

# Gender Risk and Employment Pension Plans in Canada

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*Current policy debates about Canada's retirement income system have failed to consider "gender risk" — i.e. the risk that Canadian women will bear a disproportionate share of welfare loss in old age. This paper argues that the continuing gender disparity in retirement income reflects Canada's heavy reliance on private pension instruments generated and shaped by labour markets. The author begins by looking at the relationship between gender and Canada's three-pillar retirement income system, noting that while public pensions distribute benefits based on explicit policy goals, private pensions distribute them based on the "hidden hand" of market principles. She then considers the differential impact of employment-based pension plans on men and women as a function of the distinct patterns of male and female engagement in the labour market. Noting the close relationship between pension design choices and gender outcomes, she goes on to discuss the pension reforms introduced by Canadian governments in the 1960s and 1980s, in which those governments saw gender inequality as an issue to be addressed primarily by mandatory public plans rather than by voluntary private plans. Ultimately, the author contends, the gendered impact of Canada's pension system flows from the complex interaction between women's paid employment and their reproductive and caregiving work. A gender-equal pension system would recognize the unequal burden borne by women in labour markets and in families, and would pool and share the welfare risks which that inequality entails. Voluntary employment-based pension plans shaped by market imperatives at the enterprise level will not address these issues, in the author's view, nor will the type of individualized pension contemplated by the federal government's recent PRPP legislation providing for pooled savings vehicles to which employers do not contribute. What is needed, she argues, is a broad-based collective risk-sharing vehicle such as the CPP/QPP.*

## 1. INTRODUCTION

For at least as long as we have been able to make reliable statistical comparisons, we have known that older women in Canada must live on two-thirds or less of the retirement income enjoyed by

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older men.<sup>1</sup> This means that in addition to the conventional risks that threaten the economic well-being of all Canadians in old age — health, investment and generational risks — Canadian women also face gender risk: the risk that their retirement incomes will be lower simply because they are women.<sup>2</sup> It is now broadly acknowledged that under Canada's current retirement income system, a very large number of Canadians — perhaps as many as 50 percent — are on track to experience significant welfare loss in their retirement years.<sup>3</sup>

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- 1 Statistics Canada, CANSIM Table 202-0497, Average Incomes by Gender, 1976-2009. Except for a couple of years when it fell below 60 percent, women's retirement income during that period ranged between 60 and 68 percent of men's, with no clear upward trend.
  - 2 Gender risk is not, of course, unique to Canada. See Camila Arza, *Pension Reforms and Gender Equality in Latin America* (United Nations Research Institute for Social Development, Gender and Development Paper No 15, March 2012); Bernd Marin & Eszter Zólyomi, eds, *Women's Work and Pensions: What is Good, What is Best? Designing Gender-Sensitive Arrangements* (Vienna: Ashgate, European Centre, 2010); Silke Steinhilber, *The Gender Impact of Pension Reforms: Case Studies of the Czech Republic, Hungary and Poland* (OECD Directorate for Education, Employment, Labour and Social Affairs, May 2002); Jay Ginn, Debra Street & Sara Arber, eds, *Women, Work and Pensions: International Issues and Prospects* (Buckingham: Open University Press, 2001).
  - 3 See Michael C Wolfson, "Projecting the Adequacy of Canadians' Retirement Incomes: Current Prospects and Possible Reform Options," IRPP Study No 17 (Montreal: Institute for Research on Public Policy, April 2011); Keith Horner, "A New Pension Plan for Canadians: Assessing the Options," IRPP Study No 18 (Montreal: Institute for Research on Public Policy, July 2011); Bob Baldwin, *Research Study on the Canadian Retirement Income System, Prepared for the Ministry of Finance, Government of Ontario*, November 2009, online: <<http://www.fin.gov.on.ca/en/consultations/pension/dec09report.pdf>>; Monica Townson, *Pension Breakdown: How the Finance Ministers Bungled Pension Reform* (Canadian Centre for Policy Alternatives, 2012), online: <<http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2011/12/Pension%20Breakdown.pdf>>. See also Jack Mintz, *Summary Report on Retirement Income Adequacy Research*, 18 December 2009, online: <<http://www.fin.gc.ca/activty/pubs/pension/pdf/riar-narr-BD-eng.pdf>>. Mintz's widely publicized conclusion that "[o]verall, the Canadian retirement income system is performing well" is critiqued in a number of the studies referenced here.

Policy-makers have been virtually silent about the high probability that a disproportionate number of these will be women.<sup>4</sup>

Despite the hazards it poses for more than half the Canadian population, gender risk is not on the agenda in the current national retirement income policy debate. That debate has generated two major policy options for addressing the looming deficit in retirement income adequacy and security.<sup>5</sup> Option #1 (we will call it the public option<sup>6</sup>) is to expand the scope of Canada's current public earnings-based pension plan, the Canada/Quebec Pension Plan (CPP/QPP). Option #2 (we will call it the private option) is to encourage more individual retirement savings through the development of new or improved market-based financial instruments. While the debate is far from over, the federal government has clearly aligned itself with the private option. It has rejected the public option as too expensive for Canadian employers facing a fragile economic recovery,<sup>7</sup>

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4 On the absence of any gender focus in current pension reform policy studies, see Faye Woodman, "The Fiscal Equality of Women: Proposed Changes to Legislation Governing Private Pension Plans in Alberta, British Columbia, Ontario, and Nova Scotia" (2010) 22 CJWL 129, and Freya Kodar, "Pensions and Unpaid Work: A Reflection on Four Decades of Feminist Debate" (2012) 24 CJWL 180. As Kodar points out at 200, the exception to the general silence on gender issues is the report of the Standing Committee on the Status of Women, *Pension Security for Women*, December 2009 (Hon Hedy Fry, Chair) [*Fry Report*]. A major recommendation of the Fry Report is the doubling of the CPP/QPP retirement benefit (Recommendation 11).

5 Steering Committee of Provincial/Territorial Ministers on Pension Coverage and Retirement Income Adequacy. *Options for Increasing Pension Coverage among Private Sector Workers in Canada*, January 2010, online: <[http://www.fin.gov.bc.ca/pension\\_plan\\_options\\_paper.pdf](http://www.fin.gov.bc.ca/pension_plan_options_paper.pdf)>; Ontario, Ministry of Finance, *Securing Our Future: Consulting with Ontarians on Canada's Retirement Income System*, October 2010, online: <<http://www.fin.g.on.ca/en/consultations/pension/ris.pdf>>.

6 I use this public-private distinction with considerable hesitancy. Thoroughly criticized by legal realists and critical legal scholars as artificial and misleading, it is particularly problematic in the realm of pensions, where there is comprehensive regulation of market instruments. It nevertheless remains a convenient shorthand to distinguish between pension instruments created by the state and by the market, and I use it for lack of an equally functional substitute.

7 See, for example, Government of Canada, *Background: The Retirement Income Landscape in Canada*, online: <[http://www.fin.gc.ca/n11/data/11-119\\_1-eng.asp](http://www.fin.gc.ca/n11/data/11-119_1-eng.asp)>; Government of Canada, *Hansard*, Debate on Second Reading of Bill C-25, 30 January 2012, Hon Ted Menzies (for the Minister of Finance).

and has passed legislation facilitating a new private instrument called a Pooled Retirement Pension Plan (PRPP).<sup>8</sup> The expectation is that once the federal prototype is in place, all provinces will legislate to accommodate PRPPs within their own boundaries, both for employees (although employers will not have to contribute) and for the self-employed.<sup>9</sup> The gendered consequences of this choice have not been appropriately addressed.

