Employees (CUPE) v. Ontario Hospital Association,34 however, the PCO gave the section very broad application.

The case involved the Hospitals of Ontario Pension Plan (“HOOPP”), one of the largest pension plans in Ontario.35 HOOPP had originally been established in 1960 by the Ontario Hospital Association (“OHA”) as a convenient umbrella for its member employers to provide pension benefits to hospital employees. While the plan was designed and controlled by the OHA, it had traditionally accorded the major unions representing hospital employees some representation on its governing body. In 1988, however, the OHA proposed to amend the plan text to designate itself as sole administrator. The unions involved in the heavily unionized hospital sector challenged this move before the regulator,36 arguing that the statute required the plan to be jointly governed. In support of the argument that s.8(1)(e) applied, they relied on the corporate trust agreement between the OHA and the financial institutions which had been appointed as custodians of the fund. The Superintendent of Financial Services rejected the unions’ position, taking the view that s. 8(1)(e) contemplated a trust agreement in the classic MEPP sense – an agreement between employers and unions establishing a board of trustees as the governing body of the plan and setting out rights and responsibilities between the joint parties to the plan – not a corporate trust agreement with respect to fund management such as HOOPP had entered into with the custodians of the

33 The PCO was the predecessor of the Financial Services Tribunal as adjudicator under the PBA.
35 HOOPP is often classified as a public sector plan because most of the funding for its member employers comes from government. For purposes of this discussion, I have reserved the public sector classification for plans established by statute, since they raise unique issues with respect to structure and governance. HOOPP, which voluntarily brings together a group (and an increasingly disparate group) of employers without benefit of a common collective bargaining structure or statutory framework, fits more logically into the atypical MEPP classification. HOOPP has recently been renamed the Healthcare of Ontario Pension Plan to reflect the fact that it now has many participating employers who are not hospitals.
36 The unions involved were CUPE, OPSEU, SEIU and ONA. Together, they represented 60 percent of HOOPP members.
pension fund. In addition, the Superintendent held that s.8(1)(e) did not mandate member representation on the board of trustees even for MEPPs established by trust or collective agreement, but simply sanctioned joint governance as one option among several.

When the unions appealed the Superintendent’s decision, the PCO rejected the Superintendent’s approach. Although the plan had originally been initiated by resolution of the OHA board of directors, the PCO found that it was not truly “established” until the trust agreement was completed:

Plans of this sort cannot be operative, and thereby provide pensions, unless and until a funding mechanism is in place. It is the Trust Agreement which creates the fund, sets up the scheme for administration and investment of those funds and thereby created the ability to provide pensions.

Since a trust agreement was necessary to make the plan functional, HOOPP was “established” according to a trust agreement and fell within the scope of s.8(1)(e).

In addition, the PCO found joint governance mandatory for MEPPs falling within the scope of s.8(1)(e). While it was open merely on the grammar of s.8 to find trustee governance optional, as the Superintendent had done, the PCO took what it saw as a holistic and purposive approach, guided by its perception that a role for members in plan governance is appropriate for MEPPs:

MEPPs are different from other private pension plans. There are risks to the employee members of MEPPs that do not exist for members of other types of plans. The most obvious is that contained in s.86(4)...which states that their pension benefits are not guaranteed by the Pension Benefits Guarantee Fund. In view of that, it is understandable that the creators of the Act would have viewed the role of the administrator of a MEPP differently and mandated employee participation through clause 8(1)(e).

...[R]equiring employee involvement in the administration of MEPPs such plans [sic] would meet other objectives of the Act which are especially relevant for MEPPs such as ensuring adequate disclosure of information to members.

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37 The trust agreement provided for corporate trustees who would hold and manage the fund, “rather than a Board of Trustees charged with the responsibility of managing the pension plan”: HOOPP, supra note 34 at 6, quoting the Superintendent’s Notice of Proposal.

38 Ibid. at 6.

39 Ibid. at 10.

40 Ibid. at 12.
Accordingly, the PCO held that HOOPP was now required to give plan members at least equal status on its governing body. The decision contained no discussion of the issue raised by the Superintendent – the difference in kind between a corporate trust agreement and a classic MEPP trust agreements.

The possibility that legal rules “intended for typical, trade-union MEPPs” might result in hardship for members of other types of MEPPs which do not provide the same level of representative protection for employees was acknowledged in a 1989 Ontario government report. Financial Service Tribunal members also commented critically, in a case involving an atypical MEPP, on the failure of the Pension Benefits Act to recognize and accommodate the diversity of MEPP structures:

The Act and Regulations thereunder do not provide a systematic code for understanding the treatment of multi-employer plans. Rather the legislation contains a series of apparently unconnected provisions that seem to have been intended to address only limited concerns. Multi-employer plans in the collectively bargained arena have different concerns than those in the present case. It would be preferable that the legislation be amended to provide a more systematic consideration of these plans and to consider the different contexts in which these plans may arise.

No legislative amendments followed, however, and the Ontario statute still fails to distinguish between MEPPs in which there is substantial trade union involvement and atypical MEPPs which are effectively employer-sponsored.

Other jurisdictions have been more scrupulous than Ontario in recognizing that classic MEPPs involving trade unions may warrant a different regulatory approach than other MEPPs. Some jurisdictions use different terminology for unionized than for non-unionized MEPPs, and apply different rules with respect to funding, governance and permissible benefit structures to these plans. For example, Alberta’s Employment Pension Plans Act R.S.A. 2002, c.E-8 recognizes two distinct types of multi-employer pension plans: Specified Multi-Employer Pension Plans (“SMEPPS”) and Multi-Unit Pension Plans (“MUPPs”). While the legislation does not provide detailed definitions for these two types of plans, administrative policy statements issued by the Alberta Minister of Finance make it clear that

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the SMEPPs category is reserved for plans where contributions have been collectively bargained, leaving the MUPP category for plans which are not subject to collective bargaining. SMEPPs must be governed by a board of trustees with at least 50 percent member representation, whereas there is no requirement for member representation on the governing body of a MUPP. The right to reduce accrued benefits is restricted to SMEPPs.

3.6 Evaluating MEPPs

MEPPs have operated with varying degrees of success in the Canadian employment pension marketplace. The public sector MEPP has to date been one of the most successful of all Canadian employment pension models, maintaining much higher levels of coverage than SEPPs, and delivering solid defined benefits to both women and men employees within the sector. In conception and function, the public sector MEPP differs very substantially from the other MEPPs. Historically, public sector MEPPs were neither union-generated nor closely linked to collective bargaining, and were typically controlled by legislative authority even where the government was not the direct employer. They were designed to serve the same human resource purposes as DB SEPPs, operating as recruitment, retention and control devices. Accordingly, they have historically offered defined benefits very similar to (if often more ample than) than private sector DB SEPPs. The employers who use these plans are able to maintain competitive advantage while operating on a MEPP basis because they do not compete against each other; instead they compete against the private sector for their workforce, a competition in which the first-class pension offered is undoubtedly an important factor. In terms of their ability to offer good benefits to a more diverse workforce, these plans do have one affinity with classic MEPPs; they promote portability within specific occupational sectors where plan members can accumulate pension benefits from different employers within the same plan. While employees like municipal workers and teachers do not change employers as frequently as construction workers or truckers, they have

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46See Shilton, supra note 8 at xxxi-xxxiii.
47See discussion of pension plan outcomes at section 5, below.
qualifications and develop skills which are portable within the sectors in which they work. By definition, however, the public sector MEPP model with its statutory base and state-backed funding is not portable to other parts of the economy. Its success tells us nothing useful about the general efficacy of the MEPP model.

The classic MEPP model appears to have held its own to date within the Canadian economy and the regulatory/legal structure. Like the public sector MEPP, however, it does not offer a blueprint for growth, although for somewhat different reasons. The ability of the classic MEPP to deliver an acceptable level of secure pension benefits is closely related to the conditions of economic organization within particular industries, conditions which coincided with the growth of craft forms of unionism, and to the bargaining strength of the unions which represent employees in these sectors. The willingness of those unions to take on governance roles in the MEPPs which grew up in tandem with the unique collective bargaining structures in those industries is critical to the protection of member interests. The meaningful involvement of unions as equal partners in plan governance justifies the flexibility afforded to these plans to balance contribution levels with levels of accrued benefits. Additionally, these plans are able to deliver good benefits because of the nature of the work force within the industries in which the model took root. The fact that employees make their ‘careers’ in the same industries despite job mobility means that MEPP structures provide them with genuine protection from the losses of pension value that accompany job transitions in other industries. While labour market trends suggest that the jobs of the future will be characterized by the short service and frequent turnover that characterized such industries as construction within which classic MEPPs developed, there are no similar craft-type bonds within the new itinerant workforce tying workers to particular kinds of jobs within particular industries. Equally important, there is little evidence of the emergence of strong unionism in the modern service industry; indeed, very evident declines in private sector union density over the last three decades suggest that a new era of labour-sponsored MEPPs is unlikely to evolve.

48 See discussion at section 5.4, below.
49 See Judy Fudge & Eric Tucker, Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948 (Don Mills: Oxford University Press, 2001) at 312-315; Anil Verma & Thomas A. Kochan,
If there is room for growth in the MEPP sector, it is likely to be among atypical MEPPs. There has been very little focused study of atypical MEPP models in Canada. I would argue, however, that based on the evidence available, the atypical MEPP model is not one public policy should seek to foster. The frailties of the atypical model for protecting member benefits are clearly illustrated in a recent situation to come before the regulator in one of Ontario’s most spectacular recent plan failures, a case involving the Pension Plan for the Participating Cooperatives of Ontario (the “Gay Lea” case). The Gay Lea case is the bitter fruit of the PCO’s decision in the HOOPP case that atypical MEPPs also fall within the scope of MEPPs “established pursuant to a collective agreement or a trust agreement” for purposes of the requirement under s.8(1)(e) that they be governed by a representative board of trustees. In reaching its HOOPP decision, the PCO took a “purposive” approach, focusing on the benefits to members of participatory governance. However, this purposive reasoning failed to take into account two important features of the statutory scheme. The first is that the statute mandates no criteria or procedures for the selection of member representatives, with the result that individual plans make their own rules about how members will be represented. The second, even more troublesome in light of the first, is that a finding that an atypical plan is “established pursuant to a collective agreement or a trust agreement”, while it ensures member representation on the plan’s governing body, at the same time has the consequence of stripping plan members of the important statutory protection provided under s.14(1) of the PBA: protection against plan amendments which reduce the value of accrued benefits.

Both these problems came together in the Gay Lea case. The case involved a plan that had originated as a SEPP sponsored by the United Cooperatives of Ontario for its own employees, offering optional participation to employees of other agricultural co-ops. When the original sponsor went bankrupt in 1994, the plan converted to a MEPP under a trust agreement. While some of the employee members were unionized, there was no union involvement in the drafting of the plan’s trust agreement. Nor was the union involved in the

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Gay Lea Foods Co-operative Limited et al v. Superintendent of Financial Services, FST Decision No. P 0275-2006-2 (April 11, 2008); P 0275-2006-3 (April 2, 2009); P 0275-2006-4 (April 9, 2010); P 0275-2006-5 (May 13, 2010); P 0275-2006-6 (July 29, 2010). An appeal to the Divisional Court from the last of these decisions was filed on August 30, 2010. In the interests of disclosure, I point out that I chaired the FST panel that issued these decisions. The facts reported here are set out in the decisions.
trustee selection process; trustees were appointed by the participating co-ops, and consisted primarily of members of senior management, who were also members of the plan. The plan experienced chronic and serious funding difficulties, which the trustees were unable to resolve under the mechanisms set out in the trust agreement. On final wind up in 2003, the plan was under-funded by more than 50 percent.

It was not until the plan’s funding difficulties came to light that the Superintendent of Financial Services challenged the composition of the plan’s board of trustees on the basis that the members were not properly represented. At the same time, the Superintendent also challenged the decision of the trustees to reduce accrued benefits, a course of action which, the Superintendent acknowledged, was lawful for MEPPs under the statute, but which was arguably prohibited by the Gay Lea plan text. The Superintendent issued a Notice of Proposal refusing to register amendments cutting benefits and ordering the participating employers to contribute to fund the shortfall. As the result of a settlement facilitated by the intervention of the Ontario government, which made a substantial contribution to the deficit, the novel legal issues at the core of the case were never adjudicated. Despite government intervention, however, there was no happy ending for plan members. Several of the participating co-ops had gone into bankruptcy and were unable to contribute to the settlement. Most members saw benefit cuts of at least one-third. Some retired members saw their pensions slashed by as much as 80 percent, while some active members saw the accrued value of their deferred benefits reduced even more drastically.  

The Gay Lea case is a stark exemplar of some of the difficulties which may arise from applying Ontario’s regulatory template for MEPPs to atypical plans. The special statutory rules applicable to MEPPs deny MEPP members valuable statutory protection for their accrued benefits. While the statute provides as a quid pro quo an ‘equal’ role in plan governance, in the absence of the union representation and collective bargaining that role is unlikely to be meaningful in protecting member interests.  

52 Union involvement is not, of course, complete insurance for MEPPs against running into regulatory difficulties. Ontario’s only regulatory prosecution of MEPP trustees to date involves the Canadian Commercial Workers Industry Pension Plan (“CCWIPP”), established in 1979, and the largest atypical MEPP in Canada, with over 290,000 active, deferred and retired members and some 328 participating employers (information
multi-employer collective bargaining structures or statutory frameworks may have difficulty creating stable and enforceable working arrangements for determining contribution and benefits levels, and for maintaining equilibrium between them. Such plans must establish a framework for regulating relations among participating employers on such important issues as contribution and benefit levels and plan governance without the assistance of the structures and enforcement mechanisms provided by collective bargaining statutes. *Ad hoc* agreements of this type may leave important questions unanswered and important problems unresolved, with no effective enforcement mechanisms if some or all participating employers refuse to fund the plan at levels sufficient to pay promised benefits.

4.0 DEVELOPING TRENDS FOR EMPLOYMENT-BASED PENSIONS

4.1 The Changing Calculus of Risk Distribution

As we have seen, both conventional SEPP and MEPP model have had attractions for employers prepared to undertake pension plans. In recent years, however, there has been a shift away from both these options in favour of entirely different models of plan ‘sponsorship’, accompanied by different models of plan governance within which plan members take on both the rights and responsibilities of co-governance of plans. There has likewise been a shift away from defined benefits. DC plans are taking over an increasing share of the pension market; while the pace of conversion of DB to DC plans is not as dramatic in Canada as it has been in the U.S. and the U.K.,\(^5\) there is nevertheless a clear trend towards the DC model. In 1991, over 91 percent of Canadian pension plan members

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belonged to DB plans. By 2006, that percentage was down to 81 percent, a figure that fell to 73 percent when public sector plans were disaggregated.  

In addition, a wider variety of benefit formulae are now evolving. DB and DC concepts are being merged and mingled in a variety of ways, and forms of ‘target benefits’, once the exclusive province of classic MEPPs, are now making their way into other types of plans.

In many cases, these new models for both benefit formulae and plan governance have been adopted voluntarily by employers who formerly embraced the conventional DB SEPP model in which employers controlled all aspects of plan governance and used the mechanics of defined benefits to achieve important human resource management objectives. This shift reflects significant changes in the employer cost-benefit calculus around pensions. There are a wide variety of reasons for this shifting calculus. The regulatory imposition of plan funding requirements, and the incremental tightening of those requirements over the years have radically increased the cost of providing DB pensions. Employee longevity, combined with the trend towards earlier retirement, has had a very significant impact on pension costs; the amount an employer must contribute to a pension plan over the working life of an employee to provide a pension which will last for twenty or thirty years is exponentially more than the amount required to fund that same pension for a five year lifespan. In addition, spousal benefits have increased the period over which pensions must be paid. The introduction of the “50 percent rule” means that employers can no longer count on short-service employees to fund their own benefits. At the same time, the changes in the organization of work to be discussed in section 5.4, below, have made conventional DB plans much less desirable for employers. Fewer and fewer employers rely on a business model which depends on a long-term, stable and highly trained workforce; an employer who does not place significant value

54 Philippe Gougeon, “Shifting Pensions” (2009) 10:5 Perspectives on Labour and Income 16 at 18 (my calculations based on Table 1).
55 See Arthurs Report, supra note 1 at 179-183; see also Peter Albrecht, Joachim Coche, Raimond Maurer & Ralph Rogalla, “Understanding and Allocating Risks in a Hybrid Pension Plan” in Blitzstein, Mitchell & Utkus, Restructuring Retirement Risks, supra note 2 at 204.
56 See discussion in Chapter 4 at section 6.2. The extent to which regulation generally has contributed to decisions made by employers about employment pension provision is controversial: see discussion in Chapter 7 at section 3.2.
57 The elimination of mandatory retirement may also make pension plans less useful, although this is controversial; some economists argue that the elimination of mandatory retirement gives pension plans an even more important role to play in human resource policy, in establishing incentives for timely retirement: see Morley Gunderson, Incentive Effects, supra note 1 at 26-28.
on a trained and stable workforce is much less willing to pay the burgeoning costs of providing conventional DB pensions.\textsuperscript{58}

Other cost pressures for employers come not just from the overall increased costs of DB plans, but also from the unpredictability of those costs. The volatility of capital markets in recent years has caused the size of pension funds to fluctuate dramatically based on factors unrelated either to firm profitability, employee productivity or employee demographics. The last decade in particular has battered pension funds. Current Canadian figures at the federal level suggest that as many as 83 percent of DB plans are under-funded, with an average funding level of 90 percent; fifteen percent of plans are funded at less than 80 percent.\textsuperscript{59} Under current regulatory regimes, funding shortfalls in DB plans have to be made up by employer “special contributions” over relatively short periods of time.\textsuperscript{60} Employers are required to find additional capital to contribute to pension funds in deficit even if it is reasonably predictable that investment markets will turn in the fund’s favour in future.

Regulatory rules which require employers to make up funding deficiencies in on-going plans, while at the same time denying them access to plan surpluses, are one of the major legal irritants to employers who fund DB plans. They complain bitterly about this phenomenon, which they have labeled ‘asymmetry’. As we have seen in Chapter 5, ownership of pension surplus depends on the language of a plan’s founding documents. Even under plans in which employers have a clear right to surplus, however, regulatory statutes do not normally facilitate withdrawal of surplus from on-going plans, and impose procedural requirements that may have the effect of forcing employers to share surplus with employees even if those

\textsuperscript{58}It is also argued that employee preferences have played a role, in that changing labour markets have made conventional DB plans less valuable and hence less attractive to employees. In *Pension Plans and Employee Performance: Evidence, Analysis and Policy* (Chicago: University of Chicago Press, 1997), Richard Ippolito argues that different types of employees respond to different types of pension incentives, creating a “sorting effect” which firms can use to their advantage in designing pension plans to match worker characteristics to particular types of jobs. See also S.R. Aaronson & J.L. Coronado, *Are Firms or Workers Behind the Shift Away from DB Pension Plans?* FEDS Paper No. 2005-17, http://www.federalreserve.gov/Pubs/feds/2005/200517/200517pap.pdf, last accessed October 6, 2010.