While retirement income levels are influenced by multiple interactive socioeconomic factors (many of them gendered), few scholars of comparative pension policy would disagree that the impact of these factors on women's retirement income is highly sensitive to design choices in national pension systems.<sup>10</sup> In this paper, I argue that Canada's heavy dependence on private pension instruments generated and shaped by labour markets has significantly contributed to gender pension inequality. Part 2 of the paper examines the differential impact of Canada's three-pillar retirement income system on women, setting the stage for an exploration of how design choices within different retirement income instruments have influenced gendered outcomes. Part 3 focuses on the equality dynamics within employment-based pension plans, identifying key social and labour market factors that have depressed women's pension benefits even as their pension coverage has expanded. Part 4 discusses how Canadian

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8 PRPPs will be discussed in more detail in Part 6, below. The federal government claims that there is insufficient political support for an expansion of the CPP/QPP, which would require a federal-provincial agreement. For a snapshot of the 2011 positions of the various provinces on the public and private options, see Robert L Brown & Tyler Meredith, "Pooled Target-Benefit Pension Plans Building on PRPPs," IRPP Study No. 27 (Montreal: Institute for Research on Public Policy, March 2012) at 19.

9 While this expectation is clearly reflected in federal government "backgrounders" on the PRPP, it is by no means certain that it will be realized. See the discussion in Part 6, below.

10 See, for example, Nicholas Barr & Peter Diamond, *Reforming Pensions: Principles and Policy Choices* (Oxford: Oxford University Press, 2008); John Myles, *Old Age in the Welfare State: The Political Economy of Pensions*, rev ed (Lawrence, Kansas: University of Kansas Press, 1989); Ginn, Street & Arber, *supra* note 2; Elsa Fornero & Chiara Monticone, "Women and Pensions: Effects of Pension Reforms on Women's Retirement Security" in Marin & Zólyomi, *supra* note 2 at 97; Arza, *supra* note 2.

policy-makers have used legal regulation to address gender inequality within employment pension plans over the years, examining how the pension law reforms of the 1960s and 1980s constructed gender, and what measures were put in place to correct for its impact on retirement income. Part 5 explains why anti-discrimination laws and changes in women's labour market participation over recent decades will not bring about gender equality within a voluntary employer-based pension system. Part 6 examines the new federal PRPP as an exemplar of the limitations of market-based retirement savings initiatives, making the case that it does little to promote risk-sharing in general and nothing to mitigate gender risk. Part 7 concludes that a gender-equal retirement income system demands collective pension instruments that can mitigate gender risk through design features capable of pooling and distributing the negative impact of gender inequality in labour market incomes and reproductive work.

## 2. GENDER AND CANADA'S THREE-PILLAR RETIREMENT INCOME SYSTEM

As in many developed countries, Canada's retirement income system is of the "three-pillar" (or three-tier) variety described by the World Bank in its influential 1994 report, *Averting the Old Age Crisis*.<sup>11</sup> Although three-pillar systems are common, variations on the model reflect differences in national values and choices about what retirement risks should be shared and what risks should lie where they fall. Canada's variant is a liberal one, favouring market instruments and minimizing the role of government in producing and distributing social welfare, and in managing social risk.<sup>12</sup>

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11 World Bank, *Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth* (Oxford: Oxford University Press, 1994); see also OECD, *Maintaining Prosperity in an Aging Society* (Paris: OECD, 1998), and OECD, *Reforms for an Aging Society* (Paris: OECD, 2000).

12 In *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990), Danish sociologist Gøsta Esping-Andersen outlined his now-famous taxonomy which categorized welfare states into three "regime-types": corporatist states, social-democratic states and liberal states. He assigns Canada, together with the U.S. and the U.K., to the category of liberal states, an assignment fully borne out in the structure of Canada's retirement income system.

*Pillar 1* instruments are designed for poverty relief. Canada's Pillar 1 consists of a universal old age security benefit (OAS) funded out of general revenues and intended to replace about 14 percent of the average income of working Canadians. Eligibility does not depend at all on labour market attachment, but only on residence in Canada.<sup>13</sup> In performing its poverty-relief function, the OAS is augmented by a guaranteed income supplement (GIS) for the truly needy. *Pillar 2* instruments are designed to provide basic income (or consumption) "smoothing" across the life course. Canada's Pillar 2 is the state-established and publicly-administered Canada Pension Plan and Quebec Pension Plan (CPP/QPP).<sup>14</sup> The CPP/QPP is mandatory and earnings-based, with contributions required from both employees and employers, and from self-employed persons. Its maximum benefit replaces about 25 percent of average earnings. *Pillar 3* instruments enhance the income-smoothing function by encouraging the voluntary deferral of immediate consumption in favour of a higher standard of living in retirement. Canada's two key Pillar 3 instruments, both subsidized by the income tax system, are employment pension plans and registered retirement savings plans (RRSPs).<sup>15</sup> They are market-generated instruments, with contributions and benefits bearing a direct relationship to earnings over a working life. Canadian public pension benefits (Pillars 1 and 2 combined) replace a maximum of slightly less than 40 percent of the average pre-retirement wage. This level is widely acknowledged to be ungenerous by international

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13 Legal residency in Canada for 20 years before age 65 is necessary to qualify for full Pillar 1 benefits, except where arrangements with other nations provide relief from this requirement.

14 The World Bank favours Pillar 2 models administered by the private sector rather than by the state, although it recognizes an important state role in designing such plans and making them mandatory: *Averting the Old Age Crisis*, *supra* note 11 at 163.

15 RRSPs are individual tax-assisted investment accounts, with contribution limits based on earned income. They were introduced in Canada in 1957. Tax-Free Savings Accounts, introduced in 2009, are sometimes described as Pillar 3 instruments, but because they are not geared specifically towards retirement, they are not part of the retirement income system *per se*.

standards,<sup>16</sup> leaving Pillar 3 instruments with much work to do in helping Canadians to fund a comfortable retirement.<sup>17</sup>

The substantial gap in Canada between public pension provision and expected retirement income needs is no oversight. It reflects the deliberate choice of a liberal policy, made in the 1960s and ratified again in the 1980s, to ensure that state pension provision would not “crowd out” market pensions.<sup>18</sup> That choice has had important gender consequences, as women do not fare equally well under each of the three pillars.<sup>19</sup> Women draw the lion’s share of Pillar I benefits, because they are poorer than men. Although the basic OAS benefit is uniform, women are more likely to qualify for the GIS than men, and less likely to be subject to the benefit claw-back applied to

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16 Many countries do much better. The average replacement rate from mandatory pension sources for employees who earn an average wage in OECD countries is 57.3 percent, and several OECD countries replace 70 percent of pre-retirement income at up to one-and-a-half times the average wage level. See OECD data chart, *Pensions at a Glance 2011: Retirement-income Systems in OECD and G20 Countries*, online: <<http://www.oecd.org/dataoecd/55/26/48997644.pdf>>. It should be noted that the OECD no longer classifies pension sources as “public” or “private” for comparative purposes; its key distinction now is between “mandatory” and “voluntary” pensions. Canada’s Pillar 1 and 2 pensions are classified as mandatory, and its Pillar 3 pensions as voluntary.