\textsuperscript{60}In most Canadian jurisdictions, second generation regulatory statutes gave employers between five and fifteen years to amortize funding deficiencies in their plans. Many jurisdictions provided temporary funding relief for plans which ran into funding difficulties as a result of the recessions in the early 2000s and again later in the decade.
employees have no plausible legal claim to ownership under the common law. Employers argue that such ‘asymmetrical’ legal rules create disincentives that discourage the formation of new plans, encourage employers to cut corners in plan funding, and encourage plan termination in order to trigger surplus distribution.61

As a result of these changes in the cost-benefit calculus, employers now favour pension structures that are less costly, and above all, less risky, turning to benefit formulae, and sponsorship/governance models under which costs and risks are minimized. Neither the costs nor the risks go away, however. Employers who adopt alternatives to conventional DB SEPPs simply shift costs and risks to employees; as employers take on less risk, employees take on more.62 In the rest of this section, I explore in more detail some of the important alternative models both for benefit formulae and for plan sponsorship and governance, in order to better understand the impact of this risk-shifting on employees.

4.2 Risk Distribution and Benefit Formulae

Historically, the most important alternative to the DB plan has been the DC plan. How does the DC model work? While there is considerable operational variation within DC plans, their common and defining characteristic is that they require employers to make fixed periodic contributions on behalf of active employees, rather than paying guaranteed periodic pensions to retired employees. In typical DC plans, both employers and employees contribute a fixed amount (usually a percentage of each individual employee’s income) into the pension fund. How that lump sum is treated once it is contributed to the fund depends on the particular

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mechanics of the plan. While some DC plans pool funds for investment purposes and allocate portions of the fund to individuals simply as a book-keeping transaction, plans which operate on the basis of individual investment accounts are commonplace. Regardless of the investment model, DC plans produce lump sums which are allocated to individual members, and are then available on retirement for conversion into a retirement income stream.

From the perspective of the employer, the DC model has one very clear advantage over the DB model; it converts the cost of pensions from a variable and often unpredictable cost to a fixed and predictable annual operating expense. From the employee’s perspective, however, the DC model has a number of serious downsides. The most obvious of these is that a DC plan does not provide a predictable and reliable pension. The size of the lump sum available on retirement will vary depending on a number of factors, which include the annual contribution rate, the number of years during which that contribution has been made, and the investment history during the working life of the plan member. The cost to the employee of purchasing a reliable stream of income in the form of an annuity upon retirement cannot be predicted in advance. That cost can vary dramatically depending on interest rates in capital markets at the time of retirement. Employees who do not convert their lump sums to annuities remain exposed to capital market fluctuations during retirement, an exposure that compounds longevity risk – the risk that income will run out before death – with on-going investment risk. While there is no doubt that DB plans also pose real risks for employees, the DC plan is structurally less capable of delivering the predictable and reliable retirement income stream that is so important to employees.

In addition to producing pensions which are less predictable for employees, DC plans also produce pensions which are less adequate, as measured by their ability to replace pre-retirement income. In a Statistics Canada study examining the impact of different pension

63 In typical insurance markets, annuity prices also vary with sex. Regulatory statutes in most Canadian jurisdictions provide protection against sex-based annuity rates within registered pension plans for current years of service. There is, however, no general prohibition in Canadian law against annuity rates based on sex-differentiated life expectancy tables. Accordingly, while an annuity purchased inside the shelter of a DC plan is likely to have a gender neutral cost, a similar annuity purchased outside the shelter of a DC plan (for example, from a group or individual RRSP account) will cost women more than men for the same income stream because of their longer life expectancy. See Samuel A. Rea Jr., “The Market Response to the Elimination of Sex-based Annuities” (1987), 54 Southern Economic Journal 55.

64 See Gunderson, Incentive Effects, supra note 1 at 11.
formulae on pension incomes, economist Hubert Frenken noted that DC plans produce smaller pensions and more unequal benefits:65

Contributions are usually a percentage of earnings, so only high income members with significant combined employer and personal contributions earn generous pension credits. Many long-term members would likely have had low contributions during their early years, resulting in modest pension savings during those years.

Additional factors which explain why DC pensions are typically smaller than DB pensions include the high fee structure often associated with individual investment accounts, the investing errors typically and chronically made by ‘retail’ (i.e. individual) investors, and the difficulty in achieving appropriate diversification in smaller pools of capital.66 There is also some evidence that employers have exploited the shift from DB to DC not only to stabilize their costs, but also to reduce them overall.67 It is not entirely clear whether low contribution rates inevitably accompany the model; at this stage in what many regard as an inevitable transition from DB to DC plans, DC plans are still more common in the small and medium workplaces typically associated with lower wages, than they are in larger higher-wage workplaces.68

As noted above, the move to DC benefits does not eliminate risk – it merely transfers risk from employers to employees. Not surprisingly, DC benefits have been considerably less popular with employees and their unions than they have been with employers. Attempts have been made to develop benefit types which will ameliorate some of the disadvantages of DB benefits from an employer perspective, but improve employee pension security and reliability. The ‘target benefit’ historically employed by the classic MEPP is one such model.

65 Hubert Frenken, Potpourri, supra note 17 at 21.
67 For example, the maximum contribution of the employer to the DC portion of the plan dealt with in Nolan v. Kerry (Canada) Ltd. 2009 SCC 39 was 3 percent: see discussion at section 3.3. Employers currently contribute 4.95 percent to the Canada Pension Plan. See discussion of these issues in Bob Baldwin, “The Shift from DB to DC Coverage: A Reflection on the Issues” (2008) 34 Canadian Public Policy 29.
68 Frenken, Potpourri, supra note 17 at 23. See also Gougeon, supra note 54 at 19.
Despite the general regulatory thrust to protect accrued benefits, pension statutes in most Canadian jurisdictions\(^{69}\) permit target benefit plans, imposing a variety of additional rules on these plans in an effort to safeguard member interests. Some jurisdictions restrict target benefits to plans in which trade unions are involved in the establishment and governance of the plan;\(^{70}\) others limit them to multi-employer plans with union involvement.\(^{71}\) All jurisdictions require target benefit plans to communicate clearly with plan members to ensure that they are aware that their defined benefit is not guaranteed either before or after retirement. In Ontario, target benefit plans are also required to inform members that they are not covered by the Pension Benefits Guarantee Fund, which backstops minimum benefit levels when a plan become insolvent.\(^{72}\)

Another alternative benefit formula gaining popularity in Canada is the hybrid benefit.\(^{73}\) Hybrid benefit plans offer a combination of conventional DB and DC benefits. While the variations possible for combining these two approaches are limited only by the tax laws, a common option is a two-tiered approach in which there is a guaranteed DB base pension, which can be expanded either by supplementary individual DC accounts, or on a more collective basis by reference to the investment performance of the general pension fund. Hybrid benefits may also be offered on a ‘best of’ basis, in which employees are guaranteed a DB benefit, but may get a larger pension if their DC account has had a better than expected investment performance.

The common thread in all of these alternatives to the DB benefit, of course, is the fact that they transfer to employees risks formerly borne by the employer. The impact of the shift from DB to DC on pension inequality is not yet clear. As we have seen, DB plans have been able to deliver adequate and reliable benefits to some workers at least in part because the benefits of elite workers have been subsidized by the contributions of other, more vulnerable employees.\(^{74}\) These vulnerable workers are unlikely to do better in DC plans, however, since

\(^{69}\) Quebec is currently an exception in Canada.

\(^{70}\) See, for example, PBA s.14(1), (3).

\(^{71}\) Alberta is an example of this approach: see notes 43 and 44, above.

\(^{72}\) R.R.O. 1990, Reg. 909, s.40(1)(t).

\(^{73}\) For an explanation of hybrid benefits, see Albrecht et al., ibid at note 55.

\(^{74}\) See discussion in Chapter 3 at section 6.3.2. See also discussion at section 5.3, infra.
benefits in these plans are even more clearly tied to career earnings and time in the paid workforce than they are in DB plans.\textsuperscript{75}

\section*{4.3 Risk Distribution and Governance Structures}

\subsection*{4.3.1 Jointly-Sponsored Pension Plans}

In 2005 Ontario amended its \textit{Pension Benefits Act} to recognize a new pension model with a new labeled: jointly-sponsored pension plan ("JSPP"). While the regulatory framework for JSSPs is a complex one, the essence of the model is fairly simple. Plan members share the responsibility of funding the plan, and the risks of funding shortfalls. In return, they are guaranteed an equal role with the employer in making decisions about the terms of the plan and in plan administration. The JSPP model is thus a radical departure from the standard employer-sponsored and controlled DB SEPP.

The new regulatory framework requires that to qualify as a JSPP, a plan must meet the following conditions.\textsuperscript{76} First, it must be a defined benefit plan, in which pension benefits are directly related to the member’s pensionable earnings. Second, it must be “contributory”, i.e. the members must make contributions as well as the employers. Third, employer contributions must be at least equal to member contributions. Fifth, members as well as employers must be required to contribute to going concern unfunded liabilities and solvency deficiencies. And finally, the plan must not permit reduction of benefits except on wind-up.\textsuperscript{77}

The \textit{PBA} lays out with some care its requirements for joint governance of JSPPs. Employers and plan members must be jointly responsible for making decisions about the terms of the plan, including amendments to the plan. Likewise, employers and plan members must be jointly responsible for appointing the plan administrator, or for appointing members of the plan’s governing body. While the statute does not prescribe decision-making mechanisms, it

\textsuperscript{75} Mary Condon has examined the gendered nature of defined contribution plans in “Gendered risks of retirement: The legal governance of defined contribution pensions in Canada” and “The Feminisation of Pensions? Gender, Political Economy and Defined Contribution Plans”, \textit{supra} note 66. She concludes that these plans, which are based on liberal savings and investment models, are unlikely to benefit women.

\textsuperscript{76} \textit{PBA}, s.1(2) and Reg. 909, s.3.1. In addition, plans may be “prescribed” as JSPPs (O.Reg. 909, s.3.2); under this power, OMERS has been prescribed as a JSPP (O.Reg.909, s.3.2), although it is likely that this plan would have qualified even in the absence of prescription.

\textsuperscript{77} The JSPP model differs in a variety of ways from the classic MEPP, in particular in the requirement that it be contributory, and that its defined benefits be based on earnings (either career or final/best average earnings), rather than on a flat-rate.
does require that the plan set out its method of decision-making on all matters regarding the terms and conditions of the pension plan and any amendments to the pension plan, and on the appointment of the administrator or members of the governing body. The statutory conditions therefore require “joint responsibility” with respect to a number of important issues. They fall short of a requirement for equal governance on all issues; for example the list of issues that must be subject to joint decision-making does not include pension fund investment. While there is no statutory requirement that members of JSPPs be represented by trade unions, most JSPP members are unionized and the constituting documents of Ontario’s current crop of JSPPs allocate the joint governance role to representative organizations rather than directly to plan members.78

It is no coincidence that the new regulatory model for the JSPP carefully tracks important changes which have taken place within Ontario’s major public sector MEPPs over the last two decades. As we have seen in Chapter 3, Ontario, along with other governments in Canada, had historically used its legislative power to resist the efforts of public sector unions to bargain over the design of pension benefits or to take on a broader role in pension plan governance. In the late 1980s, the government did a complete about-face, and began negotiating partnership agreements with public sector unions, ceding its unilateral legislative control and converting major public sector pension plans from employer-sponsored plans to jointly-sponsored plans in which public sector unions are represented equally on the governing bodies of pension plans and play a joint role in making contribution and benefit decisions.

Why did this change come about? Some clues can be found in the 1987 report of a government Task Force on the Investment of Public Sector Pension Funds.79 As its title suggests, the major focus of the task force mandate was on pension funds, including questions of investment policy and ownership of then-burgeoning surpluses. In the course of carrying out its mandate, however, the Task Force recognized that issues in relation to pension funds were inextricably linked with what it described as the overall economic logic

78 See, for example, Teachers’ Pension Act, R.S.O. 1990, Chapter T.1; Ontario Public Service Employees’ Union Pension Act, 1994, S.O. 1994, Chapter 17, section 143, Schedule.
of the “pension deal”.

It took the view that public sector pension “deals” should be clarified and changed “so that the taxpayers’ interest is better represented”. A major theme of the Task Force’s recommendations was the argument that it was unrealistic for government to provide defined benefit pensions to employees without linking benefits to overall compensation practices. The Task Force expressed the view that if employees and their unions wished to play a role in plan decision-making, they should be willing to accept a share of the risks involved in the defined benefit approach. It recommended that the government should establish direct links between pension and salary negotiations, and engage its employees, through their representative organizations, in discussions about the nature of current “pension deals”.

Soon after the Task Force came out with its recommendations, the government began to embrace a more collaborative pension model, driven as much by crudely utilitarian considerations of public finance as by the ‘political theory’-based arguments of the Task Force report. The trigger for the government’s approach to its first target, OTPP, was a huge unfunded liability which had emerged in the plan in the later 1980s. This unfunded liability, along with those in other government-sponsored public sector plans, was treated as part of the public debt by bond rating agencies, putting pressure on the interest rates the government was required to pay when it took its bond issues to global capital markets. In Ontario, public sector plans were governed by the PBA and subject to the same funding standards as private sector plans; unfunded liabilities therefore also raised the spectre of increased contribution requirements at a time when government policy demanded serious efforts to control public spending. The government saw an opportunity to off-load a significant share of its financial exposure for public sector pensions in return for allowing employees and their representatives a role in plan governance. The new JSPP model, developed first under a Liberal government which initiated and largely completed the negotiations for the newly-

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80 As a working definition of the “pension deal”, the Task Force adopted the following: “the statement of the pension promise by an employer to an employee and the means by which that promise will be fulfilled”: ibid at 49. The report noted that “[t]he OFL believes that the term “pension deal” is meaningless for most public sector employees, since they do not have the right to bargain the terms and conditions of their deal”. In response, the Task Force argued: “public sector employees have accepted the terms and conditions of their employment, one of which, in most cases, is no collective bargaining on pension issues. In this respect, there is a deal”: ibid at 68.

81 Ibid at 1.
revamped OTPP, was enthusiastically embraced by its successor, a New Democratic government, when the election in 1990 was followed almost immediately by a world-wide recession, placing the province’s finances in serious jeopardy. While the government’s goals for JSPPs were long-term, it was also able to negotiate some short-term financial relief in the midst of the immediate fiscal crisis; for example, in respect of the Ontario Public Service Employees’ Pension Plan, OPSEU agreed to a substantial three-year reduction in the employer’s contributions.82

What were the incentives for the employees and their unions to agree to take on co-liability for the DB pensions which, up to this point, had been the responsibility of the employer? Like the government, the public sector unions involved in JSPP negotiations had both long and short-term goals. In the longer term, they judged the trade-off worthwhile in order to achieve some real bargaining leverage with respect to their members’ pensions. The plans were contributory in any event; public servants have always paid for their pensions much more visibly than employees in non-contributory plans. Co-liability was therefore seen not as a quantum leap, but merely as a step further down a road they were already on. Furthermore, public sector unions were realists. They were not dealing with an ordinary employer to whom, at least in principle, a union can say no. The government had legislative power and had shown its willingness to use it if unable to achieve its objectives at the bargaining table. Indeed, one of the trade-offs which OPSEU demanded and got for its agreement to take on joint liability was a commitment on the government’s part to restrict its right to exercise its legislative power over employee pensions without the consent of the union.83 In the shorter term, unions who engaged in JSPP bargaining in the crucial period of the early-to-mid-1990s had a metaphorical ‘gun to their heads’ in the form of the Social Contract Act, 1993 84:

public sector wage control legislation conscripting public sector unions into a process which imposed cost-cutting ‘targets’ on various sub-sectors of the public sector, and offered unions

82 See OPSEU v. Ontario (Attorney General) (1995), 131 DLR (4th) 572. The amount involved was approximately $400 million.
83 OPSEU went to court to test this provision in the agreement when the government by Order-in-Council attempted to exempt itself from the application of s.69 of the PBA, which gave the Superintendent of Financial Services the power to order a plan wind up (or partial wind up), an order which would potentially trigger expensive “grow-in” rights. In OPSEU v. Ontario (Attorney General) (1995), 131 DLR (4th) 572, the Ontario Divisional Court found this legislation in violation of the partnership agreement, and made a declaration the Order-in-Council was of no force and effect.
84 S.O. 1993, c.5.
an opportunity to bargain ‘savings’ which could be applied towards those targets. The opportunity to credit these savings to social contract targets created a significant incentive for unions to agree to the restructuring of public sector pension plans on the JSPP model.

As noted above, the first plan to be singled out for JSPP treatment was the Ontario Teachers’ Superannuation Fund, described in section 3.3, above. Although the provincial government was not the nominal employer of Ontario teachers, it was effectively the plan sponsor, since it controlled the plan’s statutory framework, paid the employer contributions and provided the financial backstop for the defined benefit pensions paid to teachers on their retirement. Over a number of years, the government had developed a sophisticated consulting relationship with the Ontario Teachers’ Federation (“OTF”), the umbrella organization with the statutory right to represent teachers in Ontario. The government approached the OTF with the proposal that the plan be converted to a jointly-sponsored plan in which the teachers would take on shared responsibility for the plan’s liabilities. In return, teachers would get an equal role in plan governance and benefit design. Negotiations resulted in the conversion of the old Superannuation Plan into the new Ontario Teachers’ Pension Plan, enshrined in statute in late 1989.85 The new Act contemplated the negotiation of a joint governance model for the plan, to be reflected in a partnership agreement between the Ministry of Education and the OTF. This process was consummated on January 1, 1992, in a partnership agreement which gives the ‘pension partners’ an equal role as plan sponsors in the establishment of the terms of the plan and contribution levels for both teachers and the government, subject to an adjudication mechanism to sort out disagreements. A jointly-appointed board of trustees manages the plan and makes investment decisions. The government followed this model shortly thereafter for the public service plan, splitting the plan into unionized and non-unionized plans and negotiating a partnership agreement within the unionized plan which came into effect in June, 1994. The process of converting statutory plans to JSPPs culminated in 2006 with the new OMERS JSPP structure.86 The only non-statutory plan to adopt the JSPP model to date is HOOPP, discussed in section 3.4, above.

86 See Ontario Municipal Employees Retirement System Act, 2006, S.O. 2006, c.2
The JSPP model has now spread to other provinces, where governments have also recognized the very real advantages of being able to distribute more widely the risks and responsibilities of pension sponsorship for public sector plans. British Columbia has embraced the model of joint governance for its own public sector plans. An Auditor General’s Report on the BC conversion process describes in frank detail the government’s objectives in changing from a model of unilateral control to a joint governance model. Key among them were a desire to reduce the government’s “exposure to the risk of future increases in pension contribution rates”, and to reduce employer contribution rates overall. In describing the trade-offs the government was forced to make to achieve these objectives, the Auditor General’s Report touches only very lightly on loss of control from a human resource perspective; the Report notes that “the employer would have to give up half its claim on any future surpluses generated by a pension plan, and unilateral control of management of the plan.” This was not regarded as a serious loss, however: “this theoretical discretion was already fettered by the realities of public sector collective bargaining (although pensions were not formally negotiated) and had become a growing source of friction with employees.”

While the Ontario government’s 2005 Consultation Paper on JSPPs suggests that the model is long-standing and now fairly widespread, the Arthurs Commission found only five in the province in 2007, all of them large MEPPs operating in the public sector. Even in the public sector, it is noteworthy that the government has not attempted to use the model for its main non-union plan, the Public Service Pension Plan of Ontario. The model has attracted no support in the private sector.