17 Although the appropriate target income replacement rate is contested, most economists agree that 60 to 80 percent of pre-retirement income is needed to maintain pre-retirement living standards. See Myles, *supra* note 10 at 55; Jonathan R Kesselman, “Expanding Canada Pension Plan Retirement Benefits/ Assessing Big CPP Proposals,” University of Calgary School of Public Policy Research Papers, October 2010, online: <<http://investisseurautonome.info/PDF-Downloads/DIVERS/doc.1939-%20Kesselman%202010%20CPP%20expansion.pdf>>, at 3 and n 7.

18 See generally Elizabeth J Shilton, *Gifts or Rights? A Legal History of Employment Pension Plans in Canada* (SJD Thesis, University of Toronto, 2011) [unpublished] at 179-183, 195-203, online: <[https://tspace.library.utoronto.ca/bitstream/1807/27603/1/Shilton\\_Elizabeth\\_J\\_201103\\_SJD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/27603/1/Shilton_Elizabeth_J_201103_SJD_thesis.pdf)>.

19 The data cited in this paragraph has two separate sources. The percentage of men and women collecting these benefits reflects 2007 figures from Human Resources and Social Development Canada, *Indicators of Well-Being in Canada*, online: <<http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=27>>. The ratio of male to female benefits is a 2009 figure, calculated from data in Statistics Canada, CANSIM Table 202-0407.

higher-income earners.<sup>20</sup> Pillar 2, by contrast, favours men. More men than women collect CPP/QPP benefits — 96 percent of men over 65, and 86 percent of women — and women's benefits are on average only 80 percent of those received by men. Under Pillar 3, women are substantially worse off; 72 percent of men over 65 collect benefits as compared to only 63 percent of women, and women's Pillar 3 income is a scant 66 percent of men's.<sup>21</sup>

These differences in outcome between public and private pension instruments reflect important differences in design. Public pensions distribute benefits based on explicit policy choices, while private pensions reflect the far less explicit distributive principles of the market. This is clearest in Pillar 1, where a citizen's entitlement bears no relationship to market earnings. However, it is also visible when comparing Pillars 2 and 3; both of these pillars are earnings-based, but women do better under Pillar 2, due largely to the women-friendly design features of the CPP/QPP. These features, discussed in more detail in Part 4, include immediate vesting rules, seamless portability, pooling of longevity risk, inflation indexing, and child drop-out options, combined with the fact that the plan is mandatory for both employees and the self-employed. Such features are often castigated as redistributive by those who view market outcomes as natural, but they might more properly be characterized as foundational normative choices about the distributive principles to be applied to the pooling and sharing of retirement risks.

### 3. GENDER AND EMPLOYMENT PENSION PLANS

From their beginnings in the 19th century, private employment pension plans were employer artefacts, designed to further the employer's human resource management objectives. Canadian employers have always been free to decide whether to provide such plans. This has led to their uneven distribution across and within economic sectors; they are established only where they are useful

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<sup>20</sup> The clawback has been in place since 1989.

<sup>21</sup> This figure includes income from both employment pension plans and RRSPs.

to employers.<sup>22</sup> Historically, they served two principal purposes: to help recruit and retain a skilled and disciplined “career” workforce, and to support the mandatory retirement of older, less productive workers. They had considerable utility for employers in primary labour markets with large workforces, hierarchical and bureaucratic organizational structures, and internal labour markets dependent on a trained workforce.<sup>23</sup> They have always been less attractive to employers in secondary labour markets, where workplaces are smaller and enterprises are more likely to depend on unskilled, casual and part-time labour.

In 1960, when the Dominion Bureau of Statistics first surveyed employment pension coverage in Canada, women accounted for only slightly more than 20 percent of plan members.<sup>24</sup> In the intervening decades, this imbalance has largely corrected itself. By 2004, coverage of employed men and women had converged at about 39 percent. Five years later, women employees were more likely to belong to pension plans than men.<sup>25</sup>

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22 This paper tries to simplify a complex pension landscape by focusing on what are often called employer-sponsored pension plans — i.e., plans which are established and governed by employers even though they may be subject to collective bargaining. The vast majority of private pension plans in Canada have historically fallen into this category. Accordingly, it does not discuss multi-employer pension plans, often established by unions, in which collective bargaining plays a more significant role.

23 Katherine V W Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004) at 51-63.

24 Canada, Dominion Bureau of Statistics, *Pension Plans, Non-Financial Statistics, 1960* (Ottawa: Queen’s Printer, 1962) Table 4 at 10. It is likely that disproportionately few of these female plan members actually retired with a pension; the data reported in the same survey show that women constituted only 14.47 percent of the plan members who retired on pension in 1960. *Ibid* at 36 (Table 31).

25 This does not mean that women in general are more likely than men to belong to pension plans. Despite the fact that pension density is now higher among female than male workers in Canada, males still have the edge in pension plan membership, probably because their labour force participation rates are higher. In 2010, 3,025,544 men belonged to registered pension plans, compared to 2,998,197 women: Statistics Canada, CANSIM Table 280-0008.

**TABLE 1**  
**Employment Pension Plan Coverage in Canada as a**  
**Percentage of Employees**

	1965	1977	1985	1994	1999	2004	2009
<b>All</b>	38	46.2	44.2	43.8	40.8	38.9	39.2
<b>Male</b>		52.2	50.5	45.8	42	38.9	38.1
<b>Female</b>		36	35.7	41.5	39.4	39	40.4

Sources: Composite table based on data from (1) 1965, Dominion Bureau of Statistics, Survey of Pension Plan Coverage, 1965 (Ottawa: DBS, 1967); (2) 1977-1985, Edward Tamagno, *Occupational Pension Plans in Canada: Trends in Coverage and the Incomes of Seniors* (Caledon Institute of Social Policy, 2006); (3) 1994-2009, Statistics Canada, "Percentage of Labour force and employees covered by a registered pension plan," 29 April 2011. This table does not include the unemployed, the self-employed with unincorporated businesses or those who work in family businesses for no compensation. A table that included these categories would show much lower coverage.

Before we conclude that we have achieved gender equality, however, we need to probe the data more deeply.<sup>26</sup> First, Table 1 shows that pension coverage in general has remained more or less static since the mid-1960s; gender equality in coverage is largely the result of a consistent decline in male coverage over the past 30 years.<sup>27</sup> Pension coverage of women has increased by only slightly

26 We also need to be cautious about the reliability of the data, which have long been the subject of criticism. See Ontario, Expert Commission on Pensions, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (Queen's Printer for Ontario, 2008), online: <[http://www.fin.gov.on.ca/en/consultations/pension/report/Pensions\\_Report\\_Eng\\_web.pdf](http://www.fin.gov.on.ca/en/consultations/pension/report/Pensions_Report_Eng_web.pdf)>. In the studies they prepared in 2007 for the Ontario Expert Commission on Pensions, both Kendra Strauss (*Trends in Occupational Pension Coverage in Ontario*, at 19), and Richard Shillington (*Occupational Pension Plan Coverage in Ontario: Statistical Report*, at 40-41, found a continuing gender gap in coverage in Ontario, Canada's most populous province.