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87 Public Sector Pension Plans Act, 1999, S.B.C.1999, c.44. For a discussion of some of the history of the BC pension plan for public servants, see City of Vancouver v. Canadian Union of Public Employees, Local 15 [2006] B.C.C.A.A.A. No. 128 (Munroe)
89 Ibid at 27.
90 Ibid.
92 Arthurs Report, supra note 1 at 41. The Report states: “while in principle both MEPPs and SEPPs can be jointly sponsored, and may be located in either the public or the private sector, all existing JSPPs are in fact extremely large multi-unit public sector plans”. The Report’s Technical Annex identifies the following JSPPs: OMERS, OTPP, Colleges of Applied Arts and Technology Pension Plan, the Ontario Public Service Employees Union Pension Trust and HOOPP: ibid. at 45.
4.3.2 Member-Funded Pension Plans

The JSPP model shifts a significant proportion of the traditional DB risk from employers to employees. Quebec has now created a model which completes that shift: the member-funded pension plan (“MFPP”). Under this model, employers make defined contributions; any difference required to maintain funding standards is made up entirely by the members through their own contributions.93

The MFPP model provides major relief to employers from pension standards protecting accrued benefits in DB plans. It is therefore somewhat ironic that it made its way into Quebec’s statute as a result of lobbying by the labour movement for a DB regime more congenial to the needs of small and medium-sized employers.94 Because these plans require employees to accept unlimited liability,95 they cannot be imposed by employers in the usual way; regulations require that any union involved agree to such a plan,96 and give non-unionized employees the right to veto such a plan if 30 percent or more oppose it.97 While the Quebec statute does not restrict MFPPs to unionized workplaces, amendments to the Income Tax Act necessary to accommodate this funding model require as a condition of registration that MFPPs be established under the terms of a collective agreement, unless the minister issues special approval. Except to the extent that all Quebec plans are required to have some member representation on the governing pension committee, MFPPs need not be jointly governed. However, the contents of plan texts are regulated to provide that employers

93 MFPPs are governed by Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act, R.Q. c. R-15.1, r.2, Division X (ss.65-95).
94 See Shilton, supra note 8 at 31. The Quebec regulator, the Régie des rentes, notes in its website that:
Although MFPPs are not aimed at [a] specific group, they should be of particular interest to unionized workers. Workers’ associations have indicated their members want to have access to a defined benefit plan. Moreover, at a time when employers are increasingly reticent about assuming the financial risks of defined benefit plans, workers’ groups say that they are ready to take on such risks. The new MFPP responds to the concerns of both groups in that the plan members collectively assume the ultimate financial responsibility for the plan.
http://www.rrq.gouv.qc.ca/en/programmes/rcr/Pages/rrfs_nouveau_regime_retraite.aspx, last accessed on September 15, 2010
95 Employers do, of course, establish pension plans unilaterally which impose contribution requirements on employees; such unilateral employer action has been permitted by arbitrators under collective agreements (see Chapter 3 at section 4.4) and is not prohibited by regulatory statutes. The difference here is that these MFPPs require employees to accept the obligation to guarantee benefits, a liability that is collective and may impose real hardship if plan funding gets seriously out of control.
96 Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act, R.Q. c. R-15.1, r.2, Division X at s.74.
97 Ibid. at s.75.
do not have the right to unilaterally terminate the plan or amend the plan text.\textsuperscript{98} MFPPs are required to address directly the asymmetry problem by providing in the plan text that employees own any surplus assets on plan termination, but that employers may access plan surpluses to take contribution holidays “for the purpose of respecting taxation rules”.\textsuperscript{99}

While MFPPs need not be MEPPs, experienced pension professionals familiar with the pension picture in Quebec predict that new MEPPs in Quebec will likely be constituted on the MFPP model rather than the older MEPP model, largely because unlike other provinces, Quebec does not permit employers to limit their liability in DB plans through the use of target benefit formulae.\textsuperscript{100}

5.0 THE CURRENT PENSION PICTURE IN CANADA

5.1 Introduction

How well has the employment pension plan system done overall at meeting the retirement income needs of Canadians? In this section, I review historical and current information available on employment pension outcomes. I start with two caveats. First, I have relied mainly on information already collected and analyzed by other researchers, without doing my own analysis of the raw data. Second, I have encountered serious problems with the accuracy and comparability of both historical and current research data regarding Canadian pensions. This has been a chronic problem for scholars. About its own extensive efforts to describe and analyse the current state of the Ontario pension system, the Arthurs Report commented: “The data on which such a description must be based was neither readily available nor particularly reliable – a complaint first made by a Canadian pension commission in 1912, and repeated by virtually every commission since.”\textsuperscript{101} Even after systematic data collection was implemented in the late 1950s,\textsuperscript{102} shifting definitions and

\textsuperscript{98} Ibid. at s.65(4).
\textsuperscript{99} Ibid. at s.65(6).
\textsuperscript{100} See Shilton, supra note 8 at xxxvi-xxxvii.
\textsuperscript{101} Arthurs Report, supra note 1at 28. Commenting particularly with respect to Ontario, the Commission noted that basic information about plan membership and benefit entitlement was not available “at a proper level of reliability”, coverage by economic sectors “was almost impossible to determine” and statistics are not sufficiently disaggregated to track conversion of DB plans to DC plans, or identify the sources by pension plan type of Canadian retirement income. The Commission concludes that that data is “inadequate as the basis for future pension policy development”: 29.
\textsuperscript{102} See discussion in Chapter 3 at section 7.0.
changes in survey methodology have made it difficult to ensure the validity of comparisons. For my purposes, particular limitations in the data include the lack of reliable historical information specific to Canada; the lack of common definitions (indeed, often of any definitions) in data addressing the relationship between unionization and pension outcomes; the difficulty in differentiating among DB plans and other types of employment pension plans, as well as between employment pension plans and Canada’s other major registered retirement income mechanism, the registered retirement savings plan (“RRSP”); the difficulty in breaking out public sector data, as well as shifting definitions of ‘public sector’; and the general lack of reliable data, either historical or current, on gender impact. Bearing in mind these difficulties, I would nevertheless argue that the data available has been sufficiently consistent over time to ground the broad conclusions about the serious deficiencies of the employment pension system put forward in this chapter and this thesis, and in particular about its impact in promoting inequality.

5.2 Employment Pension Coverage

There is no doubt that the most critical issue currently posed by the employment pension system in Canada is the issue of coverage. As Table 1 demonstrates, even at the peak of system of coverage, in the late 1970s, only a minority of Canadian employees, about 46 percent, belonged to employment pension plans. That percentage has been in slow but steady decline since then; now only slightly more than 38 percent of Canadian employees belong to such plans. That number shrinks further when we take into account Canadians who are members of the workforce but not employees; of the overall labour force, including the self-employed, only about 1/3 are currently members of OPPs.103

103 Statistics Canada, Summary Tables: Percentage of labour force and employees covered by a registered pension plan (RPP), May 17, 2010. http://www40.statcan.gc.ca/l01/cst01/labor26a-eng.htm, last accessed September 16, 2010. In 2008, 32.6 percent of the labour force were members of employment pension plans (down from 35.8 percent in 1993), as compared with 38.2 percent of employees (down from 45.1 percent in 1993). [Note: Statistics Canada defines the labour force as a combination of the employed (persons having a job or business) and the unemployed (those without work but available for work and actively seeking work). “Employees” (formerly “paid workers”) is defined as “employees in the public and private sector and include self-employed workers in incorporated business (with and without paid help).” Self-employed people whose businesses are not incorporated are not included among “employees”, nor are unpaid workers.]
Table 1: Pension Plan Coverage in Canada as a Percentage of Employees\textsuperscript{104}

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<tbody>
<tr>
<td>All</td>
<td>38</td>
<td>46.2</td>
<td>45.4</td>
<td>42.7</td>
<td>45</td>
<td>45.2</td>
<td>39.3</td>
<td>38.2</td>
</tr>
<tr>
<td>Male</td>
<td>n/a</td>
<td>52.2</td>
<td>52.3</td>
<td>48.8</td>
<td>50</td>
<td>46.9</td>
<td>39.4</td>
<td>37.3</td>
</tr>
<tr>
<td>Female</td>
<td>n/a</td>
<td>36</td>
<td>35.8</td>
<td>34.8</td>
<td>39</td>
<td>40.8</td>
<td>39.1</td>
<td>39.3</td>
</tr>
</tbody>
</table>


The coverage picture darkens still further when we shift the lens to the working-age population as a whole. Table 2 shows that almost three in four Canadians are excluded from the employment pension system, a number that has shifted very little over three decades and after two waves of major regulatory reform.

Table 2: Pension Plan Coverage in Canada as a Percentage of Population Aged 18-64

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</thead>
<tbody>
<tr>
<td>All</td>
<td>26</td>
<td>29</td>
<td>29</td>
<td>28</td>
<td>29</td>
<td>28</td>
<td>26</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>Male</td>
<td>37</td>
<td>40</td>
<td>40</td>
<td>36</td>
<td>35</td>
<td>32</td>
<td>30</td>
<td>29</td>
<td>29</td>
</tr>
<tr>
<td>Female</td>
<td>14</td>
<td>17</td>
<td>19</td>
<td>20</td>
<td>22</td>
<td>24</td>
<td>23</td>
<td>25</td>
<td>25</td>
</tr>
</tbody>
</table>

Source: Bob Baldwin. The Long-Term Capacity of Workplace Pension Plans to Deliver Retirement Income: A Review of Key Issues (Caledon Institute of Social Policy, March 2007) Table 4 (14)

Lack of employment pension coverage on an aggregate basis is obviously a matter of serious concern for policy makers. Equally troublesome is the distribution of that coverage. Employment pension plans obviously privilege participants in the paid labour market over non-participants. They also privilege certain kinds of labour market participants over others. Because employment pension plans are voluntary in Canada, they emerge only where employers choose to establish them or workers have sufficient bargaining strength to demand and obtain them. Not surprisingly, they are not randomly distributed across the workforce.

Who are the Canadians who have pensions? Researchers Brenda Lipsett and Mark Reesor, in a much-cited study conducted under the auspices of Human Resources Canada,\textsuperscript{105} found

\textsuperscript{104} This table amalgamates data from a variety of sources which may not be entirely comparable.
certain very specific job and personal characteristics associated with employment pension plan coverage. Unionization was the most significant correlate with pension coverage. In Canadian workplaces as a whole, some 75 percent of unionized workers belong to pension plans, compared to only about 27 percent of non-unionized workers. In addition to unionization, Lipsett & Reesor found a number of other characteristics to be “major determinants” of pension coverage. Size of the workplace was a major factor. Despite regulatory changes mandating coverage for part-time employees where comparable full-time employees are covered, they found that full-time workers are still much more likely than part-time workers to belong to OPPs. Likewise permanent employees are more likely to be plan members than temporary employees. Employees with higher incomes are much more likely to have pension coverage than those with lower incomes. Job tenure was also significant. There have been few specific studies of employment pension coverage for aboriginal Canadians and other racialized Canadians; based on other available data on

105 Brenda Lipsett & Mark Reesor, *Employer-Sponsored Pension Plans: Who Benefits?* (Canada, Human Resources Development Working Papers, 1997) at 3. The data in this study included group RRSPs. The authors of the study estimate that in 1995, 55 percent of (non-student) employees in Canada had coverage under either a registered pension plan or a group RRSP: *ibid* at 12-3.
106 While Lipsett & Reesor do not themselves describe unionization as the most significant factor (they call it a “major factor”: *ibid* at 25), Bob Baldwin interprets their data as establishing unionization is the number one factor: see Bob Baldwin, *Determinants of the Evolution of Workplace Pension Plans in Canada* (Caledon Institute of Social Policy, March 2007) at 15.
107 Lipsett and Reesor, *supra* note 105 at 37.
108 Prior studies had found that 80 percent of workers in large firms with 500 or more workers had pension plan coverage, as compared to 17 percent of workers in firms of fewer than 20 workers. Lipsett & Reesor found similar correlations: *ibid* at 18 and 25.
109 Lipsett & Reesor found that 60.2 percent of full-time workers had pensions, as compared to 27.8 percent of part-time workers: full-time workers were therefore more than twice as likely as part-time workers to be members of pension plans: *ibid* at 17 and 26.
110 The data analyzed showed that 58.5% of permanent workers were covered, as compared to 24.9 percent of temporary workers: *ibid*.
112 Lipsett & Reesor found pension coverage increasing in lock step with job tenure, from a low of 21 percent for employees with less then six months on the job, to a high of 87 percent for employees who had worked for the same employer for more than twenty years: *ibid* at 19.
113 *Ibid* at 28. Other secondary determinants identified by Lipsett & Reesor include industry, occupation, age, education, province of residence, marital status and presence of dependents: *ibid* at 37.
114 An exception is René Morissette, “Pensions: Immigrants and visible minorities” (2002) 3:6 Perspectives on Labour and Income (Statistics Canada) 13. The findings of this limited study include the fact that male immigrants who are members of visible minorities are significantly more disadvantaged in pension coverage than those who are not: *ibid.* at 16.
labour market disadvantages for these groups, it is predictable that they will be less likely than non-racialized Canadians to belong to employment pension plans.\textsuperscript{115}

It is also clear that Canadian workers are very significantly more likely to be members of employment pension plans if they are employed in the public sector than in the private sector.\textsuperscript{116} As Table 3 demonstrates, the public sector supplies almost half (46 percent) of employment pension plan membership, despite that fact that the public sector employs only about 21 percent of Canadian workers.\textsuperscript{117} The decline in pension plan membership over the past three decades has taken place entirely in the private sector; coverage in the public sector has actually increased over the same period.\textsuperscript{118}

Table 3: Employment Pension Plan Members in the Public Sector

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>1974</td>
<td>3424</td>
<td>1480</td>
<td>43%</td>
</tr>
<tr>
<td>1978</td>
<td>4193</td>
<td>1855</td>
<td>44%</td>
</tr>
<tr>
<td>1990</td>
<td>5109</td>
<td>2266</td>
<td>43.5%</td>
</tr>
<tr>
<td>1994</td>
<td>5215</td>
<td>2556</td>
<td>49%</td>
</tr>
<tr>
<td>1998</td>
<td>5088</td>
<td>2396</td>
<td>47%</td>
</tr>
<tr>
<td>2002</td>
<td>5471</td>
<td>2521</td>
<td>46%</td>
</tr>
<tr>
<td>2004</td>
<td>5590</td>
<td>2598</td>
<td>46.5%</td>
</tr>
</tbody>
</table>

Source: Edward Tamango, *Occupational Pension Plans in Canada: Trends in Coverage and the Incomes of Seniors*, Caledon Institute of Social Policy, December 2006, 2- Figure 1. Statistics Canada defines the public sector as all economic entities controlled by government. This includes school boards, colleges and universities, hospitals etc., as well as all three level of government (Numbers in thousands).

With the ambiguous exception of gender, an issue that will be discussed in more detail below,\textsuperscript{119} it is clear that pension plan coverage is co-extensive with workplace privilege.

Lipsett & Reesor concluded that:\textsuperscript{120}

The most financially insecure workers today (the non-permanent, part-time, non-unionized, short-tenured, low-wage earners working in small firms) are much less likely to have ESPP coverage than those who have been working in a permanent, full-time, unionized, high-wage position in a large firm for many years [emphasis in original]


\textsuperscript{116}Patricia Schembari, “Employer-sponsored pension plans over the last 30 years” in Canada’s Retirement Income Programs, 2006 ed. Statistics Canada Cat. No. 74-507-XCB (CD Rom) 4.

\textsuperscript{117}See data in Gougeon, supra note 54 at 18.

\textsuperscript{118}Schembari, ibid at 5, Chart 4.

\textsuperscript{119}See discussion at section 5.3, below.

\textsuperscript{120}Lipsett and Reesor, supra note 105 at 3. See also the Arthurs Report, supra note 1 at 40.
It is clear that the employment pension plan system is disproportionately the preserve of those who are already winners in the Canadian income distribution system.

While existing studies provide reasonably good data on pension coverage, and the kinds of workers who enjoy coverage, it is more difficult to get a clear picture on the adequacy of pensions among workers who belong to pension plans. Current figures suggest that among Canadians age 65 and older, employment pensions and RRSPs combined replace approximately 35 percent of the average wage.121 This figure does not disaggregate employment pension income from RRSP income. It does not distinguish between direct pension benefits paid to plan members, and the pensions paid to surviving spouses of plan members. In addition, it is by definition a backward-looking figure; it tells us what current retirees are receiving, rather than what those currently in the workforce might expect to receive.

This 35 percent is very far from evenly distributed among Canadians. As Bob Baldwin has pointed out, “[p]ension wealth is …very highly concentrated, with more than 80 percent being held by one-quarter of households”.122 As we shall see in more detail in section 5.3, below, it is certainly distributed disproportionately to male workers. It is also differentially distributed based on types of plans. In a study conducted for Statistics Canada, economist Hubert Frenken ranked different types of plans in accordance with the generosity of their benefits; he found that DB plans with final earnings formulae paid the best benefits, followed by DB career earnings plans. DC plans were in third place; bringing up the rear were DB flat benefit plans.123 Frenken argues that “[r]etirement benefits depend on factors such as years of participation in the plan and, most frequently, the worker’s earnings. The most important factor, though, is the formula used to calculate pensions.”124 There is a clear correlation between pension benefits and other measures of wealth in Canada. Richard Shillington’s

121 In 2007, income from employment pensions (and RRSPs) in Canada averaged $15,000 for seniors reporting income:Canada. Human Resources and Skills Development Canada, *Indicators of Well-being in Canada* http://www4.hrsdc.gc.ca/3ndic.1t.4r@-eng.jsp?iid=27, last accessed on October 30, 2010. The Year’s Maximum Pensionable Earnings for that year (a figure roughly equal to the average wage) was $43,700. See Table 4 in section 5.3, below.
122 *The Long-Term Capacity of Workplace Pension Plans to Deliver Retirement Income: A Review of Key Issues* (Caledon Institute of Social Policy, March 2007) at 16.
123 Frenken, *Potpourri, supra note* 17 at 21-22.
analysis of data in Ontario for the years 1999-2005 finds a close correlation between employment pension coverage, and individual and family earnings.\textsuperscript{125} Frenken’s research also shows that families with higher net worth overall are more likely to hold larger amounts of pension assets.\textsuperscript{126}

It is clear, then, that both in terms of coverage and in terms of benefit distribution among those covered, the employment pension system makes a significant contribution to the perpetuation of income inequality into retirement.

5.3 Pensions and Gender

Particularly interesting and troubling are the inequality effects of the employment pension system on women workers. By most measures, women in the workforce are now equally likely to be covered by employment pension plans. It is very clear, however, that they are not getting equal benefits from the system. The reasons for this inequality provide important insights into the complex and dynamic mechanisms by which employment pensions generate inequality.

In the 1960s when Canada first embarked on a focused examination of the effectiveness of its private pension plan system, that system, like the labour force as a whole, was very much male-dominated. The 1960 Dominion Bureau of Statistics survey showed that women constituted only slightly more than 20 percent of pension plan members.\textsuperscript{127} In 1977, that figure had improved somewhat: one in three women in the labour force was a member of a pension plan, compared to more than half of working men. Then as now, however, the gender imbalance was worse in the private sector, where only one woman in five was a plan

\textsuperscript{125} Richard Shillington, \textit{Occupational Pension Plan Coverage in Ontario: Statistical Report} (Ontario Expert Commission on Pensions, 2007), Table 14 (40) and Table 16 (44).