27 Increases in women's coverage have helped to mask the extent to which Pillar 3 is generally in decline, keeping average coverage rates up and lessening policy pressure for change because it has increased "family" access to pensions. See Baldwin, *Research Study*, *supra* note 3 at vi.

more than four percentage points since 1977, and not at all since the mid-1990s. Second, well over half of female pension plan members work in the public sector.<sup>28</sup> Women currently have better pension coverage than men primarily because they are disproportionately employed in the public sector, where coverage remains strong.<sup>29</sup> In the private sector, where coverage is much weaker, only about 22 percent of employed women are members of pension plans, compared to 31 percent of men.<sup>30</sup>

Moreover, equal coverage is only the first step towards achieving pension equality. At least as important is the level of benefits women derive from their workplace pension plans. The absence of reliable historical data makes it difficult to measure progress in the quantity of women's benefits, but recent comparative snapshots dispel any illusion that equal coverage produces equal benefits. As we have already seen, women collecting Pillar 3 income currently receive, on average, about 66 percent of what men receive,<sup>31</sup> down from over 80 percent in the 1970s.<sup>32</sup> This decline is to some extent a mathematical construct, reflecting policy changes in the 1980s (discussed in more detail in Part 4, below) which added to the pension rolls part-time workers and widows, whose individual benefit levels are likely to be substandard in

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28 In 2010, more than 62 percent of the women covered by employment pension plans worked in the public sector. Statistics Canada, CANSIM Table 280-0008.

29 Women now constitute over 60 percent of public-sector employees. Patricia Schembari, "Employer-sponsored pension plans over the last 30 years" in *Canada's Retirement Income Programs*, 2006 ed, Statistics Canada Catalogue No 74-507-XCB (CD Rom) n 15, 3. About 86 percent of both male and female employees in the public sector belong to pension plans. Schembari, *ibid* at 4.

30 At least in Ontario, the percentage of men covered by pension plans in the private sector has fallen quite drastically since 1977, while the much lower percentage of women has changed very little. Strauss, *supra* note 26 at 23-25.

31 As noted earlier, the 66 percent figure includes income from both RRSPs and employment pension plans. While no close comparison has been done of the gendered impact of the two vehicles, it is likely very similar. Statistics Canada reported in 2008 that while 47 percent of RRSP contributors in that year were women, they made only 39 percent of the total RRSP contributions. Online: <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388/tbl/tbl017-eng.htm>>. The median contribution by a woman was \$2,240, or about 69 percent of the median male contribution of \$3,220.

32 Statistics Canada, CANSIM Table 202-0407.

comparison to those of the average male recipient.<sup>33</sup> Even accounting for such anomalies, however, working women can expect to receive significantly lower pension benefits than working men.

This outcome should not surprise us, in light of the rationale for employment pension design. From the beginning, pension plans were calibrated to the career trajectories of skilled workers whose training and experience were particularly valuable to their employers. The reward structures embedded in those plans therefore favoured permanent, full-time workers with long service and relatively high pay — what has been called “male pattern employment.” Long after explicitly gendered pension plan rules were made illegal, typical benefit structures still forced lower-paid, temporary or part-time employees — those in typical “female pattern employment” — to subsidize the benefits of workers with more market power. This is true of all pension plans, although the way in which the gender dynamic works depends on the type of plan.<sup>34</sup>

The majority of Canadian pension plan members, both male and female, are still enrolled in defined benefit (DB) plans,<sup>35</sup> where an employee’s annual pension is calculated by multiplying a percentage of annual earnings by the employee’s years of service.<sup>36</sup> Women earn less for their work in Canada than men, and typically spend fewer

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33 See Bob Baldwin & Pierre Laliberté, “Incomes of Older Canadians: Amounts and Sources, 1973-1996” (Canadian Labour Congress Research Paper No 15, December 1999) at 45. Pension-splitting and survivor pensions also created some new male pensioners, but since male coverage was significantly higher than women’s coverage between the 1960s and the 1990s, the overall effect was probably to enhance women’s benefits.

34 Teresa Ghilarducci, Garth Magnum, Jeffrey S Petersen & Peter Philips, *Portable Pension Plans for Casual Labor Markets* (Westport, Conn: Quorum, 1995) 99-115.

35 About 75 percent of Canadian pension plan members were in DB plans in 2010 (see Statistics Canada, CANSIM 280-2008). Public-sector plans are almost invariably DB plans; most members of DC plans in Canada work in the private sector.

36 The differences in benefit formulae are generally explained in Morley Gunderson, *Incentive Effects of Occupational Pension Plans: A Report Prepared for the Ontario Expert Commission on Pensions* (October 2007) at 3-4. The majority of DB plans multiply “final/best average earnings” by years of continuous service.

years in the paid workforce.<sup>37</sup> Now that statutes mandate pension credit for periods of statutory pregnancy leave and parental leave, time spent out of the paid labour force to bear and care for young children is less likely to depress pension entitlements than in the past. However, women continue to be more likely than men to take time out for reproductive work not covered by statutory leaves — gaps in service for which they often accumulate no pension credit.<sup>38</sup> They are also much more likely to work part-time for family reasons.<sup>39</sup> In addition, women retire, on average, one year earlier than men,<sup>40</sup> often to accommodate the retirement timetables of typically older male partners or to care for family members.<sup>41</sup> It is therefore inevitable that earnings-based formulae will produce lower pension benefits for women. Women are also negatively affected by plan rules and benefit formulae that penalize frequent job turnover, such as waiting periods for plan membership, delayed vesting periods and other portability

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- 37 Canadian men in full-time, full-year jobs average about four more years of work experience than women in such jobs. See Marie Drolet, “The Male-Female Wage Gap” (2001) 12:2 *Perspectives on Labour and Income* (Statistics Canada).
- 38 There has been recent expansion in the types of statutory leave which provide some protection for pension credits (Ontario, for example, has recently introduced legislation amending the *Employment Standards Act, 2000*, to further expand family-related leaves with pension protection: *Employment Standards Amendment Act (Leaves to Help Families), 2013* (Bill 21)). However, pension credit is still not granted for many leaves of absence and breaks in service, including extended parenting leaves, and breaks to care for school-age children or disabled or elderly family members. At all age levels except the youngest (15-24), Canadian women have lower labour force participation rates than men. They are less likely to work when their children are young, and are more likely than men to work part-time for family-related reasons. See Vincent Ferrao, “Paid Work” in *Women in Canada: A gender-based statistical report*, 6th ed (Ottawa, Statistics Canada, 2010) at Tables 1, 4-9.
- 39 Almost 70 percent of part-time workers in Canada are women, a figure that has been relatively constant for the past 30 years. Ferrao, *ibid* at 13.
- 40 In 2004, the median retirement age for Canadian men was 61.8; for women it was 60.8. Lynn McDonald, “Gendered Retirement: The Welfare of Women and the ‘New Retirement’ ” in Leroy O Stone, ed, *New Frontiers in Research on Retirement* (Ottawa: Statistics Canada, 2006) at 144-145.
- 41 See Maxine E Szinovacz, “Families and Retirement” in *New Frontiers, ibid* at 165; Grant Schellenberg, Martin Turcotte & Bali Ram, “The Changing Characteristics of Older Couples and Joint Retirement in Canada” in *New Frontiers, ibid* at 199.

rules that impede transitions from one pension plan to another.<sup>42</sup> Some of the longstanding pension rules that penalized women's work patterns have changed in response to changing legislative standards, but DB benefit formulae continue to compound penalties for the lower pay, shorter working life, breaks in service and higher job turnover that are typical of female pattern employment.

While DB pension plans raise concerns about gender equality, employees in DB plans generally do better than workers in other types of plans.<sup>43</sup> DB plans are, however, quickly losing ground in the marketplace to defined contribution (DC) plans and group RRSPs, in which the risks borne by employers in DB plans are transferred to individual employees.<sup>44</sup> This is not good news for women; the much more individualized approach to pension provision reflected in non-DB plans is likely to leave women in an even more disadvantaged position.<sup>45</sup>

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42 The gendered impact of Canada's legal rules on pension vesting is explained in Woodman, *supra* note 4 at 148-149. See also Ghilarducci, Magnum, Petersen & Philips, *supra* note 34. The recent legislative trend toward mandating the immediate vesting of pension benefits is a woman-friendly reform. See, for example, *Pension Benefits Act*, RSO 1990, c P-8, s 37. This section previously permitted plans to delay vesting for two years; effective July 1, 2012, it now requires that all benefits for service acquired on or after July 1, 1987 vest immediately.

43 Alicia H Munnell, "Employer-Sponsored Plans: The Shift from Defined Benefit to Defined Contribution" in Gordon L Clark, Alicia H Munnell & J Michael Orszag, *The Oxford Handbook of Pensions and Retirement Income* (Oxford: Oxford University Press, 2006) 359; Bob Baldwin, "The Shift from DB to DC Coverage: A Reflection on the Issues" (2008) 34:51 *Canadian Public Policy* 29.

44 Baldwin, *ibid.* DB plans were overwhelmingly the norm in Canada prior to the mid-1980s. Baldwin estimated (at 31) that at the time he wrote, at least 25 percent of plan members belonged to DC plans, and that if group RRSPs were included among pension plans, about half of plan members belonged to savings-type plans rather than to DB plans.

45 Debra Street & Janet Wilmoth, "Social Insecurity? Women and Pensions in the US" in Ginn, Street & Arber, *supra* note 2, 120 at 126; Baldwin, "The Shift from DB to DC Coverage," *supra* note 43 at 33; Mary Condon, "Gendered Risks of Retirement: The Legal Governance of Defined Contribution Pensions in Canada" in Kelly Hannah-Moffat & Pat O'Malley, eds, *Gendered Risks* (Abingdon & New York: Routledge-Cavendish, 2007); Mary Condon, "Privatizing Pension Risk: Gender, Law and Financial Markets" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002); Mary Condon, "The Feminisation of Pensions? Gender, Political Economy and Defined Contribution Plans" in Libby Assassi, Anastasia Nesvetailova & Duncan Wigan, eds, *Global Finance in the New Century: Beyond Deregulation* (Palgrave Macmillan, 2007).

DC plans operate essentially as individual savings and investment plans to which employers make a specific periodic pension contribution, usually a percentage of salary matched by an employee contribution, instead of promising a specific periodic pension benefit on retirement.<sup>46</sup> These contributions are invested and accumulate over the years, producing lump sums which can then be drawn down as retirement income. Because such plans do not promise specific benefits, they have no complex formulae with gendered leveraging effects. However, DC benefits are tied even more closely than DB benefits to individual labour market earnings over a working life. In addition, DC plans privilege early contributions, which will have more time to attract investment income. As a consequence, contribution gaps are penalized most heavily if they occur in the early part of a career — precisely the stage at which women are most likely to have diminished earnings because they are caring for young children. Female pattern employment therefore leads inexorably to lower capital accumulation in DC plans. Moreover, since Canadian regulatory statutes do not require members of DC plans to annuitize the capital sums they accumulate, those plans frequently do not pool longevity risk across gender lines.<sup>47</sup> Members who do not annuitize bear their own longevity risk. Since women on average live longer than men, women's accumulated capital sums (already smaller on average than those of their male counterparts) need to last longer.<sup>48</sup>

Although DC plans shift much of the retirement risk from employers to individual employees, many employers consider any share of the risk to be too much. Like DB plans, DC plans require employer contributions and impose fiduciary responsibilities on employers, including the cost of regulatory compliance. Employers who wish to be seen to be offering a pension plan, but who do not

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46 While employers are required by law to contribute to DC plans as well as DB plans, there is no minimum contribution; the rule requiring employers to provide at least 50 percent of the value of a DB benefit does not apply to DC plans. See, for example, *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2d Supp), ss 21(1), (2) [PBSA].

47 Some individual plans may impose a requirement to annuitize. Where annuities are purchased with funds accumulated within DC plans, pension regulatory statutes in most provinces require that insurers price the annuities based on unisex annuity rates. See Shilton, "Insuring Inequality: Sex-Based Mortality Tables and Women's Retirement Income" (2012), 37 QLJ 383 at 400-401, 419-421.

48 Arza, *supra* note 2 at 12.

wish to assume any significant part of the costs and burdens of doing so, have embraced group RRSPs as an alternative.<sup>49</sup> Group RRSPs are simply individual RRSPs managed by a financial services provider and grouped under an administrative umbrella facilitated by the employer. Employers do not contribute to group RRSPs, although they may provide employees with lump-sum wage supplements that are earmarked for the RRSP. Because group RRSPs are not regulated as pension plans, they do not have to offer features such as spousal survivor pensions.<sup>50</sup> In addition, women who wish to hedge their personal longevity risk by purchasing annuities with their RRSP savings must buy those annuities on open insurance markets, where they are priced using sex-based mortality tables rather than the unisex tables required in regulated plans. This pricing practice imposes women's statistical longevity risk on women alone, rather than pooling it across gender lines.<sup>51</sup>

DC plans are a significant move down the continuum away from the pooling and sharing of retirement risk burdens and toward the desocialization and individualization of those burdens. Group RRSPs tend even further in that direction, with serious gender consequences.

#### 4. EMPLOYMENT PENSION REFORM AND GENDER

As policy-makers have been well aware, gender inequality has been deeply embedded in the Canadian retirement income system ever since it first took on its present contours. When the CPP/QPP was introduced in the 1960s, the poverty of elderly women was a

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49 Brenda Lipsett & Mark Reesor, *Employer-Sponsored Pension Plans: Who Benefits?* (Canada, Human Resources Development Working Papers, 1997) is one of the few Canadian studies that looks at group RRSPs as well as registered pension plans. The authors point out, at 11, that "RRSPs do not provide the same security as [employment pension plans] since they do not involve enough risk pooling to provide predetermined amounts of retirement income and may not insure against the risk of outliving one's savings."

50 Baldwin, "The Shift from DB to DC," *supra* note 43 at 33. See the discussion of the women-friendly features of pension regulatory statutes in Part 4, below.