\textsuperscript{126} \textit{Ibid.}, at 51, Table 22. This data separates employment pension assets from RRSP assets. See also Edward Tamagno, \textit{Occupational Pension Plans in Canada: Trends in Coverage and the Incomes of Seniors}, Caledon Institute of Social Policy, December 2006; Margaret Denton & Linda Boos,“Gender Inequality in the Wealth of Older Canadians” (2007), McMaster University Research Institute for Quantitative Studies in Economics and Population, QSEP Research Report No. 413.

\textsuperscript{127} Canada. Dominion Bureau of Statistics, \textit{Pension Plans, Non-Financial Statistics, 1960} (Ottawa: Queen’s Printer, 1962) Table 4 at 10. It is likely that disproportionately few of these women actually retired on pension; the retirement date reported by the same survey for the year 1960 shows that women constituted only 14.47% of total retirements: \textit{ibid.} at 36 (calculations based on Table 31).
member, compared to almost half the male workforce. Some of these gender differences can be accounted for by direct exclusion due to sex-based membership qualifications. More influential, however, was the de facto exclusion of women resulting from the compound impact of uneven distribution of the pension plans across the economy, and plan rules which imposed lengthy waiting periods and restricted entry to permanent full time employees.

Over the intervening four decades this imbalance in coverage has been slowly correcting. Table 1, in section 5.2 above, shows that by 2003 male and female employment pension plan coverage among Canadian employees had virtually converged at slightly more than 39 percent. By 2008, women had pulled ahead two full percentage points. Among all Canadian workers, and not just those with employee status, that convergence took place in the mid-1990s, and by 2008, women’s coverage stood at 34.1 percent of the labour force, compared to male coverage at 31.3 percent. By these measures, women workers are now more likely to be members of employment pension plans than male workers, a dramatic reversal from the situation that confronted policy makers in the first two rounds of employment pension plan reform.

Before we celebrate the achievement of gender equality in employment pensions, however, we need to probe this data more deeply. If the issue is how well the system is serving working women, the first and most obvious observation to make about the coverage figures reflected in Table 1 is that pension coverage for women remains low, and has shifted by only slightly more than three percentage points since 1977. Equality of coverage has been achieved largely as a result of a consistent decline in male coverage for the past thirty years. Second, women employees have held their own better than men in pension coverage primarily because of their disproportionate representation in the public sector; indeed, almost 60% of female pension plan members overall are public sector employees. Third, there are continuing and unexplained gender gaps in important ‘pockets’ of pension coverage. Recent

129 See discussion in Chapter 3 at section 7.
131 Calculations based on data from Edward Tamagno, Occupational Pension Plans in Canada: Trends in Coverage and the Incomes of Seniors, supra note 126 at 2-3, Figure 1.
detailed statistical analysis by Kendra Strauss for the Ontario Expert Commission on Pensions reveals a continuing gender gap in pension coverage in Ontario, Canada’s most populous province and the one where the majority of Canada’s pension plans are registered. Furthermore, as Table 2, above, shows, there remains a significant gender gap between male and female coverage of the adult working age population as a whole, despite the fact the women’s coverage over all has increased by almost 65 percent between 1974 and 2004.

In any event, equal coverage is only the first step in achieving pension equality. At least as important is what benefits women derive from their workplace pensions. Recent snapshots comparing sources of retirement income for male and female Canadians demonstrate that women are not even close to achieving pension equality. As Table 4 shows, women’s retirement income overall is only 70 percent of men’s. In the category in which we find employment pension income, women do even worse in comparison to men, collecting about 60 cents on the male dollar, down from highs of 65 – 69 cents in the early 1980s. When we consider that these figures include survivor benefits, paid disproportionately to women, it is clear that the employment pension system has not served working women well.

132 Kendra Strauss, Trends in Occupational Pension Coverage in Ontario, Report Prepared for the Ontario Expert Commission on Pensions, 2007 at 19. Strauss reported that in the private sector in Ontario only about 22% of employed women are members of pension plans, compared to 31 percent of males. While conventional Statscan “Pension Plans in Canada” (“PPIC”) measures show pension gender parity, other measures reveal unexplained discrepancies. Shillington examined Ontario data from another relevant Statscan source, the Survey of Labour Income Dynamics, and found a continuing and significant pension coverage gender gap between workers aged 25-64. When he looked separately at ‘persons’, ‘persons with jobs’ and ‘persons with paid employment’, he found gender gaps ranging from 3 percent to 7 percent: Shillington, supra note 125 at 42, Table 15. Shillington was unable to account for the discrepancy between his data and the PPIC results, and suggested that the difference “may be due to reporting errors, or to gender differences in job turnover rates”:

ibid. at 41-42.

133 See Morley Gunderson, Incentive Effects, supra note 1at 46, Table 2; data reported there indicates that in 1980 women collecting Pillar 3 income received about 65 cents on the dollar compared to men; the comparable figure for 2003 is about 57 cents (my calculations). See also Bob Baldwin and Pierre Laliberté, “Incomes of Older Canadians: Amounts and Sources, 1973-1996”, (Canadian Labour Congress Research Paper #15, December 1999) at 45, reporting a decline from 68.8 cents on the dollar in 1981 to 57 cents in 1996. In Occupational Pension Plans in Canada: Trends in Coverage and the Incomes of Seniors, supra note 126 at 11, Edward Tamagno reports that women collected about 60 percent of male Pillar 3 income in both 1991 and 2001.
Table 4: Average Income for seniors, by gender and income source, 2005

<table>
<thead>
<tr>
<th></th>
<th>OAS/GIS</th>
<th>CPP/QPP</th>
<th>Investments</th>
<th>Private pensions and RRSPs</th>
<th>Employment</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>$6400</td>
<td>$6800</td>
<td>$6100</td>
<td>$18200</td>
<td>$13100</td>
<td>$50600</td>
</tr>
<tr>
<td>Women</td>
<td>$7100</td>
<td>$5300</td>
<td>$4400</td>
<td>$11000</td>
<td>$7600</td>
<td>$35500</td>
</tr>
</tbody>
</table>


Why do women do worse than men from employment pensions despite the fact that they may now have equal coverage? The answer lies in how pension benefits are distributed within the system, an issue we have explored already at a more general level. Decades after explicitly gendered plan rules became unlawful, typical benefit structures still disadvantage women because of their propensity to privilege well paid, permanent, full-time career employment, and to force lower-paid, temporary and/or part-time, short service employees to subsidize the benefits of more-advantaged employees. Gunderson argues that the differential in pension benefits between males and females may do more than merely reflect wage differences in the labour market; it may exacerbate those differences “and imply a larger gap in total compensation when pensions are factored in”.

To some extent, lower pension benefits for women are simply the fruit of women’s general and well-documented disadvantaged status in the labour market. Since women’s wages have historically been and still are lower than those of men, it is unsurprising that their pensions are also lower. In addition, however, structural features of pension plans, including their

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134 Income in this category comes from both employment pension plans and RRSPs. The exclusion of RRSP income would be unlikely to improve relative outcomes for women, since women are also disadvantaged within the RRSP system. Data published in 2005 indicate that women accounted for approximately 45% of RRSP contributors (up from 28% in 1979 and 41% in 1989), with average contributions equal to approximately 70% of male contributions: see Investment Dealers Association of Canada, *Wealth Watch* (February 2005) 3. See also Hubert Frenken, “Women and RRSPs” (1991) 3:4 Perspectives on Labour and Income 1.

135 Ontario’s current rules governing discrimination in benefit plans, found in the *Employment Standards Act, 2000*, S.O. 2000, c.41, ss. 43-44 and O.Reg. 286/01 have been in place since 1975. Ontario’s *Human Rights Code* R.S.O. 1990, c.H.19 continues to exempt discrimination in pension and group insurance plans from its general provisions as long as benefit plans comply with the *Employment Standards Act* (see S.25(2)). Both federal and provincial second generation regulatory statutes prohibit some forms of sex discrimination in pension contributions and benefits: see discussion in Chapter 4, section 6.2.


137 See Statistics Canada Summary Tables, which show that full-time women workers earned 71.4 cents to the male dollar in 2007: [http://www40.statcan.gc.ca/l01/cst01/labor01a-eng.htm](http://www40.statcan.gc.ca/l01/cst01/labor01a-eng.htm), last accessed on October 30, 2010.
tendency to privilege long-term ‘career’ employees at the expense of shorter-term employees, may have compounding effects. Gendered outcomes flow from the leveraging effects of standard DB formulae, which are typically driven by two factors, earnings and length of service.\textsuperscript{138} In a typical mature DB plan, each year of service earns a pension worth 1-2\% of annual earnings.\textsuperscript{139} Definitions of annual earnings vary from plan to plan, but fall into two main categories: ‘final/best average earnings’ plans, and ‘career average earnings’ plans.\textsuperscript{140} ‘Years of service’ is typically defined as years of continuous service with the employer/plan sponsor. In a ‘final/best years’ formula, by far the most popular in Canada,\textsuperscript{141} exit salary levels leverage years of service: contributions in earlier years have been based on entry level (and typically much lower) salaries, but pay-out is based on salary at retirement. All long service employees benefit from this structure, but employees with steep wage curves – i.e. employees whose ‘job ladders’ contain significant increases over time, or those who have had more promotions – do best of all. Higher earnings produce higher payouts. Women, who work at lower wage rates and often in jobs with flatter wage curves, end up with lower pensions. The extent to which these features of benefit design skew plan benefits in favour of elite employees was recognized as early as 1938, when the Queens’ Study described what it called a “class bias” in formula structures.\textsuperscript{142}

What of the second driver of the benefit formulae, years of service? The responsibilities associated with social reproduction have historically been and continue to be disproportionately allocated to women, with the result that they spend less time in the paid

\textsuperscript{138} Not all DB formulae are based on a percentage of earnings: some provide a flat benefit per year of service. These plans may also define “service” as cumulative service, often with a series of employers all working in the same industry, rather than continuous service with a single employer. Flat benefit plans are typical of unionized, male-dominated industries like construction, where the pattern of employment is typified by short-term relationships with a series of employers, and wage curves are flatter. While the flat benefit approach produces more egalitarian results in general, women would continue to be disadvantaged by their shorter service. In practice, of course, these plans have few women members.

\textsuperscript{139} 2 \% per year of service is the maximum permitted under the Income Tax Act: Gunderson, \textit{Incentive Effects}, supra note 1 at 25.

\textsuperscript{140} The differences between these types of benefit structures are generally explained in Gunderson, \textit{Incentive Effects}, \textit{ibid.} at 3-4.

\textsuperscript{141} As of January 1, 2004, over 60 percent of private pension plan members in Canada belonged to DB plans with final earnings/average best earnings formulae, as compared to less than 6.5 \% percent with career earnings formulae: calculations based on Schembari, \textit{supra} note 116 at 7, Figure 1.

\textsuperscript{142} Industrial Relations Section, School of Commerce and Administration, Bulletin No.1, \textit{Industrial Retirement Plans in Canada} (Queen’s University, Kingston, Ontario, 1938) (“Queen’s Study”) at 43. See also Murray Webb Latimer, \textit{Industrial Pension Systems in the United States and Canada} (New York: Industrial Relations Counselors, 1932) at 930.
Despite dramatic increases in women’s labour force participation since the 1960s, Canadian women at all age levels still have somewhat lower labour force participation rates than men, and are more likely than male workers to work part-time. Since modern human rights statutes mandate pension credit for periods of statutory pregnancy and parenting leave, periods out of the workforce to bear children are less likely to reduce pension entitlement than they were in the past. But many women take time out of the workforce for family reasons not covered by statutory leaves; extended parenting leaves, leaves to care for disabled and elderly family members, and ‘downtime’ related to a spouse’s job transfer will not accumulate pension credit. In addition, women typically retire a year earlier than men, often for family-based reasons including the need to care for family members.

In addition, women are more likely than men to lose out on pension credits simply because of higher job turnover. Under the current Canadian legal framework, frequent job changes almost invariably result in years in the workforce that do not produce pension credits. Second generation regulatory statutes permitted vesting to be delayed from two to five years. While many Canadian jurisdictions are now moving to immediate vesting, current pension minimum standards legislation still permit plans to impose waiting periods of up to two years before new employees are eligible for plan membership. This means that even on the unlikely scenario that there are no gaps between jobs, and the even more unlikely scenario

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144 McDonald, ibid. at 144-147.

145 In 2004, the median retirement age for Canadian men was 61.8, and for women 60.8: see McDonald, ibid at 144-45, 149-152.

146 See data in Gunderson, Incentive Effects, 16-18, 47-49, Table 3 A-C. Gunderson’s data show that while the average job tenure of a female employee is still about one year less than for a male employee, the gender gap has been shrinking substantially over the past 30 years. See also Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace, supra note 62 at 75-77.

147 Quebec has required immediate vesting for several years now; other jurisdictions have either recently amended their legislation to require immediate vesting or have announced an intention to do so. See Chapter 7, note 4.

148 See, for example, Ontario’s Pension Benefits Act, R.S.O. 1990, c.P.8, s.31(2). These vesting rules are in the process of changing: see Chapter 4, note 190.
that every job has a DB pension plan, an employee who has high job turnover will lose significant opportunities to accumulate pension credits every time she changes jobs. The overall result is that Canadian women pay a high and continuing price during retirement for the role they play in families during their pre-retirement years.

Job turnover has other costs as well. In addition to loss of years of pension credits, standard benefit formulae penalize job turnover through the salary side of the DB formula. Most DB pension formulae are based on final salary, i.e. average salary over the last 3-5 years of service. This has a significant impact on the ultimate pension benefit for employees who leave deferred pension credits behind them when they change jobs. The pension credits they leave in the old plan will be paid out as a pension based on final salary at the time they left the old employer. The credits accumulated in the new plan, by contrast, are paid out based on final salary with the new employer. The result is almost invariably a pension lower than would be the case if all credits were paid out at the salary rate at time of retirement. The more frequent the job changes occurring over a working life, the more pension credits that will be paid out based on a salary lower than the retirement salary, with negative effects on the pension overall.

5.4 Labour Market Trends

I have argued above that the employment pension system is currently making a major contribution to income inequality for retired Canadians. From a public policy perspective, however, a question of at least equal importance is what outcomes the system is likely to produce in the future. Labour market trends, and in particular a clear trend away from stable employment relationships to what many scholars and researchers have labeled ‘precarious work’ suggests that inequality is likely to increase for Canadians under the current legal framework.149

Noted Canadian sociologist Leah Vosko defines precarious work as “forms of work involving limited social benefits and statutory entitlements, job insecurity, low wages and high risks of ill health”.\textsuperscript{150} Precarious work contrasts with work performed under the ‘standard employment contract’: work associated with full-time continuous employment with a single employer, often unionized, and with access to social benefits.\textsuperscript{151} Vosko argues that precarious work is by no means a new phenomenon; it was the norm prior to the evolution of Fordist models of work organization in the 20\textsuperscript{th} Century.\textsuperscript{152} Work falling within Vosko’s definition has always had a negative association with pension entitlements. Both Latimer’s 1932 study of \textit{Industrial Pension Systems in the United States and Canada} and the 1937 \textit{Queen’s Study} noted the mismatch between the mechanisms of the standard employment pension plan and the employment patterns of workers who could not, or did not hold long-term, full-time jobs.\textsuperscript{153} The same problem was identified and discussed extensively by the Ontario Committee on Portable Pensions reporting in the early 1960s.\textsuperscript{154} As we have seen, however, most employment pension plans in both the public and private sector took root in large, stable, bureaucratic businesses, environments in which the standard employment contract prevailed. The policy thinking that shaped Canada’s retirement income system in the mid 20\textsuperscript{th} Century reflected that world.

The world of the standard employment contract is certainly changing rapidly, if it is not vanishing altogether.\textsuperscript{155} Large, stable domestic business enterprises are no longer the engines of job creation; since the 1980s, they have been replaced by smaller, nimble, more globally


\textsuperscript{151} \textit{Ibid.} at 6-7.

\textsuperscript{152} \textit{Ibid.} at 4-11.

\textsuperscript{153} See supra note 142.

\textsuperscript{154} Ontario Committee on Portable Pensions, Second Report (Toronto: Queen’s Printer, Aug. 1961)

competitive firms which offer much more insecure forms of employment. Work patterns are changing to match the new business model. Work has become much more flexible, contingent and nomadic. For many workers, stable, full-time, long-term careers are unattainable, replaced by part-time work, short term contract work, relatively transient attachments to any single employer and “own account” self-employment. Unionization is also on the decline, a decline that has been particularly sharp in the private sector.156

It is true that not all non-standard jobs conform to Leah Vosko’s definition of “precarious work”. Non-standard work may be “good work”, challenging, highly skilled and well-compensated work that enhances workers’ autonomy and capacity for self-actualization and freeing workers from the “bonds of subordination”157 that define the standard contract of employment. In an article provocatively entitled “Non-Standard and Vulnerable Workers: A Case of Mistaken Identity”,158 Raphael Gomez and Morley Gunderson point out that non-standard work is a very heterogeneous category. While acknowledging that one-third of the Canadian workforce is in non-standard jobs, they contend that non-standard work is by no means all ‘precarious’, nor is it always performed by vulnerable workers. The authors argue that non-standard work is often voluntary, chosen by workers to “facilitate a work family balance, as well as transitions from school to work and from work to retirement….”, and that it is not typically a permanent condition.159 Other scholars, while recognizing the diversity of non-standard work, emphasize two gendered issues. They note first that women are disproportionately represented among non-standard workers. Second, they argue that the “good” non-standard work is much more likely to be allocated to male workers, whereas women workers are relegated to the type of non-standard work most properly characterized as ‘precarious’.160 These trends in the distribution of non-standard work are likely to further exacerbate the already badly skewed gender distribution of employment pension income.161

159 Ibid. at 190.
While there may be legitimate debate about whether the trend towards non-standard work is an entirely negative development, few would argue with the conclusion that current trends in the organization of work are running counter to the acknowledged determinants of good pension coverage. The key job characteristics historically associated with pension coverage are declining rather than increasing: unionization, employment by a large firm, full-time work and permanent status. This evolution in the labour market has been described by scholars as the “feminization of work”, a phrase which highlights the prediction that in the post-modern world of work, jobs and work histories for all workers will more and more resemble what used to be described as “women’s jobs”: the kinds of jobs which have produced such substandard results for women in the 20th century.

Researchers such as Lipsett and Reesor have made direct links between these general trends in the labour market, and the likely trajectory of employment pension plan coverage:

...the areas where employment has grown significantly in recent years – in small firms and in part-time, temporary and self-employment – are negatively associated with [employment pension plan] coverage. This suggests that potentially fewer workers will have access to [employment pension plan] coverage in the future.

Other researchers exploring the same issues have identified significant declines in public sector employment as a troubling trend for pension plan coverage, particularly for women.


163 Lipsett & Reesor, supra note 105 at 37-38.
With respect to unionization, the *Arthur’s Report* identified the secular decline in union density as closely tracking the decline in pension coverage; while prepared to draw only “guarded conclusions” on the causes of loss of pension coverage, the Report places de-unionization very high on the list of potential candidates. Arthur’s likewise identifies “decreasing employment in sectors where DB pensions were historically most common” as a key factor. Jobs associated with the characteristics that have been identified as the determinants of good pensions are clearly disappearing. Their disappearance cannot fail to have negative implications both for coverage and benefit quality in employment pension plans.