51 See Shilton, "Insuring Inequality," *supra* note 47 at 389-397 for a discussion of the evolution of the use of sex-based mortality tables in the insurance/pension industry. Sex-based mortality differences are shrinking, and are projected to fall to about 2.4 years by 2024. *Ibid* at 392-393, n 25.

very visible item on the policy agenda. Typical of that era, however, policy-makers did not seek solutions in women's roles as workers; gender discussion was driven by the stereotype of the elderly widow left destitute by the death of the family provider. The policy objective of employment pensions plans was to increase the security of the "deferred wages" of male breadwinners, so that they could make continuing provision for their dependants. For women without male breadwinners, the problem called for social welfare responses. The first line of defence was Pillar 1, with the enhancement of the OAS benefit (in place since 1952) by lowering the age of eligibility to 65 from 70 and the introduction of the GIS.<sup>52</sup> The second line of defence, introduced as part of the initial design of the CPP/QPP in 1965, was a Pillar 2 survivor benefit. While the CPP/QPP was fundamentally based on labour market earnings, it departed from that concept by including a mandatory benefit for widows of CPP/QPP contributors, equal to 60 percent of the pension paid or payable to the wage-earning husband.<sup>53</sup> Survivors' benefits provided a valuable hedge against the statistical probability that the wives of CPP/QPP contributors would outlive their husbands' "breadwinner pensions." Consideration was also given to including "homemakers' pensions" in the CPP/QPP.<sup>54</sup> In the early 1960s, this cause was espoused 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 CPP/QPP expressed concern that earnings-based pensions might entice housewives into the labour force, to

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52 The universal OAS benefit, payable at age 70, was initially supplemented by a means-tested federal-provincial benefit payable between 65 and 70. OAS became payable at 65 in 1970. See Kenneth Bryden, *Old Age Pensions and Policy-Making in Canada* (Montreal & London: McGill-Queen's University Press, 1974) at 104-106, 130-131.

53 The initial CPP survivor's benefit was not payable to widowers except in the case of disability. Nor was it paid to surviving widows unconditionally; payment depended on the age of the widow and the number of children of the marriage, and ceased upon remarriage: Bryden, *ibid* at 147-182. The rule that surviving spouses who remarried lost their survivor benefits was not repealed until 1987.

54 For a useful discussion of the history and politics of the idea of a "homemaker's pension" in Canada, see Kodar, *supra* note 4.

the detriment of the social fabric.<sup>55</sup> The proposal for a homemakers' pension found little traction, however, in a context in which providing for a wife was still ultimately seen as her husband's responsibility.

In 1965, women were only beginning to enter the labour force in large numbers, and the basic design features of the earnings-based CPP/QPP pension were not specifically targeted at women workers. Reformers nevertheless saw significant advantages for women workers in the CPP/QPP's benefit design, in contrast to the benefit formulae typical of private employment-based plans.<sup>56</sup> All working Canadians earning above an established minimum were required to contribute, whether they were employees or self-employed and whether they worked part-time or full-time. Employers matched their employees' contributions. Everyone who contributed, no matter how sporadically, earned credits toward a pension payable at retirement age.<sup>57</sup> These credits vested immediately, benefitting workers whose employment histories were characterized by short and discontinuous service. Since the CPP/QPP plan encompassed all Canadian employers and workers, there were no portability issues and no complex valuations were needed to transfer vested credits from one plan to another when members changed jobs. Indexation features continually adjusted benefit levels (as well as earnings minima and maxima) to

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55 See, for example, the testimony of D.E. Kilgour, President, Great-West Life Assurance Company, in 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], *Minutes of Proceedings and Evidence*, 26th Parliament, 2d Sess, 1964-65, 2 vols (Ottawa: Queen's Printer, 1965) at 1261-1294, and 1324-1325.

56 A detailed summary of the women-friendly structural features of the CPP/QPP as of the mid-1990s is found in Monica Townson, *Independent Means: A Canadian Woman's Guide to Pensions and Secure Financial Future* (Toronto: MacMillan Canada, 1997) at 72-93.

57 CPP/QPP retirement age was initially pegged at 70, although members who retired between ages 65 and 69 could collect reduced pensions. The eligibility rules have been changed a number of times. Currently, normal retirement age is 65, but an actuarially reduced early retirement pension can be collected as early as age 60, and there are actuarial incentives built into the benefit formula to encourage working and contributing past age 65.

compensate for inflation,<sup>58</sup> giving much-needed protection to the purchasing power of benefits. Low-wage earners contributed less overall in return for their pensions than higher earners, which led to a modest (re)distributive impact.<sup>59</sup> Another (re)distributive feature permitted plan members to exclude their worst seven earning years from an overall benefit calculation based on average career earnings, to the advantage of late entrants into the labour market or those with periods of broken service or unemployment.<sup>60</sup>

As women began to enter the workforce in larger numbers in the 1970s, the links between gender equality and women's paid work became much more visible.<sup>61</sup> Interim amendments to the CPP/QPP in the mid-1970s tried to respond to women's complex location in both workplace and family. 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 important addition was a "drop-out" provision permitting parents who took breaks from the labour force to care for young children to leave certain low-earning years out of the benefit calculation.<sup>62</sup>

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58 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 fall behind the average wage. See Bryden, *supra* note 52 at 156-159; Royal Commission on the Status of Pensions in Ontario, *Report* (Government of Ontario, 1981) vol V at 24.

59 A minimum earnings threshold also means that those whose earnings do not reach the minimum do not accumulate any pension credits at all.

60 The standard CPP/QPP benefit formula treats a full working life as the 47 years between the ages of 18 and 65. Very few Canadians are in the paid workforce for this length of time. Shorter qualifying periods for full pensions are seen as more women-friendly. Jay Ginn & Sara Arber, "A Colder Climate for British Women" in Ginn, Street & Arber, *supra* note 2, 44 at 46-49.

61 For a more extended discussion of the gender impact of CPP/QPP reforms in that era, and the role of national women's groups and institutions in relation to those reforms, see Kodar, *supra* note 4 at 188-199.

62 This provision did not come into effect until 1983 (retroactive to 1 January 1978), as a result of opposition by some provinces. Ontario was the last holdout. See Louis Ascah, "Recent Pension Reports in Canada: A Survey" (1984) 10:4 Canadian Public Policy 415 at 421.

In this early era of pension reform, women-positive design features of this type were confined to public pensions; they were not paralleled in the regulatory statutes governing employment pension plans, where market-generated structures and benefit design features were still seen as normal and inevitable. By the late 1970s and early 1980s, however, it was no longer possible to ignore the structural mismatch between employment pension plans and the nature of women's participation in labour markets. A 1982 federal Green Paper on pension reform identified gender inequality as one of the key shortcomings of the Canadian retirement income system.<sup>63</sup> The Green Paper highlighted a wide range of pension issues of particular concern to women: workers who left the labour force to raise children lost opportunities to accrue retirement benefits;<sup>64</sup> life annuities were more expensive for women because market annuity pricing penalized their greater statistical longevity;<sup>65</sup> longevity increased the impact of inflation on women's benefits;<sup>66</sup> and homemakers, who were treated by pensions plans as dependants, could not accrue pension benefits in their own right.<sup>67</sup> The Green Paper saw room for improvement in how private pensions accommodated women's role in "male breadwinner" families: "Many pension plans do not provide adequate survivor benefits and few married women benefit from the pension credits of their spouses upon marriage breakdown."<sup>68</sup> Importantly, the Green Paper also identified systemic problems in the structure of private pension delivery that disadvantaged women as *workers*:

[P]ension 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.<sup>69</sup>

To grapple seriously with these issues, it would have been necessary to challenge the essential nature of private pension plans as labour

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63 Canada, Department of Finance, *Better Pensions for Canadians* (Ottawa: Minister of Supply and Services, 1982) [Green Paper].

64 *Ibid* at 14.

65 *Ibid*.

66 *Ibid* at 42.

67 *Ibid* at 14-15.

68 *Ibid* at 13.

69 *Ibid*.

market instruments. Ultimately, Canadian governments were not prepared to go very far down that road.

Confronted with the inextricable link between women's work patterns and their role in families, policy-makers were forced to question whether the pension system should continue to recognize (and perhaps even expand) its recognition of dependency relationships in families or should treat all citizens simply as individual workers. A committee reporting to the Quebec government argued that the "family approach" was inconsistent with the new realities of working women, and urged that survivor pensions should be seen as temporary measures for widowed women to enable a smooth transition back into the workforce.<sup>70</sup> Ontario's Royal Commission agreed that the "woman as dependant" stereotype was on its way to obsolescence, but cautioned against simply replacing it with the stereotype of the "career woman."<sup>71</sup> The Royal Commission argued that "[t]here still exists a wide range of dependency within the family unit" and that "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."<sup>72</sup> For the same reason, a 1980 federal Task Force on Retirement Income Policy also favoured retaining a "family" approach: "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."<sup>73</sup> The issue of homemakers' pensions returned to the table, this time with broader support, including support from some women's advocacy groups that were definitely not of a social

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70 Québec, Comité d'étude sur le financement du régime de rentes et sur les régimes supplémentaires de rentes, *La Sécurité financière des personnes âgées au Québec: Rapport de COFIRENTES* (Québec: Éditeur officiel, 1977).

71 Royal Commission on the Status of Pensions in Ontario, *supra* note 58, vol III, *Design for Retirement*, at 116-137.

72 *Ibid* at 136.

73 Task Force on Retirement Income Policy (Harvey Lazar, Chair), *The Retirement Income System in Canada: Problems and Alternative Policies for Reform* (Ottawa: Ministry of Supply and Services, 1980) vol 1 at 337.

conservative stripe.<sup>74</sup> Predictably, however, women's groups were divided on whether homemakers' pensions would promote or retard the social equality of women.<sup>75</sup> The homemakers' pension proposal was championed by the federal government committee appointed to report on the recommendations set out in the Green Paper,<sup>76</sup> but it got no farther.

Although no consensus on gender questions emerged from policy discussions at the time, the pension reforms of the 1980s did address some of the issues identified in research reports and in the Green Paper as having implications for gender equality. Unlike the reforms of the 1960s, the reforms of the 1980s recognized women's role as labour market participants. The new federal *Pension Benefits Standards Act, 1985*<sup>77</sup> introduced a general prohibition against sex discrimination in conditions of eligibility for plan membership, pension contributions or pension benefits. It eliminated the use of sex-based annuity pricing for calculating women's pension benefits.<sup>78</sup> It made a number of women-friendly amendments, including reducing maximum vesting periods<sup>79</sup> and making pension credits more portable from plan to plan. The new *PBSA* required employers to offer plan membership to part-time workers,<sup>80</sup> potentially expanding opportunities for pension coverage among the women who made up the bulk of Canada's part-time workforce. Women were definitely acknowledged as workers, but in line with the themes of the Task Force and

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74 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 62 at 421-422.

75 Kodar, *supra* note 4 at 188-199.

76 Parliament, House of Commons, *Report of the Parliamentary Task Force on Pension Reform* (Ottawa, 1982).

77 *PBSA*, *supra* note 46. This statute was the prototype for second-generation pension regulatory statutes in Canada.

78 *Ibid*, s 27.

79 *Ibid*, s 17.

80 *Ibid*, s 15. This requirement was limited in two ways: it applied only to part-time workers in "classes" comparable to those where pensions were available to full-time employees, and membership could be made voluntary for part-time employees even if it was compulsory for full-time employees.

Royal Commission reports, they were seen primarily as secondary wage earners within families. The reforms of the 1980s emphasized improving women's access to a fair share of the "family pension." They required private plans to establish survivors' benefits, but unlike those under the CPP/QPP, they were waivable and could be funded on a cost-neutral basis by reducing the value of the plan member's pension.<sup>81</sup> While the *PBSA* did not mandate pension credit-splitting, it required pension plans to accommodate court orders for such splitting based on provincial law.<sup>82</sup> Previously, a surviving spouse could lose all pension benefits if the spouse who was a plan member died prior to retirement; the *PBSA* now required plans to provide a pre-retirement death benefit entitling a surviving spouse to the commuted value of the member's vested pension credits.<sup>83</sup>

Despite these attempts to make private pension plans more responsive to women's work and family patterns, it was clear that governments saw tackling gender inequality as primarily a task for public rather than private plans. The federal Green Paper, setting out the pros and cons of public- and private-sector approaches to filling the gap between resources and retirement income needs, placed meeting the needs of women in the "pro" column for public pensions: "The public sector approach . . . offers greater flexibility to incorporate benefits that take into account factors such as the work patterns of women."<sup>84</sup> In general, the primary strategy for improving private pension benefits for women was optimism — optimism that women would solve the inequality problem for themselves by changing their patterns of engagement with the labour market to conform to the male model. Women's rates of participation in the paid labour force were on a

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81 *Ibid*, s 22.

82 *Ibid*, s 25(2).

83 *Ibid*, s 23. All of these spousal rights were accorded both to married and to common-law partners. *Ibid*, s 2(1).

84 The Green Paper bluntly concluded, as if the point were too obvious to need explanation, that "the child-rearing drop-out provision in the Canada and Quebec Pension Plans could not be included in employer-sponsored pension plans." *Supra* note 63 at 38.

steady upward trajectory.<sup>85</sup> If women's labour market profile would only move quickly and decisively towards the male norm, the gender equality problem in pensions would, governments hoped, disappear.

## **5. WHY GENDER INEQUALITY WILL PERSIST IN A VOLUNTARY EMPLOYMENT-BASED PENSION SYSTEM**

### **(a) The Pension Impact of Labour Market Changes**

The analysis in Part 3 above makes it clear that the gender equity problem in pensions has not resolved itself; employment pension plans are not delivering gender equality to current retirees. Was the Green Paper justified in its optimistic view that if we simply wait long enough, the problem will abate? That view is based on what we will call the "convergence hypothesis," which runs along the following lines. Continuing gender disparities in pension incomes are products of the life circumstances of men and women who spent their working lives under different laws and social arrangements than those which now prevail. They are the residue of a bygone era, reflecting patterns of family organization and labour market discrimination that are on their way to the dustbin of history. Pay equity laws and anti-discrimination laws, combined with the sea-change in female labour force participation rates, will have solved the pension equality problem by the time current cohorts of working women retire on pension.<sup>86</sup>

The convergence hypothesis suffers from a number of serious flaws. First, the argument that female and male wages will converge