**6.0 PENSION REFORM: NEW PROPOSALS FOR DELIVERING EMPLOYMENT-BASED PENSIONS**

The serious shortcomings in the Canadian’s employment pension system reflected in this chapter, and the trend towards pension models which provide fewer guarantees and more precarious retirement incomes for employees, have not gone unnoticed by policy makers. A third round of pension reform – a follow-up to the major reforms of the 1960s and the 1980s – is now well underway. In November of 2006, the Ontario government appointed Professor Harry Arthurs as sole Commissioner of its Expert Commission on Pensions. A year later, Alberta and British Columbia appointed a Joint Expert Panel on Pension Standards (“ABC-JEPPS”), followed shortly thereafter by the Nova Scotia’s appointment of a Pension Review Panel (“NSPRP”). These bodies were given mandates of varying scope, ranging from the narrow mandate of the Arthurs Commission which focused primarily on DB plans.

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and related funding issues,\textsuperscript{170} to the much broader mandate of ABC-JEPPS, “to conduct a full and independent public review of the pension standards in the two provinces, and make recommendations for sustaining and improving the pension system for Albertans and British Columbians”.\textsuperscript{171}

In contrast to the two previous rounds of pension reform, however, issues of improving coverage and benefit quality have not been the primary impetus for third round pension reform to date. The mood is one of crisis. There is a collective sense that for employment pension plans, third round reform will be at best a salvage operation: an effort to slow down the inevitable decline of the system, and to ensure that existing plans will be able to meet their commitments, or at least some scaled-down version of their commitments, to existing plan members. The focus of immediate concern has been pension funding. Pension fund assets have been whipsawed throughout the last decade; capital losses on the asset side combined with the unusually low interest rates that increased pension plan liabilities produced record deficits for many plans. Employers who had coasted for years on contribution holidays funded by the pension fund surpluses of the 1980s found themselves suddenly face to face not only with an obligation to resume contributions, but with deficits on which they were required by law to make good. This already precarious situation was became what has been described (far too frequently) as a “perfect storm”\textsuperscript{172}: the pressure of escalating pension costs pressures pension plans to adopt increasingly risky investment strategies in a global capital market which was already extremely volatile, and which finally crashed catastrophically in 2008-2009. The extent to which this crisis of capital generated panic about pension plans reflects the extent to which pension funds and capital markets have

\begin{footnotesize}
\textsuperscript{170} The Arthurs mandate was “to examine the legislation that governs the funding of defined benefit pension plans in Ontario, the rules relation to pension deficits and surpluses, and other issues relating to the security, viability and sustainability of the pension system in Ontario”: see \textit{Arthurs’ Report, supra} note 1, Appendix One at 207.


\textsuperscript{172} Googling [“perfect storm” & Canada & pension] on September 7, 2010 produced 29,600 ‘hits’.
\end{footnotesize}
become mutually dependent, to the point where the health and sustainability of employment pension plans has become inseparable from the health and sustainability of capitalism itself.

The immediate pension solvency crisis, and the pressure from pension plans for immediate funding relief, provided the impetus for governments to examine a number of pension issues of concern to plan sponsors. A major item on the agenda was the issue of ‘regulatory burden’, both generally, in terms of solvency standards for pension funds, and more specifically in terms of regulatory rules and legal decisions on such issues as ownership of surplus and the general problem of ‘asymmetry’, as well as a miscellany of other regulatory rules which were viewed as creating continuing bottlenecks for corporate and pension plan restructurings and impairing the efficient and orderly flow of capital. Strong voices in the pension community argued that over-regulation and trust-law-based court decisions unfavourable to employer flexibility were responsible for declining pension coverage.

All three expert bodies received briefs promoting de-regulation, or ‘principles-based’ regulation over ‘rules-based’ regulation, a term that has become code for less government ‘interference’ and more ‘flexibility’ in the system. The three reports take somewhat different approaches to the issue of “regulatory burden”. The Arthurs Report is generally sceptical of the argument that unnecessary regulation has contributed to the decline of the system. Nevertheless, Arthurs supports the concept of allowing more flexibility for pension plans to shape and monitor their own benefit arrangements. His quid pro quo, however, is a meaningful role for members in plan governance. At the centerpiece of his proposals for innovative employment pension plan design is a new jointly-governed target benefit pension plan (“JGTBPP”), which combines elements of two existing models, MEPPs and JSPPs, models which he clearly sees as having more shelf-life than standard DB SEPPs. This new model would be available to single employers only where there was a bargaining

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173 See, for example, Arthurs Report, “Terms of Reference”, supra note 1 at 207-209.
174 The submission of the Pension Investment Association of Canada to the Arthurs Commission (2007) reflects the position of at least part of the pension industry on the contribution made by regulation and legal decisions to the decline of the DB system (2).
175 Mary Condon discusses principles-based regulation extensively in her report, Comparative Models of Risk-based Financial Services (Ontario Expert Commission on Pensions, 2007); See also ABC-JEPPS Report, supra note 168 at 43-49.
176 Arthurs Report, supra note 1 at 47.
agent – a trade union or “union-like organization”\textsuperscript{177} – which had agreed to the model; the plan would be jointly governed by a board of trustees on which members and retired members would hold at least half the seats. JGTBPPs would, as their name indicates, be target benefit plans rather than classic DB plans, with the power to respond to underfunding by reducing benefits not just on wind-up, like JSPPs, but also, like MEPPS, while the plan was on-going. All jointly-governed plans, including both existing models and the new JGTBPPs, would be subject to less rigorous funding standards, reflecting Arthurs’ view that what he calls “the intensity of regulatory oversight”\textsuperscript{178} might be reduced where plans are jointly governed.

The \textit{ABC-JEPPS Report} does not directly endorse the argument that over-regulation has contributed to the decline of the employment pension plan system. However, the Panel makes no secret of its view that regulation operates as a disincentive to employers. The Panel sees the project of third generation pension reform as a complex balancing act between “the potentially contradictory goals of improved benefit security and higher participation.”\textsuperscript{179} The report makes constant reference to the need to maintain a balance between these two objectives.\textsuperscript{180} Part of the ABC-JEPP mandate was to come up with “practical, affordable and feasible” recommendations.\textsuperscript{181} For the Panel, the range of the practical is largely shaped by the central fact that the system is voluntary. The \textit{Report} hints strongly that there will have to be a trade-offs between pension standards and pension coverage: “increasingly, since workplace pensions are optional, the social policy issue for pensions has expanded from ensuring that workers are fairly treated towards trying to halt, or even reverse, the slide in coverage”.\textsuperscript{182}

Without explicitly embracing a policy of deregulation, the \textit{ABC-JEPPS Report} espouses a more hands-off approach to the content of pension plans. One of the Guiding Principles for its report is that “[o]ccupational pension plans are best characterized as contracts between

\begin{itemize}
\item[\textsuperscript{177}] \textit{Ibid.} at 176 (Recommendation 8.27). Arthurs did not define “union-like”.
\item[\textsuperscript{178}] \textit{Ibid.} at 27, 173.
\item[\textsuperscript{179}] \textit{ABC-JEPPS Report}, supra note 168 at i.
\item[\textsuperscript{180}] \textit{Ibid.} at 23, 27, 38.
\item[\textsuperscript{181}] \textit{Ibid.} at 5.
\item[\textsuperscript{182}] \textit{Ibid.} at 13.
\end{itemize}
employers and employees.”¹⁸³ It favours an approach in which “the parties” make their own “deals”.¹⁸⁴ The guiding principle is that the parties should be able to ‘define the deal’; the role of legislation is to contain sufficient safeguards to ensure that the deal is delivered. It is never made clear, however, who the parties are to this “deal”, or when and how it is to be made. Despite a lengthy and detailed discussion of the importance of good plan governance, the Report makes no recommendations on union involvement, nor on mechanisms for ensuring that members actually have an effective voice in developing and monitoring the pension “deal”.¹⁸⁵

The centerpiece of the ABC-JEPPS proposal for addressing the coverage issue is an alternative model for pension delivery called the ABC Plan.¹⁸⁶ The ABC Plan would be a multi-employer plan spanning both Alberta and British Columbia, subject to regulation under ordinary provincial law governing pensions. Drawing on the wisdom of behavioural economics, the panel proposes that all employers and their workers would be automatically enrolled; employers would have a right to opt-out, but membership would be mandatory for workers whose employers remained enrolled.¹⁸⁷ The self-employed would be encouraged to participate, but not auto-enrolled.¹⁸⁸ The Report emphasizes the ‘private’ nature of the proposed plan; while it would be government-facilitated it would not be government-run, and plan investments and funds would be immunized from government interference. Plan governors would generally be experts in the pension industry, with some representation from what are described, without more detail, as “employer and employee groups”.¹⁸⁹ While the plan would generally be funded by matching contributions from employers and employees,

¹⁸³ Ibid. at 22.
¹⁸⁴ See, for example, Appendix D, Recommendations 6.3-A, 6.4.2-A, 8.1.3-A, 8.2.1-A: ibid at 213-241. The ABC-JEPPS Report rejects mandatory coverage on principle: “[t]he Panel’s view is that employers and employees should be the ones to determine the most appropriate mix of compensation in their context, including whether they should have an occupation pension plan”: ibid at 40. In addition, “the Panel believes that plan sponsors and members should have the flexibility to define whatever pension “deal” is most appropriate in their circumstances”: ibid at 51.
¹⁸⁵ Ibid. at 88-94.
¹⁸⁶ Ibid. at 180.
¹⁸⁷ Ibid. at 185.
¹⁸⁸ Ibid. at 189 (Recommendation 11-C). The issue of whether the self-employed should be automatically or voluntarily enrolled was hotly debated in connection with the CPP in the 1960s. The ultimate decision was that enrolment should be compulsory for all workers regardless of their employment status.
¹⁸⁹ Ibid. at 194 (Recommendation 11-G-H).
with immediate vesting, the proposal contemplates that the contribution policy would be flexible from workplace to workplace; in some workplaces the employer might make all the contributions, while in others there might be no employer contribution at all. It would be a DC plan, but would not operate on an individual-account basis; funds would be pooled and invested under the guidance of the plan’s governors. Pension credits would be converted to annuities to provide a retirement income stream.

The Nova Scotia Pension Review Panel deals much more directly with the issue of the role of regulation in the decline of pension coverage and quality. The Panel was clearly convinced by the argument that over-regulation has contributed significantly to the decline of the employment pension system. The NSPRP Report makes generous use of the language of “regulatory burden”, and is decidedly de-regulatory in tenor. The Report argues that “benefit tradeoffs should not be made by government”, and explicitly abdicates any government role in relation to such issues as the adequacy of pensions, or promoting one type of plan over any other. Even on issues which have long been addressed by regulation, such as non-discrimination among employee groups, it sees no role for state involvement; it recommends that “employers should be allowed to make their own decisions on classes of employees, and benefit design for each”, subject only to the constraints of collective bargaining and human rights legislation. Many of the Nova Scotia recommendations take the approach that issues previously dealt with by regulation should now be governed simply by the plan text. While the Report acknowledges the role unions play in the system and the desirability of allowing employees to have more voice in the governance of plans, there is no quid pro quo here; the plan text should govern regardless of whether it is negotiated or promulgated unilaterally. None of the Panel’s recommendations are directed towards

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190 Ibid. (Recommendation 11-M).
191 Under existing regulatory schemes, including both regulatory statutes and the Income Tax Act, a plan to which the employer makes no contribution does not fall under the definition of pension plan; it cannot be registered and is not entitled to tax benefits.
192 ABC-JEPPS, supra note 168 at 194 (Recommendation 11-J).
193 NSPRP Report, supra note 169 at 15, 43.
194 The “elimination of unnecessary rules and regulations” is an explicit part of the Panel’s mandate: see ibid at 3.
195 Ibid. at 13.
196 Ibid. at 35.
197 See, for example, Recommendations 17(e) and 18 which “encourage” without mandating employee/union involvement in plan administration and governance, and the establishment of advisory committees: ibid at 52-53.
supporting or enhancing the role of unions, or more generally to enhancing the voice of plan members. Indeed, the Report explicitly rejects a proposal to require member approval of plan changes on the grounds that such proposals would interfere with the increased “flexibility and administrative ease” required to stave off the decline of the system.\footnote{\textit{Ibid.} at 13.}

The NSPRP Report makes clear that its primary mandate is the security of the pension promise for those who already have pensions.\footnote{\textit{Ibid.} at 2, 12. See also “The main objective of the Pension Benefits Act is to safeguard employee entitlement to benefits promised under pension plans”: \textit{ibid} at 30.} The panel notes that coverage in the province, as in the rest of the country, has been on the decline: “the Panel could find no instance of a truly new private sector plan being implemented on a Defined Benefit basis in the last ten years.”\footnote{\textit{Ibid.} at 9.} Expansion of coverage, however, is no part of the Panel’s mandate.\footnote{\textit{Ibid.} at 3.}

For those who do not already have pensions, the Report has little to offer except the hope that decreasing the “regulatory burden” and increasing the promotion of employment pensions may encourage plans to spring up where they have not done so before.\footnote{\textit{Ibid.} at 40.} Like the ABC-JEPPs, the NSPRP proposes a new province-wide private sector alternative. The details are vague, except to make it clear that the proposed plan would \textit{not} be mandatory, would \textit{not} offer DB benefits, and would \textit{not} be a government plan.

All three reports reflect an awareness that the voluntary system is increasingly fragile, as incentives for employers to establish and maintain plans fall away. To the extent that regulatory standards impose increased costs on employers, therefore, they are seen as posing a direct threat to the continued existence of the system. The ABC-JEPPs Report makes this link explicit:\footnote{\textit{ABC-JEPPs Report, supra} note 168 at 119.}

\begin{quote}
It has been said that funding rules that require plan sponsors to keep enough money in a pension plan to eliminate completely the risk of loss of benefits on insolvency can make these plans unaffordable. The assertion is that, while it might be theoretically desirable to maximize benefit security, the financial reality is that legislation that attempts to further increase the security of members’ benefits will likely hasten the demise of voluntary DB pension plans. This reflects the challenge before the Panel in recommending DB funding rules: to find the right balance between the need for benefit security and the importance of encouraging pension coverage for the future.
\end{quote}
The Arthurs Report makes the same point when it identifies the paradox that:

… coverage should not be achieved by impairing the security of the pension promise for workers and retirees, but security cannot realistically be purchased if sponsors are required to pay too high a price for it. In short, a delicate balance has to be struck among policy goals that are all desirable but not always easily reconciled.

The theme of “balance” is evident throughout the reports, echoing the concerns reflected in the recent decisions of the courts discussed in Chapter 5, that within a voluntary system, the evolution of legal rules which do not favour employer business concerns will backfire on employee pension security and result in worse rather than better employment pensions. The ‘salvage operation’ may require employees to accept poorer, less secure employment pensions in order to get any employment pensions at all.

7.0 CONCLUSION

The data on coverage and benefit quality we have examined in this chapter make it clear that the employment pension plan system is not working for a significant majority of Canadians. Our close look at the gender impact of the system shows that the system fails women to an even greater degree. Research on the determinants of good pensions tells us that trends do not favour the system; changes in the organization of work are likely to have a further detrimental impact on the growth and quality of employment pensions.

The DB SEPP, still the dominant model in Canada, accounts for much of the measurable outcomes we have surveyed. Employment-based alternatives to that model are increasing their market share, as the employer cost-benefit calculus which supported the system in the first place turns against the DB SEPP. These alternatives are unlikely to slow the general decline in employment pension coverage. The MEPP model has been widely available since the 1940s in Canada. As a market phenomenon, it has been successfully adopted only on the home ground of the classic MEPP – unionized industries characterized by multi-employer collective bargaining structures and where work is organized around a series of short-term contracts in a single industry. Public sector MEPPs have also done well, but because of their defining characteristics – their basis in statutes and the deep pockets that back them and immunize them from the hazards of demography and capital markets – they do not offer a

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204 Arthurs Report, supra note 1 at 52.
model that is portable to the currently unpensioned sectors of the Canadian economy. Where the conditions that fostered classic and public sector MEPPs do not prevail – i.e. in the world of the atypical MEPP – the MEPP model has been much less attractive, and much less successful.

The newest alternative pension structures, the JSPP and the MFPP, explicitly require plan members to take on group risks that under the DB SEPP model are borne by employers. The JSPP model transfers half the risk to employees, in return for an equal member voice in important governance decisions. The MFPP model takes the JSPP model one step further, transferring all the risk to employees, in return for a group right to refuse to participate, and a veto on plan amendment and plan termination. To date, these explicit risk-shifting models have had only limited appeal. In Ontario, the JSPP model has not spread beyond the confines of the public sector, probably for the very good reason that private sector employers who are prepared to continue with the DB benefits on any basis still value the control feature. It is also probable that unions are reluctant to get involved in sponsorship arrangements which may prove hazardous and costly to their members. The MFPP model is as yet confined to Quebec, where target benefits are not available to standard MEPPs; its shows no signs of spreading to other jurisdictions.

In general none of these models are offered as superior to the DB SEPP from a benefit perspective. The sole advantage highlighted by their advocates is that because they are less risky and less costly for employers, they may attract more employers to provide pensions. This is a doubtful proposition. While employers who had previously embraced more risky models may prefer these new models, there is little about them to attract employers whose business interests do not require them to offer a pension plan. Furthermore, the less risk and cost the employer is willing to absorb, the less valuable the benefit from an employee perspective. These new models will almost certainly produce benefits that are less secure and less adequate than existing models. There is no evidence that they will distribute benefits more equally.

As employers become less and less reliant on employment pension plans to manage their employees, and consequently less and less willing to take on the risks and costs of supplying retirement income to those employees, any policy argument for dependence on a voluntary
employment-linked pension plan system substantially diminishes, and with it the efficiency argument for legal rules fostering employer control of those pension plans. Now that most employers no longer have any compelling business interest in an employment-based pension system, it is surely well past time for lawmakers to catch up and explore some meaningful alternatives to that system for the provision of retirement income. The third round of pension reform to date is not off to a promising start. The Ontario government constrained its expert commission with a narrow mandate based on the assumption that the current employer-based and employer-controlled system would continue to be the prevailing model. The Alberta-British Columbia and Nova Scotia reviews failed to take advantage of their broader mandates to venture very far outside a narrow range of private sector alternatives. While they propose a broader and more flexible range of options, they do not challenge the fundamental proposition that Pillar Three pensions should remain under employer control.

In the concluding chapter, I return to the theme of employer control as the primary source of the multiple contradictions within Canadian pension law, and the key contributor to the failure of the system to produce good pensions for Canadian workers.
CHAPTER 7

CONCLUSION

1.0 INTRODUCTION

In legal theory, employment pension rights are terms of the contract of employment, subject to market negotiation and agreement between employer and employee about their content. In practice, leaving pension outcomes to the market means leaving pension outcomes to employers. Under a voluntary, contract-based system, employers provide plans when and where it suits their business interests to do so. They design those plans to maximize their business advantage in the workplace. Increasingly, as economic and social changes alter both the organization of work and the behaviour of capital markets, the cost-benefit calculus that drives business decisions results in employers choosing not to provide any pension plans at all. This system has not produced good employment pensions – indeed, it has not produced any employment pensions – for the majority of Canadians. As employers use the flexibility they are granted by a voluntary system to withdraw from that system altogether, it is clear that the Canadian legal framework for pensions, as it had been designed, interpreted and applied by lawmakers at all levels, gives workers and their representatives few tools with which to fight back.

While experiments with voluntary, employment-based alternative benefit and plan governance structures – JSPPs, MFPPs, hybrid and target benefit plans – show some promise of stabilizing the system in certain specialized and unionized sectors, these experiments are unlikely to change the business calculus which influences employer pension decisions. The general thrust of these experiments to date is simply to redistribute risk from employers to employees within already pensioned sectors of the labour market, a trade-off to preserve coverage with uncertain consequences for the adequacy and security of benefits. Increasingly, the only categories of employees who can count on good pensions are employed in core public sector jobs, where career patterns have changed less than in most
other sectors of the economy, and the employer promise (now increasingly converted to a qualified promise) to guarantee the pension is still reliable.

In the preceding chapters, I have taken a largely historical perspective on the evolution of the law governing employee rights within employment pension plans. In this final chapter, I draw some broader conclusions about the role played by lawmakers in shaping employee pension rights, and why law has not been an effective counterweight to employer power in the system. In section two, I argue that the Canadian legal system has failed to develop a coherent theory of enforceable employee pension rights, or a framework within which those rights can be enforced. In all three legal regimes which structure the employment relationship in this country— the common law, collective bargaining and statutory regulation— lawmakers have acknowledged that employees have pension rights, but have shied away from developing legal rules which would convert those rights into good pensions. Legislatures have left fundamental pension decisions to employers. Legal decision-makers have weighted the scales further in favour of employers in both individual and collective employment relationships by interpreting and applying common law and statutory law to promote and enhance employer control. I examine the multiple contradictions within Canadian “pension law” which arise from the initial decision to build the system on the foundation of the employment relationship. I discuss the implications for pension law of the core contradiction at the heart of the employment relationship: freedom of contract in the face of inequality of bargaining power. I also explore the extent to which the contradictions of pension law have undermined the ability of employees to find effective enforcement channels even for the limited rights the law has been prepared to recognize.

As I made clear in Chapter 1, the key focus of this thesis is to examine the evolution of employee pension rights within the context of the employment relationship as constructed by law, and to explore the role played by law in the failure of the employment pension system. It is not my purpose in this project to develop proposals for alternative vehicles which could replace employment pensions. Nevertheless, there are insights from my research which have application to the challenges facing Canadian policy makers in the next round of pension reform. In section three, I turn to the lessons that can be learned from this research for pension policy-making. The first is that the employment relationship is not a workable legal
foundation upon which to construct a system of adequate and reliable pensions for most Canadians. The power imbalance in that relationship leads inexorably to outcomes in which employee pension interests take second place to employer business interests. Furthermore, changes in the organization of work and society have both decreased the tolerance of contemporary employers for absorbing the risks inherent in defined benefit plans, and have weakened the already frail structural capacity of employer-linked plans to deliver secure and adequate benefits to most Canadian workers. Accordingly, policy-makers must seriously reexamine the decision to rely for a significant portion of Canada’s retirement income on voluntary, employer-controlled instruments grounded in the employment relationship. The second is that within a voluntary, employment-based pension system, ‘de-regulation’ – the dilution of legislated pension standards in deference to the pension ‘deal’ and the ‘intentions of the parties’ – is not a viable policy option. As we have seen, within the current legal framework the ‘deal’ typically reflects the ‘intentions of the employer’, rather than the ‘intentions of the parties’ to the contract of employment. In both common law and collective bargaining regimes, pension law in Canada now makes legislated minimum standards and regulatory protection of benefits, rather than contract or trust law, the bedrock of employee pension rights, and the only effective bulwark against employer self-interest. The third is that the state is necessarily implicated in all aspects of pension reform. A commitment to market outcomes in pension policy does not “get government out of the pension business”\(^1\); it simply implicates government in the unequal outcomes generated by the market. In the context of national retirement income policy, reform choices should not be guided by ideological commitments for or against government involvement in pensions. Instead, they should be guided by an assessment of the likely consequences of different choices for different constituencies, by a close analysis of the relevant evidence about what instruments will produce the best pension outcomes for Canadians, and by national objectives informed by national values.

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\(^1\) In the pension context, the phrase is Nicholas Barr’s, chosen to echo the vernacular of liberalism and neoliberalism: see Nicholas Barr, *Reforming Pensions: Myths, Truths and Policy Choices*, IIMF Working Paper WP/00/139, IMF, August 2000) at 31-32. See also Nicholas Barr, *The Welfare State as Piggy Bank: Information, Risk, Uncertainty, and the Role of the State* (Oxford: Oxford University Press, 2001).
2.0 EMPLOYEE RIGHTS v. EMPLOYER POWER IN THE PENSION SYSTEM

2.1 The Contradictions of Pension Law

As we saw in Chapter 5, employee pension rights in Canada are governed by what is now called “pension law”, a complex and shifting amalgam of common law, labour law and statute law. Pension law is burdened by multiple contradictions. It now firmly rejects the ‘gift theory’, which prevailed in this country until the mid-20th Century. It has not, however, generated a coherent and enforceable rights framework for employment pensions. Despite its formal commitment to employee pension rights as contract rights, with trust law available as an “added layer of protection”, pension law leaves employees almost entirely dependent on the decisions of employers. Pension statutes recognize that pension plans are inherently long-term contracts, but protect only accrued benefits, ignoring the employee’s long-term interest in the stable, predictable accumulation of pension benefits throughout a working life. Statutes provide meaningful regulatory protection to pension rights, but leave entirely in the hands of employers the decision as to whether or not employees will have any pension rights to protect. Legal decision-makers compound these contradictions by shaping, interpreting and applying the law so as to enhance employer power over key pension decisions. Within the collective bargaining context, decision-makers have recognized pension rights as within the scope of bargaining, but have at the same time developed legal rules which largely exclude those rights from the scope of collective agreements, and make them very difficult to enforce. Legislatures, courts and arbitrators have all imposed fiduciary obligations on employers administering pension plans, but have exempted them from the fiduciary obligation that would be most meaningful: an obligation to exercise their power as employers in the interests of their employees. Instead, under Canadian pension law, employees must look to freedom of contract to protect their interests, despite the reality that inequality of bargaining power gives them no leverage with which to negotiate. While collective bargaining frameworks offer a measure of countervailing bargaining power in unionized workplaces, unions face considerable obstacles, as we have seen, in putting their collective bargaining power to effective use in the pension context.

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2 See discussion in Chapter 5, section 5.0.
In Chapter 4, we saw legislatures take a radical step towards constructing pensions as rights by mandating minimum vesting standards for benefits. In many Canadian jurisdictions, those vesting standards have now been expanded, to the point where most plan members now belong to plans which offer immediate vesting. Minimum standards legislation also guarantees concrete employee pension rights such as portability for employees who leave before reaching retirement age, and spousal benefits. In all cases, however, these rights flow only where the employer has established a plan, and attach only to the benefits defined by that plan. Beyond minimum standards, the state has not interfered with employer autonomy to shape benefits as they see fit. Employers still determine whether there will be a pension plan; who will be covered by that plan; what type of benefits the plan will provide and at what level; and how long the plan will continue. The regulatory framework itself gives employees no tools to enhance their bargaining power in order to protect their own pension interests. Their role in plan governance is severely limited, leaving it to the ordinary mechanisms of labour and employment law to determine pension outcomes.

The ordinary mechanisms of labour law and employment law include the common law and the general law of collective bargaining. After a protracted struggle over where and how pensions fit within its limited canon of legal relationships, the common law has now opted fairly decisively for the law of contract as the paradigm within which to structure pension rights and liabilities. At a conceptual level, the repudiation of the gift theory in favour of contract rights was an important breakthrough for employee retirement income security. At a practical level, however, it did not signal any transformation in the power relations that generate employment pensions. Despite the contractual status of pension plans, employers continue to dictate their terms.

Courts have not been entirely comfortable with the capacity of the law of contract to do justice to competing pension claims. In particular, they have been troubled by the obvious potential for employers to pursue their own interests against the interests of their employees.

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4 Ontario and the federal government both amended their legislation very recently to provide for immediate vesting: see Pension Benefits Act, R.S.O. 1990, c.P.8 (“PBA”), ss. 36-37, 63-64, as am. by S.O. 2010, c. 9, ss. 23-24, 41-42 (not yet in force as of Jan. 1, 2011); Pension Benefits Standards Act, 1985, R.S. 1985, c.32 (2nd Supp.) (“PBSA”), s. 17 as am. by S.C. 2010, c.12, s. 1805. Quebec has provided for immediate vesting for many years now.
Schmidt v. Air Products\(^5\) reflects the court’s attempt to locate within the law of trusts a rights framework more robust than the law of contract to shelter employee expectations against employer conflict of interest. As we saw in Chapter 5, however, Schmidt and trust law have had a rough ride in Canadian courts over the last decade. In their retreat from Schmidt, courts have been influenced in part by difficulties in reconciling the competing claims of trust law and contract law, and in applying trust concepts to the complex and heavily regulated world of employment pensions. They have been at least equally influenced, however, by the realpolitik of employment pension plans in a voluntary system. In decisions like Buschau v. Rogers Communications\(^6\) and Nolan v. Kerry,\(^7\) the Supreme Court of Canada has frankly acknowledged its institutional concern that judicial meddling in the complexities of employment pension plans will upset the delicate equilibrium of whatever cost-benefit analysis still supports the survival of this endangered system. While trust law has some capacity to rein in employer self-interest, Canadian courts now appear to be convinced that reining in employer self-interest – i.e. interfering with market outcomes – is neither wise nor safe in pension cases. Perversely, common law rules now operate almost exclusively to reinforce employer power over pension plans.

The same is true for the legal rules developed by arbitrators (and largely sustained by courts) in the context of collective bargaining and collective labour law. In particular, the efficacy of collective bargaining to empower employees in the pension context has been significantly undermined by the vigorous application of the doctrine of reserved management rights to pension plans and pension-related issues. By giving employers unilateral scope to deal with pension issues except to the extent that they are definitively fettered by provisions of the collective agreement, reserved rights doctrine raises the cost to unions of pension bargaining. Since the ‘default’ position is employer hegemony, employers who were and are prepared to resist bargaining may retain their pre-collective bargaining power over pensions. Accordingly, employers have no effective incentive to bargain over pensions, and unions who seek to do so must be prepared to pay, in other benefits or in strikes, simply for the right

\(^5\) Schmidt is discussed in Chapter 5 at section 2.4.
\(^6\) Buschau is discussed in Chapter 5 at section 3.2.
\(^7\) Kerry is discussed in Chapter 5 at section 3.3.
to ensure that pension plans are encompassed within the collective agreement. Pension improvements, of course, will cost more.

In addition, the effective exclusion of employee pension rights from the scope of collective agreements has consigned the pension rights of unionized employees to legal limbo. These pension rights have no obvious legal ‘home’; they may not be incorporated into the collective agreement, but cannot properly be attached to an individual contract of employment, since by law that individual contract had been subsumed into the collective agreement. This indeterminacy has negative consequences for the ability of unionized employees to enforce their pension rights, an issue discussed in section 2.3, below.

2.2 Consent and Pension Contracts

The primary legal paradigm for employment pensions, the law of contract, gives employees little effective leverage over pension outcomes because of unequal bargaining power. In the real world of the workplace in which pension contracts are made, the parties – the employer and the individual employee – typically do not negotiate. The pension plan is employer fiat. Through the alchemy of the law, however, that fiat is transmuted into ‘the intention of the parties’; since contracts by definition reflect the intentions of the parties, the parties by definition have consented to their contents. Ironically, while the conversion of pension entitlements from ‘gifts’ to ‘rights’ gives employees no effective tools to influence the content of pension plans, it deems them responsible in law for the outcomes of the employer-controlled system. When pension plans are drafted so that the employer has the unilateral right to change them, as they typically are, the law deems the employees to have consented to that mode of drafting. When plan documents are construed to assign ownership of surplus to the employer instead of to the employees, as contracting parties the employees have consented to that outcome in the eyes of the law. Accordingly, the fiction of consent embedded in the contract paradigm operates to legitimate outcomes which have resulted from an exercise of unequal economic power.

A collective version of this legitimating phenomenon operates within arbitration law as well. Indeed, the notion of consent is essential to the legitimacy of the reserved management rights

8 This issue is discussed in Chapter 3 at section 4.4.
doctrine itself. In its Canadian version, the theory of reserved management rights is grounded in recognition that unions are endowed by collective bargaining legislation with a broad right to bargain over any term or condition of employment, including pensions. Not all issues which fall within the scope of bargaining make it into the collective agreement. When issues are not addressed in the agreement, their absence is deemed to reflect the joint ‘intention of the parties’ that management will retain the same unilateral power to act on those issues that it possessed prior to unionization. According to this theory, the failure of many collective agreements to address pension issues does not reflect lack of union bargaining power; it reflects union consent that pensions will remain under employer control.

We see this “presumption of consent” beginning to perform its legitimating work as early as Laskin’s decision in the Rexall case, in which he held the union to the terms of the pension plan simply because the union knew about the plan prior to the execution of the first collective agreement. Accordingly, the collective agreement must be read to “accommodate” the plan. The “presumption of consent” reaches its apotheosis in the mandatory retirement cases decided under the Canadian Charter of Rights and Freedoms. As we saw in Chapter 3, both courts and arbitrators have transformed the collective bargaining process itself into a compelling section 1 rationale for determinations that policies of mandatory retirement which would otherwise violate constitutionally enshrined equality rights are in fact reasonable limits on those rights in a free and democratic society, often on facts very little stronger than the mere coexistence of trade union representation and pension plans containing mandatory retirement clauses.

The myth of union consent in these contexts is all the more powerful because, as we have seen in Chapter 3, there is at least a grain of truth at its core. In some cases, the institutional interests of unions have indeed been well-served by keeping mandatory retirement, as well as core issues of pension structure, benefit design and investment policy, out of the collective bargaining process.

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9 The U.S. version of the duty to bargain recognizes a distinction between mandatory and permissive subjects of collective bargaining, and allows management to exclude from meaningful bargaining certain key areas regarded as outside the realm of “wages and conditions of employment”, such as subcontracting: see Katherine Van Wezel Stone, “The Post-War Paradigm in American Labor Law” (1981) 90 Yale L.J. 1509 at 1547-8. Pensions do not fall within that excepted area; under the Inland Steel doctrine, they are a mandatory subject of bargaining (see discussion in Chapter 3 at section 3.1).

10 Stone, ibid. at 1573-77.

11 See discussion in Chapter 3 at section 4.2.

12 See discussion in Chapter 3 at section 6.3.3.
bargaining process.\textsuperscript{13} The power of the doctrine is quite independent of its plausibility in particular cases, however; many of the arbitration decisions examined in Chapter 3 involve situations in which unions had fought doggedly to deal with pensions at the bargaining table, only to be defeated by entrenched resistance from employers who took the view that pension plans were simply none of a union’s business.\textsuperscript{14}

Neither first nor second generation pension regulatory statutes attempted to remedy the deficiencies of labour and employment law by allotting a role to unions in plan design or plan governance. As the labour market dynamics which held the employment pension system together are now unraveling, however, there is a new enthusiasm for involving unions in both the design and governance of employment pension plans. Employers anxious to rid themselves of risks they were very willing to absorb in the 1960s now perceive the need for participation by unions in strategies to legitimize the shifting of those risks to employees. In Chapter 6, we saw this phenomenon at work in the creation of jointly-sponsored and member-sponsored pension plans, in which employers in unionized workplaces, particularly government employers, off-load onto employees retirement risks which are now so substantial that they are unwilling to shoulder them alone. It has now become the job of unions to protect employees against the very substantial hazards of pension sponsorship in the current economic climate.

This trend towards conscripting unions for the purpose of consenting to the transfer of increased pension risk to employees is also reflected in the strategies of regulators and legislatures for dealing with the most recent crises in the funding of defined benefit plans. Unions, rigorously excluded for decades from any meaningful role in pension plan governance, are now being invited into the inner circles of plans in financial difficulty, for the purpose of waiving regulatory funding standards that would otherwise apply. This approach, first taken by the federal regulator on an \textit{ad hoc} basis in the case of Air Canada’s recent insolvency restructuring under the \textit{Companies’ Creditors Arrangements Act},\textsuperscript{15} is now enshrined in general federal law. Recent amendments to the \textit{Pension Benefits Standards Act}

\textsuperscript{13} See discussion in Chapter 3 at section 6.3.2.
\textsuperscript{14} See discussion in Chapter 3 at section 4.0.
\textsuperscript{15} R.S.C. 1985, c.C-36. \textit{Air Canada Pension Plan Solvency Deficiency Funding Regulations}, SOR/2004-174; \textit{Air Canada Pension Plan Funding Regulations}, 2009 SOR/2009-211
introduce a new process applicable to federally regulated DB-SEPPs which the statute labels a “distressed pension plan workout scheme”. Under this procedure, an employer embarking on insolvency/restructuring proceedings or who is otherwise unable to make scheduled payments into a pension plan, may elect to initiate a ‘workout scheme.’ Pension contributions and special payments are deferred while the employer negotiates ‘workout’ arrangements with representatives of the members and beneficiaries of the plan. If the members are unionized, the trade union is their representative for purposes of these negotiations. If they are not, the proposed law provides for the Federal Court to designate authorized negotiating representatives. While the regulations which will give substance to this new process have not yet been issued, it is clear that the sole purpose of a ‘workout’ is to produce an agreement for funding relief, subject to the approval of the Minister. In other words, the role of the union or other representatives is simply to sanction non-compliance with minimum statutory protections, on the best terms possible for the employees. The ironies of this procedure are obvious; the union will share the blame with the employer if the workout agreement does not succeed, despite the fact that it likely had no involvement in any of the decisions that got the plan into difficulties in the first place.

2.3 Pension Rights and Pension Remedies

In addition to the indeterminate content of their pension rights, employees in both non-unionized and unionized workplaces employees face problems in identifying effective channels for the enforcement of those rights. As we have seen in Chapter 5 in the Buschau case, there are signs that courts are less willing than they once were to deal with employee pension claims at common law. In Buschau, the court decided that the employees should take their claim for termination of the plan and distribution of surplus to the Superintendent of Financial Institutions to be dealt with under the Pension Benefits Standards Act, rather than to the courts to be determined at common law. This decision is much more than a procedural decision. In “passing the buck” to the regulator, the court did not merely determine that the

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16 Part 9 of the Jobs and Economic Growth Act, S.C. 2010, c. 12 contains a package of amendments to the PBSA. Section 1817 adds ss. 29.01-29.3, entitled the “Distressed Pension Plan Workout Scheme”. As if January 1, 2011, these amendments were not yet in force.

17 PBSA, s. 29.08. This power applies for non-unionized members; it is unclear how it applies for retirees and spousal pension beneficiaries. While court-appointed non-union representatives are required to secure the agreement of two-thirds of the persons they represent before their agreement in binding, there does not appear to be any requirement that a union holding bargaining rights put the issue of funding relief to the membership.
Superintendent should decide the issues in the case; it determined that the only rights the employees had were the rights they had been given by statute. As the sequel before the Superintendent in the *Buschau* case confirms, the employees’ statutory rights may be considerably more limited than the rights they had claimed at common law. The court’s evolving reluctance to engage with pension issues as a matter of common law appears to reflect a loss of confidence in the capacity of common law categories and principles to navigate through the complex web of intersecting rights and interests at play within the pension law framework. The court’s more recent decision in *Burke v. Hudson’s Bay Company*, may appear to back-track somewhat from *Buschau*; that decision formally reaffirms the court’s allegiance to the common law and to the role of the courts in addressing employee pension claims. In substance, however, the *Burke* decision is entirely compatible with *Buschau*; it confirms the core *Buschau* holding that the common law erects no barriers in the face of unilateral employer pension decisions made against interests of the employees, as long as those decisions do not violate regulatory standards. Like *Buschau*, *Burke* shrinks the scope of employee common law pension rights to the point where it is no longer clear that the common law adds anything to the statutory rights employees already possess.

The *Buschau* and *Burke* decisions, and the lower court decisions that follow them, highlight the extent to which, under pension law, there is now almost perfect overlap between regulatory statutes and other sources of pension rights for non-unionized employees. That overlap is equally apparent for unionized employees in the absence of express and comprehensive language in collective agreements. In Chapter 3, I explored the problems created for pension rights enforcement by the ‘four category test’, consistently applied by arbitrators to refuse jurisdiction over the content of pension plans despite the fact that the rights created by such plans are clearly terms and conditions of employment. Until recently, the arbitrability problem could be circumvented simply by going to the courts, which were willing to deal with pension issues for both unionized and non-unionized employees within

18 2010 SCC 34. See discussion in Chapter 5 at section 3.4.
19 Regulatory standards include holding employers to the terms of their plans: see note 23, infra. In a *Benefits Canada* article published very shortly after the *Burke* decision came down, Gary Nachshen argued that in *Burke* the Supreme Court of Canada has “implicitly blessed the two hats doctrine”, although it did not expressly refer to it by name: “Supreme Court upholds HBC pension ruling”, *Benefits Canada*, October 7, 2010.
20 See discussion in Chapter 5 at section 4.0.
ready-made common law categories. As we have seen, courts are now generally less willing
to deal with pension claims as a matter of common law, irrespective of union status.

Enforceability problems have been further complicated for unionized employees by the
decision in **Bisaillon v. Concordia University**, in which the Supreme Court of Canada sent a
message to the labour law community that pension issues for unionized employees should be
dealt with at grievance arbitration. As we have seen in Chapter 3, however, many arbitrators
have resisted the Supreme Court’s message, and continue to apply the ‘four category’ test
with vigour, dismissing pension grievances on jurisdictional grounds despite the lack of
obvious alternative channels of enforcement. The significant outlier on this issue is the
decision in **National Automobile, Aerospace and Agricultural Implements Workers Union of
Canada, Local 1015 v. Scotburn Dairy Group (Pension Funds Grievance)**,\(^\text{21}\) in which
arbitrator Innis Christie took jurisdiction over pension plan issues on the basis of s.43(1)(e)
of Nova Scotia’s **Trade Union Act**, which provides that arbitrators have the power to “treat as
part of the collective agreement the provisions of any statute of the Province governing
relations between the parties to the collective agreement”.\(^\text{22}\) Christie’s reasoning is
persuasive, and the collective bargaining statutes of several key Canadian jurisdictions have
comparable provisions. The good news is that this decision may lead the way for the
arbitration of statutory pension rights for unionized employees. The bad news, however, is
that under this approach, pension rights may increasingly be equated simply with statutory
rights for unionized employees, as they clearly have been for non-unionized employees.\(^\text{23}\)

Decisions like **Buschau** and **Scotburn Dairy** suggest that the scope of common law pension
rights is shrinking, and employee pension rights, regardless of where they are enforced, are
increasingly merging into statutory rights. This convergence places an increased premium on

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\(^{23}\) It is not yet clear how broadly or how narrowly arbitrators will interpret their jurisdiction to deal with pension
issues under collective agreements. Pension regulatory statutes typically contain general provisions placing a
statutory obligation on plan administrators to administer the pension plan according to its terms: see, for
example, *PBA*, supra note 4, s.19(3). Such provisions in combination with legislation like s.43(1)(e) of the
**Nova Scotia Trade Union Act** gives arbitrators broad jurisdiction to enforce all employee rights provided by
pension plans. Since it is now recognized that arbitrators also have jurisdiction to enforce the common law (see
*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929), it is clearly arguable that arbitrators who apply the **Scotburn Dairy**
reasoning have plenary jurisdiction to enforce the statute and the plan, applying any applicable common
law principles.
the content of statutory rights, a development which has obvious implications for law reform. I discuss this issue in section 3.2, below.

In this section (and in this thesis) I have argued first, that the current market-based employment pension system produces pensions tailored to the business interests of employers, and second, that the Canadian law of the workplace provides no countervailing framework within which employees or their unions can effectively ensure that their interests are reflected in these plans. In the concluding part of this chapter, I argue that in the third round of policy reform on which we are currently embarked, Canadian policy makers should give serious consideration to developing instruments for the provision of retirement income that do not leave employees hostage to the power relations inherent in the employment relationship. I now turn to that issue.

3.0 LESSONS FOR THE THIRD ROUND OF PENSION REFORM

3.1 Changing the Foundation: Moving Away from the Employment Relationship

The first and central lesson from this research is that the employment relationship is a poor foundation upon which to erect retirement income instruments in Canada.

The mismatch between the market imperatives that drive a voluntary employment-based system, and the conditions under which much of the work is performed in this country, has been apparent for decades. Precarious work, job turnover, labour market disadvantage based on gender, wage inequality and the economic insecurity of individual business enterprises have challenged the system since its outset. In 1938, the authors of the Queen’s Study noted that employment pension plans were largely shaped by labour market factors unrelated to employee needs and desires for pension income:

Potential economic gains and employee pressure for retirement provision are both unlikely to be important in industries where employees are rarely retained to old age, where labour is migratory, where most of the workers are women, where the firms are financially unstable, and where the need for retirement provision occurs infrequently because of the small scale of the business. Moreover, the [pension] movement is unlikely to advance rapidly in any industry where the wages are relatively low and

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24 Industrial Relations Section, School of Commerce and Administration, Bulletin No.1, Industrial Retirement Plans in Canada (Queen’s University, Kingston, Ontario, 1938) (Queen’s Study) 108.
where employees feel that present needs are more pressing than provision for an uncertain future which may never arrive, and which, in any case, may be provided for by the state.

They concluded that “[s]ince industrial retirement plans will probably never be extended to even the majority of employees, and since, in any case, they cannot protect the important group of aging people working on their own account or not engaged in industry, they cannot be regarded as an alternative to an inclusive state-operated plan.” The authors saw a role for employment-based plans only as a supplement to state benefits, and as an early retirement ‘buffer’ to help industry to rid itself of workers who were too young to collect the state old age pension but too old for productive labour.

For decades, we have been warned about the frailties of a system which depends for its existence on the voluntary decisions of individual employers. In the 1960s, in the course of the first round of Canadian pension reform, Ontario’s Committee on Portable Pensions, despite its clear free-market orientation, recommended a mandatory system in place of the existing voluntary system. The Committee argued that effective regulatory standards were needed to make employment pensions meaningful for their members. It recognized, however, that it was unworkable to impose such standards on voluntary plans; employers seeking to evade the standards would simply refuse to participate in the system. The Committee’s recommendations were accepted, but the introduction of the Canada Pension Plan cut short Ontario’s experiment with mandatory initiatives before it got off the ground, replacing it with a voluntary regulated system.

Twenty years later, the Ontario Royal Commission on Pensions came to the same conclusion as the Committee on Portable Pensions before it: a voluntary system would not fill the gap in Canada between worker pension needs and state provision. The Royal Commission, no friend of state action, recommended that the existing voluntary system be replaced with a system of mandatory private plans similar to the one recommended by the Committee. Under pressure from business and the financial services industry, however, the politicians of the 1980s engaged in second round pension reform decided to give market forces one more

\[25\text{Ibid.}\]
\[26\text{See discussion in Chapter 4 at sections 2.0 and 3.1. The Committee recommended against a public system and in favour of a mandatory system supplied by the private sector.}\]
chance. Rejecting the Royal Commission’s recommendation of mandatory measures, the majority report of Ontario’s Select Committee on Pensions had this to say:28

[F]or the present, [a mandatory system] will not be recommended so as to allow the existing employment pension system the opportunity to absorb the reforms proposed here and to provide better coverage and better pensions. If the private system fails to respond quickly and effectively it may then become necessary to reconsider the [mandatory option] [emphasis added].

The federal Parliamentary Task Force on Pension Reform was likewise not ready to make the leap to more interventionist solutions. Nevertheless, reporting to Parliament in 1982, it echoed the Select Committee’s sentiment that the private pension system was now on probation:29

In part, [our recommendation] represents a decision to give the private sector a further opportunity to demonstrate that coverage of adequate scope and depth can be achieved without recourse to a universal public plan….The majority is of the view that if our recommendations do not lead to early evidence of dramatic improvement in the coverage problems we have identified, then either significant expansion of the C/QPP or mandatory expansion of private plans is likely to be irresistible [emphasis added].

The voluntary employment pension system survived second-round pension reform. Its weaknesses, however, had become increasingly difficult to ignore.

Since the 1980s, the problems identified in these earlier reform studies have only worsened. Modern globalized capital markets, modern family structures and the changing risk calculus that accompanies these social and economic developments have rendered the employment relationship an even less stable foundation now than it was in the 1960s and 1980s upon which to erect a pension system. The old employment-focused approach has become less and less efficacious as business enterprises streamline and globalize, organizational hierarchies flatten and the work histories of individual Canadians deviate more and more from those of the old Fordist career employee.30

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30 See Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace (Cambridge: Cambridge University Press, 2004) and discussion in Chapter 6 at section 5.2.
The system has obviously worked better for some workers then for others. As we have seen, good employment pensions were historically generated by a combination of defined benefit formulae, high wages and career-length service. That combination, while increasingly difficult to find, still exists in some sectors of the economy. Conventional SEPP and MEPP models appear to work well within the statutory frameworks and labour markets conditions that shape pensions for public sector employees. New JSPP models may work even better, with their combination of joint governance and distinctive target benefits. The classic MEPP structure appears well-adapted to the organization of work and unique collective bargaining framework which has evolved in such industries as construction. As I have argued in Chapter 6, however, existing MEPP frameworks do not work effectively in the private sector outside unionized environments. The same is true for benefit structures such as target-benefit and member-sponsored plans. Such innovative approaches to benefits have become attractive primarily because they transfer a significant part of pension risk from employers to employees. In an employer-controlled system, they cannot be fairly implemented without effective union representation of plan members. In view of current downward trends in private sector unionization in Canada, such risk-sharing models are clearly not the solution to coverage and benefit quality problems.

In Chapter 4, I argued that the shape of the three-pillar system established in the mid-1960s can best be understood as a ‘deal’ between the Canadian state and Canadian business; in return for the state’s agreement to leave room for employment pension plans, employers would provide such plans, absorbing a significant portion of the risks of retirement that would otherwise be borne by the state or by individual workers. As we have now seen, even those employers who previously took on defined benefit liabilities are increasingly unprepared to bear those risks alone. Indeed, the employers of a significant majority of Canadian workers have made it clear that they are unprepared to assume any portion of those risks. For most employers, there is simply no longer enough business benefit. Whether the original deal was ever wise or workable – and I have argued that it was not – it is clear that it has now broken down.
3.2 The ‘Paradox of Regulation’: The Argument for Strong Statutory Pension Rights

The second lesson to be learned from this thesis for third round pension reform is the importance of maintaining strong regulatory standards for defining and enforcing employee pension rights in any employment-based system. This argument may seem perverse amidst widespread complaint that the current regulatory system has created significant disincentives for employers to create, maintain and improve employment pension plans. While they do not use his language, those who protest against “regulatory burdens” place pension regulation in the category of what Cass Sunstein has labeled “paradoxes of the regulatory state”, in which statutes designed to improve regulated enterprises have in fact undermined or even destroyed them.\(^{31}\) International scholarly and policy opinion appears to favour the view that statutory pension regulation runs the risk of putting employment pension plans out of business.\(^{32}\)

Leslie Hannah, assessing the impact of regulatory rules on private pensions in OECD countries generally, concludes: “It is a paradox that the more a country makes private pensions suitable vehicles for old-age savings through legislative controls, the less likely employers are to want to offer such pensions.”\(^{33}\)

Before embarking on a discussion of this issue, it is worth noting that the deployment of ‘paradox of regulation’ arguments in support of the proposition that we should reduce ‘regulatory burdens’ on pension plans is almost entirely circular. The case for effective minimum pension standards for voluntary employment pension plans is at least as strong now as it was in the 1960s when Ontario’s Committee on Portable Pensions first identified the extent to which unregulated employer pension practices robbed employees of their legitimate pension expectations. Ontario Committee recommended that employment pension plans be made mandatory, precisely because of its concern that within a voluntary system,

the necessary level of regulation would drive employers out of the pension field. Ontario initially followed that recommendation. If plans were mandatory, there could be no ‘paradox of regulation’, since withdrawal from the system would not be an option for employers. Strong regulatory standards are problematic only in systems designed to make it easy to opt out: i.e. in systems like Canada’s in which plans are voluntary and employer-controlled. It is clear that paradoxes of regulation flow not from legislative choices about whether to regulate, but from choices about how to regulate. The argument that regulation of voluntary plans leads to a reduction in the number of plans and in the quality of the pensions they provide does not lead inexorably to the conclusion its proponents believe it does: that plans should be deregulated. With equal logic, it leads to the conclusion that they should be made mandatory, or replaced with state pensions.

Within the context of the current debate, however, the argument is addressed to the existing legal framework, and I shall evaluate it in that context. As I have discussed in Chapter 6, there is controversy in Canada over the practical impact of regulation on the employment pension system. The Report of the Ontario Expert Commission on Pensions argues that:

...the evidence does not seem to support over-regulation as a prime cause of declining pension coverage. The downward trend in coverage – evident in the mid-1970s and well-documented from 1985 onward – predates the introduction of most of the regulatory requirements complained of, and has not accelerated during periods of heightened regulatory or legal change. Moreover, the decline in pension coverage coincides with and is better explained by other factors – principally, the decline in union density and in employment in sectors where DB plans were most prevalent.

By contrast, the other two provincial reports generated to date in the third round of pension reform have no hesitation in attributing declines in pension coverage at least in part to “regulatory burden”. In its background paper issued in January of 2010, Options for Increasing Pension Coverage Among Private Sector Workers in Canada, the Steering Committee for the Provincial/ Territorial Finance Ministers on Pension Coverage and Retirement Income Adequacy assumes a consensus that “regulatory burden” is a problem in Canada; the term appears without comment on the list of factors, along with “changing

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35 See discussion in Chapter 6 at section 6.0. See also Bob Baldwin & Brian Fitzgerald, Seeking Certainty in Uncertain Times: A Review of Recent Government Sponsored Studies on the Regulation of Canadian Pension Plans (Toronto: C.D. Howe Institute Pension Papers, 2010)
workplace dynamics (international competition, reduced unionization of the workplace and declining size of employer) [and] rising costs”, that are “making employer sponsorship of pension plans less attractive”. 36

Whether the type and level of statutory protection Canada currently affords to employee pension benefits is a serious disincentive to the establishment and continuation of pension plans is at least in part an empirical question. Little detailed Canadian empirical work has been done to answer this question. One of the few Canadian studies to evaluate the direct impact of regulatory reform on pension coverage concludes that regulation has had some postive effects on coverage, although the authors concede that these effects have been “modest”. 37 If regulation has operated as a disincentive to some employers to embark on pension provision and has influenced the decisions of others to establish or convert to DC plans – and the argument is certainly more than plausible at a theoretical level38 – there is no persuasive evidence that it is a key or independent factor. Numerous other interlinked factors, including changes in labour markets and the decline in union density, have likely been more influential in changing the business calculus upon which the ultimate fate of a voluntary system depends. 39

Even if there were clear evidence that regulatory standards were a barrier to pension coverage, however, a general loosening of the minimum standards establishing employee pension rights is not a viable policy option for saving the voluntary, employment-based system. 40 A recurrent theme in the provincial reform reports to date in this third round of pension reform is the argument that governments should step aside and let the ‘parties’ work

36 http://www.fin.gov.bc.ca/pension_plan_options_paper.pdf, last accessed on October 20, 2010 at 18 (“Options for Increasing Pension Coverage”) at 1; see also at 8.
37 Andrew Luchak, T. Fang & Morley Gunderson. “How Has Public Policy Shaped Defined-Benefit Pension Coverage?”(2004) 25 Journal of Labor Research 469 at 481: “the objectives of the pension reform movement to increase private pension coverage, at least through earlier vesting and broader eligibility requirements have been successful”.
38 See discussion in Chapter 6 at section 4.1.
39 Arturs Report, supra note 34 at 47.
40 I emphasize that my focus here is on regulatory minimum standards establishing employee pension rights. I certainly do not argue that the regulatory system could not be improved. To focus only on Ontario, the Arturs’ Report identified numerous areas in which regulatory rules did not work well and posed unnecessary impediments to good pension provision. Many of the recent amendments to the PBA of the type identified in the conclusion to this chapter were long overdue.
out their own pension ‘deal’.\textsuperscript{41} It is clear from the research reviewed in this thesis that within the current legal framework, that ‘deal’ is written by the employer. Although the Supreme Court of Canada has now unequivocally confirmed that “the pension plan text is a contract between the employer and the employee”,\textsuperscript{42} the notion that this contract reflects the intention of the parties is in most cases a legal fiction. A typical pension plan is at best a contract of adherence; to invest a contract formed in this way with the normative power to supplant minimum standards would be to pile fiction upon fiction.

For both unionized and non-unionized employees, legal decision-makers have been unable or unwilling to develop stable, coherent theories of enforceable employee pension rights within either common law or arbitral jurisprudence. Arguably, regulatory statutes have become the sole meaningful repository of employee pension rights; unless such statutes provide employees who are members of pension plans with a solid floor of rights, as well as clear channels for the enforcement of those rights, they will be left without legal protection. In the absence of mechanisms for equalizing employee bargaining power, minimum statutory standards have become certainly the most, and perhaps the only effective bulwark against employer-self interest. A reversion to the pension ‘deal’ would be a retrograde step which would not improve coverage, and would almost certainly lead to a deterioration in pension quality for employee plan members.

\section*{3.3 The Role of Government}

\subsection*{3.3.1 The Public-Private Debate}

The third key lesson to be learned from this thesis is that choosing among retirement income instruments based on whether they are “public” or “private” is a fundamental policy error. As Nicholas Barr has argued, it is a myth that “private pensions get governments out of the pension business”.\textsuperscript{43} It is, however, an enduring myth in Canada. The issue of “regulatory burden” discussed in section 3.2 above is very closely related to the issue which has structured the debate about retirement income policy in Canada since the mid-1960s: the

\begin{thebibliography}{99}
\bibitem{41} See discussion in Chapter 6 at section 6.0. There I note that despite the fact that the \textit{Arthurs Report} is much more sceptical of the ‘regulatory burden’ argument than the other two reports, it does support increased autonomy for plans to make their own ‘deal’, provided there are proper safeguards for employee interests.
\bibitem{42} \textit{Burke v. Hudson’s Bay Company}, supra note 18 at para. 6.
\bibitem{43} Barr, \textit{supra} note 1.
\end{thebibliography}
issue of the proper role of government in retirement income provision. As we saw in Chapter 4, Canada’s three-pillar system was an attempt to draw clear lines between public and private pension instruments. Policy-makers opted for the current three-pillar model not because it was demonstrably superior for producing good retirement pensions, but because it met the liberal objective of minimizing state interference with the operation of pension markets. Although the idea that modern political, social and economic life can be divided into neat, distinct and coherent public and private spheres has long been discredited, “keeping government out of the pension business” remains a powerful theme in this third round of pension reform. In its January 2010 paper, Options for Increasing Pension Coverage Among Private Sector Workers in Canada, the Steering Committee of Provincial/Territorial Ministers on Pension Coverage and Retirement Income Adequacy noted that:

[T]he appropriate role for governments in providing solutions is controversial. While some support a strong role for governments in both setting the legislative framework and ensuring the ongoing sustainability of the policy solution, others favour a private sector solution that could be developed with governments only acting to provide an appropriate regulatory framework. This difference of opinion appears to be a fundamental driver for what type of solution is preferred.

Strong voices continue to resist calls for broader public engagement with pensions, arguing, as they did in the previous two rounds of pension reform, that government expansion of the public system is unaffordable, that mandatory systems are “inflexible” and “paternalistic” and that the market can provide instruments capable of meeting the diverse retirement income needs of Canadians. There are calls for “modernization” of the regulatory environment to make it more “flexible” and less hostile to financial innovation, including calls for loosening funding standards, not just to provide short-term funding relief, but on a permanent basis; for amendments to the Income Tax Act to permit more money to be tax-

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44 In the context of law, this observation was first made by the Legal Realists a century ago, and has continued to be a central theme in critical legal studies and in much feminist legal analysis: see, for example, Karl Klare, “The Public/Private Distinction in Labor Law” (1981-82) 130 U. Pa. L. Rev. 1358; Morton Horwitz, “The History of the Public Private Distinction (1981-82) 130 U. Pa. L. Rev. 1423; Susan Boyd, ed., Challenging the Public/Private Divide: Feminism, Law and Social Policy (Toronto: U of T Press, 1997).


46 Current Alberta Minister of Finance Ted Morton has suggested that the private sector should be given another ten years to explore new retirement income options: see Janet McFarland, “Slow approach urged on pension reform”, Globe & Mail, April 13, 2010. Alberta’s current official position is that “[w]e should be looking for the right combination of private sector delivery with public oversight and monitoring”. It opposes an expansion of the C/QPP: see Minister’s Statement, June 11, 2010.
sheltered above current ceilings; and for more flexibility in the statutes to permit pension plans to be offered by insurance and other financial service providers.\(^{47}\)

Interestingly, many of the same critics of tax and regulatory laws as obstacles to pension entrepreneurship are also calling for the revamping of these same laws to promote new types of tax-sheltered retirement savings vehicles.\(^{48}\) The insurance industry has expressed cautious support for law reform which would make private sector plans mandatory (or at least quasi-mandatory, with auto-enrolment and opt-out features) in Canadian workplaces,\(^{49}\) a move which would expand pension coverage by providing extraordinary marketing opportunities for the costly, off-the-shelf defined contribution products which have become such an important part of the insurance business in this country.\(^{50}\) This inconsistency in free-marketers’ support for regulation which favours their industry is, of course, neither unique to the insurance industry nor particularly new. In 1933, Legal Realist Morris Cohen observed that: \(^{51}\)

…those who talked about “keeping the government out of business” are the last to desire that the government shall not help or protect, by proper rules, the business in which they are involved. The differences which divide men in this respect concern the question of what interests should be protected and who shall control the government.

It does, however, serve to underline one of the key contradictions in the public-private debate around pensions in Canada: the fact that our so-called ‘private’ pensions are deeply and inextricably embedded in law.

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\(^{49}\) Options for Increasing Pension Coverage, supra note 36 at 27, is critical of the role played by the investment industry (including the insurance industry) to date in retirement income provision; it charges that “the industry has had little success in filling the gap in retirement savings among the middle to high income group. Where the industry has been successful, such success has been accompanied by some of the higher MERs [management expense ratios] in the world…”

Canada’s current employment pension system is clearly an artifact of the state throughout all of its pillars. Employment pension plans have been nurtured by the state since their earliest beginnings. Such plans are heavily subsidized by the income tax system. Both pension payments and contributions have been tax deductible almost since the inception of income taxation in Canada in the early part of the 20th Century, and contributions grow within such plans on a tax-free basis. The value of the tax subsidy to private pension plans is massive: a recent research report estimates that it costs the Canadian income tax system some $20 billion a year, 70% as much as the cost of the entire OAS Pillar 1 benefit. In addition, as we have seen, employment pension plans have been shaped since the mid-1960s, for better or for worse, by the regulatory system, a system into which considerable public resources are invested. There is certainly room for employers to manoeuvre within the overall boundaries of statutory regulation. It is clear, however, that those boundaries are defined not only by law, but by what we call public law. As Lebel J. observed in Nolan v. Kerry, “pension law is governed first and foremost by provincial legislation”. It is no longer plausible to claim, as did McLachlin J. in Schmidt, that we must “look to the principles of private law” for solutions to such problems as the distribution of pension surpluses.

Defense of the employment pension system as private is even less plausible in the face of the reality that almost 50 percent of current plan members work in the public sector, with a very large percentage of those members in plans established and shaped by statute. Some Canadian jurisdictions maintain the fiction that these plans are ‘private’ by placing them under the jurisdiction of general regulatory statutes; others regulate them only under special government pension legislation. Whichever regulatory strategy is adopted, however, it is clear that plans for public employees are sustained by political at least as much as by market forces; they differ from acknowledged public plans like the C/QPP and the OAS not in the

52 Gösta Esping-Andersen has observed more generally that “states created markets and …markets created states. For pensions, at least, it required the application of state power to build and nurture a viable private market. In turn, the state’s role in furnishing pensions had been decisively shaped by the nature and limits of markets”: *The Three Worlds of Welfare Capitalism*. (Princeton: Princeton University Press, 1990) at 79.


56 See discussion of public sector pensions in Chapter 6 at sections 3.3 and 5.2.
level of state control, but only by virtue of the fact that eligibility for benefits is restricted to public employees. They are ‘state action’ in any meaningful sense of that phrase.

The difficulty in drawing intelligible lines between public and private pension instruments is not, of course, unique to Canada; it pervades pension policy discussions internationally.\(^57\) International monitoring and reporting agencies take a variety of approaches to whether employment pension benefits paid to public servants should be classified as public or private.\(^58\) In France, where public debate has recently raged about raising the age of retirement, the government sees mandatory occupational pension plans as part of the public system, while the national trade unions see them as the product of collective bargaining.\(^59\) Chile’s ‘privatized’ national pension system is mandated by law and compulsory for all workers, although it is based on individual accounts and managed by insurance companies.\(^60\) European competition law has forced the reclassification of many pension schemes, including the Dutch occupational scheme established through collective bargaining, from private to public.\(^61\) Even those international organizations who promote private pension solutions most vigorously have trouble drawing meaningful lines between them. The OECD now makes broader use of a distinction between mandatory and non-mandatory instruments

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\(^{58}\) The International Labour Organization regards employment pensions for public employees as public pension expenditures., while the OECD does not: see John Myles, \emph{Old Age in the Welfare State: The Political Economy of Pensions}, rev. ed. (Lawrence, Kansas: University of Kansas Press, 1989) at 64.

\(^{59}\) Boboli, \emph{supra} note 57 at 258.

\(^{60}\) Herbertsson, \emph{supra} note 57 at 584; Muller, \emph{supra} note 57 at 372-394; Martin Rein & John Turner, “How societies mix public and private spheres in their pension systems” in Rein & Schmahl, \emph{supra} note 57 at 251-293; Whiteside, “Private Pensions and Public Policy: The Public-Private Divide Reappraised” in Clark, Munnell & Orszag, \emph{supra note 32} at 684.

\(^{61}\) Whiteside, “Private Pensions and Public Policy: The Public-Private Divide Reappraised” in Clark, Munnell & Orszag, \emph{supra} note 57, 684 at 697.
for purposes of international comparisons, than it does of a public-private distinction. On close examination, the conceptual divide between public and private pension measures which has loomed so large in the Canadian pension policy debates of the past appears largely chimerical.

### 3.3.2 Inequality and the Public-Private Debate

In view of the level of state involvement clearly evident throughout the pension system, there can be no principled ground on which to reject or affirm pension instruments based on whether they are public or private. Even if opponents of expanded public pensions could be persuaded of that conclusion, however, it would not resolve the debate. A deeper issue remains: the issues of distribution. History tells us that the choice of public or private pension instruments will have a significant impact on how the benefits of the retirement income system, and consequently the risks of retirement, are allocated among Canadians as a whole.

Scholars engaged in comparative studies of national pension systems point out that the choice of so-called public or private pension instrument makes very little difference to the overall national cost of providing retirement income to the elderly. The issue of ‘affordability’, frequently raised both internationally and in the Canadian debates as a barrier to expansion of public systems, proves on close examination, to be a red herring. The amount of retirement income distributed to Canadians 65 and over in future years – the proportion of Canada’s overall resources consumed by the elderly – is likely to be constant, no matter what choices are made by policy-makers in this third round of pension reform about pension instruments. In their 2006 article, “Sustainable and Equitable Retirement in a Life Course Perspective”, sociologists Gösta Esping-Andersen and John Myles highlight “[t]he remarkable fact …that average living standards of the elderly differ little across

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countries … irrespective of which kind of pension mix prevails”.
They argue that “less government and more market will not alter much the future scenario in terms of levels of financing. All it really implies is from which pocket we take the money”.

And perhaps more importantly, into whose pocket we put it. While overall costs do not vary, what does vary, depending on policy choices about pension instruments, is the distributive outcome. Who wins and who loses can vary dramatically depending on the policy choices made among pension instruments. Worldwide, dependence on market-based retirement instruments tends to increase inequality in old age. As we have seen, this has certainly been true in Canada, where voluntary employment-based pension plans have been a consistent force for inequality in the generation and distribution of retirement income. Economists and sociologists predict that as income from employment pensions becomes an increasingly large share of retirement income in Canada, income inequality among the elderly will increase rather than decrease. The inequality effects associated with the concentration of employment pension income will become even more pronounced as coverage becomes more uneven and benefits more unequal. Against a backdrop of generally rising inequality in

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63 In Clark, Munnell & Orszag, supra note 32, 839 at 840-848.
64 Ibid. at 842. The authors note, of course, that use of private instruments may add transaction costs to the mix: see 841.
67 See discussion in Chapter 6 at 5.0.
Canada, income inequality among the elderly is on the rise again. And as we have seen in Chapter 6, income inequality associated with employment pensions will track the same factors that influence success in the labour market, including class, race and (dis)ability. For women, these factors will be further exacerbated both by continued pay discrimination in the workplace, and by the impact of family on women’s earnings and time use patterns.

Public pensions, by contrast, have been distributed much more evenly. In Canada, this has occurred in part because their basic structure – universal coverage and seamless portability – eliminates many of the design flaws that flow from a system linked to individual employment relationships within the Canadian legal system. Their superior equality effects are also a result of the fact that they have been deployed to implement specific social policy decisions. The OAS flat benefit provides a universal floor for retirement income. C/QPP contains some (re)distributive features, the most obvious of which is the family “drop out” provision which allows parents to eliminate from pension calculations some of the years in which their earnings were depressed due to their responsibilities for young children.

These are deliberate design features, and design features of this nature are not inextricably linked to the public or private character of the instruments to which they are attached. Either public or private instruments can be designed to further social policy goals. Not all public systems promote equality goals; like private systems, public systems can be calibrated to produce unequal distributive consequences. A prime exemplar are the broad public systems

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69 The OECD has recently reported that the rich are getting richer in Canada, both nationally and in comparison to their counterparts in other countries: “the average income of the richest 10% is US $71,000 in purchasing power parities, which is one third above the OECD average of US $54,000. The poor and middle class in Canada are also richer than the OECD average, but by less – their average incomes are only 18% above that of their counterparts in a typical OECD country”. The same report indicates that inequality of household earnings and poverty have also increased in Canada over the same time; the overall poverty rate (defined by the OECD as less than half the median income in a country) is 12%, up from below 10% in the mid-1990s: see Country Note: Canada http://www.oecd.org/dataoecd/44/48/41525292.pdf, last accessed on November 7, 2010.

70 OECD, Pensions at a Glance, 2009, supra note 62 pegs Canada’s poverty rate for seniors at below 5 percent (see Figure 2.5 at 64), while the 2009 figures reported in the Country Note cited at note 69 above, shows it at 6 percent.

71 See discussion in Chapter 6 at section 5.0.

72 See Chapter 6, section 5.3, Table 4.

73 The claw-back feature, which mars OAS universality, affects fewer than 5 percent of Canadians: Myles, The Maturation of Canada’s Retirement Income System, supra note 68 at 5, footnote 9.

74 See discussion in Chapter 4 at section 4.3, note 90.

75 Myles & Esping-Andersen, Clark, Munnell & Orszag, supra note 63 at 842; see also Esping-Andersen, The Incomplete Revolution, supra note 65 at 153.
of states that fall into Esping-Andersen’s corporatist category, in which public pensions maintain tight links throughout the system between income levels and contributions, and between contributions and benefits, with the objective of reproducing existing social hierarchies within the system of retirement benefits. It is no coincidence, however, that states whose pension mix favours public instruments are more likely to have more equal outcomes. As we have seen, the legal framework within which employment pension plans function in Canada inevitably results in highly “concentrated” pensions: they are distributed only to a minority of the labour force; they are disproportionately allocated to those who are already winners in the labour market; and among those with pensions, the highest benefits go to those with the longest service in the highest paid jobs. Public pension instruments, by contrast, distribute their benefits much more widely and evenly. They are therefore better adapted to spread the risks of retirement across wider risk pools, at significantly lower costs. They can certainly better correct for the ‘market failures’ – among others, serious information asymmetries, high transaction costs and the ‘adverse selection’ problems that plague the private annuity market – that result in lower retirement incomes and subsequent loss of welfare. Because of their capacity for universal coverage, public pension instruments are also better adapted to accommodate inequality caused by the distribution of labour market income on market principles – provided that Canada as a nation decides that it is appropriate to do so.

From the perspective of national welfare, the primary issue is not whether pension instruments are labeled “public” or “private”. The issue is what work we ask those

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77 See discussion in Chapter 6 at section 5.0.
79 Lump sums saved for retirement, whether tax-sheltered or not, may be converted to lump sums on the private annuity market (currently the preserve of insurance companies in Canada). Because conversion is voluntary, typically those who purchase annuities are those who expect to get the best value from them: i.e. those who expect to have the longest life spans. Consequently, the market prices annuities higher than it would if annuities were mandatory and retirees who are ‘low-risk’ from the perspective of insurance companies (i.e. could be expected to have shorter life spans) were included in the risk pool. On the private market, annuities are more expensive for women because, on average, women live longer than men.
The quest for a new pension framework inevitably engages the role of the state in setting clear policy goals, in identifying the social risks that must be addressed collectively within the system, and establishing distributive (or redistributive) objectives that are most consistent with national values. The key policy question is not whether the state ‘interferes’ in retirement income provision; the issue is how the state chooses to use its power, what goals it seeks to achieve and what normative principles it chooses to guide its choices. Once those choices are made, the choice of a public or private instrument is a much more straightforward exercise. In his recent study comparing various public and private policy options for pension reform, Jonathan Kesselman has outlined the types of factors that need to be considered in making this choice. His study assesses various policy options against such behavioural and institutional factors as “individual myopia” and undersaving; deficient investing skills and temperaments; relative costs of investing and annuitization in employer, individual and public schemes; and public external costs of individual behavior embodied in the Samaritan’s Dilemma”. On the basis of his own study, Kesselman concludes that these factors clearly favour an expansion of the C/QPP over any of the private sector options on the table. Other factors may be relevant, and other conclusions possible, depending on the precise design of particular pension instruments. The point is that liberal preferences for private over public instruments (or indeed social democratic preferences for public over private instruments) do not resolve the core distributive issues; they simply avoid them. Sound policy-making mandates that these issues be addressed. There is no substitute for the difficult exercise of identifying national values, linking those values to retirement income objectives and constructing instruments designed to achieve those objectives. That

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81 In this context, “myopia” refers to well-documented tendency of workers to take a short-sighted approach to retirement savings that does not follow the model of rational economic behavior: Kesselman, supra note 42 at 13.

82 Kesselman, supra note 42 at 20. Kesselman defines a Samaritan’s Dilemma as the “phenomenon of a public program that seeks to help people but actually worsen[s] their dependency through disincentives”: ibid. at 15. The reference here is to the structure of the Guaranteed Income Supplement (GIS) portion of Canada’s Pillar 1 benefit, in which income above a certain level from any source results in a claw-back of GIS at a rate of 50 cents on the dollar.

83 Ibid. at 29-30.
exercise did not take place in Canada in the first two round of pension reform. This time, we should not skip this essential step.

4.0 CONCLUSION

In this thesis, I have sought answers, from the perspective of the law of the workplace, to the question of why the employment pension plan system has not worked well to produce good pensions for Canadians. Based on this research, I conclude that Canada’s decision to harness employment pension plans to national retirement income policy without serious disruption to the power relations which initially generated them within the employment relationship has been a significant contributor to the dysfunction of the system. This policy choice was implemented by law, through an intricate series of decisions by lawmakers both legislative and adjudicative, about the framework within which pension plans will operate, and how that framework will be interpreted and applied. These decisions have given market-generated inequities a major role to play in our national retirement income policy. The result is inadequacy, insecurity and inequality in retirement income for increasing numbers of Canadian workers.

Canadian public policy has stubbornly maintained its commitment to employment pension plans despite ample evidence, generated through two rigorous rounds of pension reform and more than a century of experience with employment pension plans, that the employment-based plan model is profoundly defective. The current reform initiative may be headed in the same direction. As noted in Chapter 6, the prime catalyst of the current debate was the funding crisis for DB plans, evident even before the most recent crisis in capital markets, rather than the overall inadequacy, insecurity and inequality generated by the system. To date, third generation reform activity has revolved around identifying and implementing “quick fixes” for apparently technical dysfunctions in the existing employment pension system. New rules have been enacted to remove impediments within the system to the freer flow of capital, facilitating plan mergers and asset transfers between plans.\textsuperscript{84} Initiatives have been introduced to provide funding relief to “distressed” DB plans,\textsuperscript{85} and to facilitate dispute

\textsuperscript{84} PBA, supra note 4, ss. 80-80.2, 81, as am. by S.O. 2010, c.9, ss. 68-70.
\textsuperscript{85} See amendments to the PBSA discussed at note 16, supra.
resolution over such recurring problems as surplus ownership. There are some moves towards more flexibility in structuring plans and plan benefits. These measures go nowhere near the root of the core problem with the employment pension system: employer control, and the fact that employees have no countervailing power to influence pension outcomes.

Canada has never, as a nation, had a real debate about the objectives of our retirement income system: what foundational principles and values should ground it, and what it should be seeking to achieve. As Paul Pierson has pointed out, national pension policies have “major implications for the distribution of benefits and burdens along the lines of income, class, gender, and age”. In the new round of pension policy reform on which Canada now has embarked, policy-makers need to go back to first principles. They must define good pensions and decide who should get them. They must set clear goals for the retirement income system as a whole, taking into account the current realities of labour markets and the social division of labour. They must examine what distributive principles are appropriately applied to post-retirement income, grappling with the hard questions about social class, gender, and inter- and intra-generational equity that inform such principles. Only when this exercise is complete can there be a productive debate about what mechanisms for generating and distributing retirement income will best achieve those goals.

86 PBSA, supra note 4, s.9.2, s.1796; PBA, supra note 4, s.77.11, as am. by S.C. 2010, c.12.
87 See, for example, PBSA, supra note 4, s.16.2 (variable benefit); PBA, supra note 4, s.39.2 (target benefits) and s.40.1 (optional benefits).
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