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85 The participation of women in the prime working years from age 25 to 44 had grown from 22 percent in 1946 to 35 percent in 1967, and again to 65 percent by 1980. See Francine Roy, "From she to she: changing patterns of women in the Canadian labour force" (June 2006) Canadian Economic Observer (Ottawa: Statistics Canada, Catalogue No 11-0101) Figure 2. In 2009 it stood at 77.1 percent, compared to 83.8 percent for men: Ferrao, *supra* note 38 at Table 4. Over the same period, men's labour force participation declined in all age categories between 15 and 64. Ferrao, *ibid.*

86 Optimism on this point is implicit in much of the testimony discussed in the *Fry Report*, *supra* note 4, and in that report itself. The report observes (at 4) that the "statistics bode well for future generations of women upon retirement," but acknowledges that "they do not tell the whole story."

under pressure from pay equity legislation overlooks the limited objectives of that legislation. Even if pay equity laws were 100 percent effective (which they are not), they would remove only that portion of the pay differences between men and women that is measurably related to sex discrimination.<sup>87</sup> Pay equity laws do not seek to eliminate pay differences based on hours of work, the loss of seniority and salary increments consequent on time spent out of the workforce for family reasons, and the many other ways in which women's life patterns affect their labour market earnings. A study completed in 2001 on the male-female wage gap in Canada projected that, on the most optimistic scenario, the wage gap between women and men in full-year, full-time jobs would still exceed 20 percent in 2031.<sup>88</sup>

Second, despite the fact that women and men now belong to pension plans in almost equal numbers, the problem of unequal pension coverage has not been resolved in a sustainable way. As we have already seen, women have gained their current "equal" status largely, if not entirely, because they are over-represented in the public sector, where pension plans are much more common than in the private sector. Although the public sector has historically accounted for just over 20 percent of the Canadian workforce, that percentage has been declining incrementally but fairly consistently since the early 1990s,

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87 While there is controversy over how much of the wage gap is due to unlawful employment discrimination, there is general agreement that some of it is unexplained by conventional human capital and demographic factors or by job characteristics. Michael Shannon & Michael P Kidd, "Projecting the Trend in the Canadian Gender Wage Gap 2000-2031 (2001) 27:4 *Canadian Public Policy* 447. See also Julie Cool, *Wage Gap between Men and Women, Parliament of Canada Background Paper*, July 2010, online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-30-e.pdf>>.

88 Shannon & Kidd, *ibid* at 457, Table 4. The current gender pay gap for full-time, full-year workers in 2008 (29.7 percent) was slightly *larger* than it was ten years earlier, when it stood at 29.1 percent: Cara Williams, "Economic Well-being" in *Women in Canada: A gender-based statistical report*, 6th ed (Ottawa: Statistics Canada, 2010) at 13 (Table 7). For all earners, the gender wage gap stood at 35.5 percent in 2008. While hourly wage comparisons (which yield lower gaps) may be more reliable indicators than annual income of the extent to which wage gaps are due to gender discrimination, annual incomes are a more relevant indicator of the likely impact of gendered wage differentials on retirement income.

except in periods of high unemployment.<sup>89</sup> If this trend continues, there will be relatively fewer good pensionable jobs for women. In addition, “generous” public-sector pension plans<sup>90</sup> have become the target of what has been popularly dubbed “pension envy.” The Canadian Federation of Independent Business has embarked on a sustained campaign to undermine public support for good pensions for public employees, arguing that “there is no valid reason why Canadian taxpayers are on the hook for public sector pension plans when in fact half the Canadians working in the private sector will not even benefit from any private pension plan upon retirement.”<sup>91</sup> Public-service pension plans are also being targeted by tax-cutting and cost-cutting governments; in 2012, both the Ontario and federal spring budgets identified reductions in public-sector pension spending as priorities. With public policy turning against public-sector pension plans, women’s pension coverage is likely to deteriorate more quickly than men’s, along with their benefit levels.<sup>92</sup>

Declines in the availability and quality of public-sector plans will not be made up for in the private sector. In a 1992 report entitled *Employer-Sponsored Pension Plans: Who Benefits?*, federal government researchers Brenda Lipsett and Mark Reesor examined the characteristics of firms most likely to offer employment pension plans

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89 See *Public Sector Statistics: Supplement, 2006* (Ottawa: Statistics Canada, Catalogue No 68-213-SIE) at 6, Chart 1.2.

90 Public-service pension plans are invariably defined benefit plans, often offering the maximum benefits permitted under income tax regulations. Pension plans in the broader public sector are more variable.

91 Lucie Charron, *Canada’s Pension Predicament: The widening gap between public and private sector retirement trends and pension plans* (Canadian Federation of Independent Business, January 2007) 9. See also Ted Mallett, “Public Sector Pensions: A Runaway Train”, CFIB Pension Research Series, Report 2 [2012].

92 Ironically, part of the attack on public-sector pension plans includes a critique of the mechanisms whereby such plans favour elite workers. See Geoffrey Young, “Winners and Losers: The Inequities within Government-Sector, Defined-Benefit Pension Plans” (CD Howe Institute, Commentary No 347, 2012). Young argues (at 3) that DB “plan formulas tend to favour those who retire early with fast-growing earnings toward the end of their career and disadvantage those who spend only a portion of their career within a plan.” While Young’s prototypical “winner” is a deputy minister and his “loser” is a clerk, he does not comment on the gender implications of his thesis. The reforms he advocates might make these plans more equitable, but they would also reduce their general quality for all recipients.

in Canada.<sup>93</sup> In the private sector, they found that pension plan coverage correlated positively with firm size and unionized status, both of which are declining in Canada.<sup>94</sup> They noted that the fastest growing sectors of the economy are those associated with low pension coverage — services (business, personal and miscellaneous), wholesale and retail trade, and construction. Lipsett and Reesor also found that worker characteristics associated positively with pension coverage were on the decline. They concluded:

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 [employment pension plan] coverage than those who have been working in a permanent, full-time, unionized, high-wage position in a large firm for many years.<sup>95</sup>

Of course, men as well as women work in unpensioned jobs. While most of the worker characteristics negatively associated with pension coverage are gendered,<sup>96</sup> recent studies of non-standard work in Canada provide considerable evidence for the proposition that work patterns in general are trending away from the profile of the pensioned worker. Apparent gains in gender equality in labour markets — narrowing wage gaps and convergence in union density and

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93 Lipsett & Reesor, *supra* note 49; see also Hubert Frenken & Karen Maser, “Employer-sponsored pension plans – who is covered?” (1992) 4:4 Perspectives on Labour and Income (Statistics Canada).

94 René Morissette, Grant Schellenberg & Anick Johnson, “Diverging Trends in Unionization” (2005) 6:4 Perspectives on Labour and Income (Statistics Canada) 5; Statistics Canada, “Union membership and coverage by selected characteristics, 2007-8” (Table 1). There has also been a decline in the number of firms with 500 or more employees: see Danny Leung, Césaire Meh & Yaz Terajima, “Productivity in Canada: Does Firm Size Matter?” Bank of Canada Review, Autumn 2008 at 9.

95 Lipsett & Reesor, *supra* note 49 at 3.

96 The exception is unionization. Although women were underrepresented for many years in unionized workplaces in Canada, current figures show women workers are now at least as likely as male workers to be represented by trade unions, in large part because of a sharp decline in male union membership in the private sector. In 2010, 32.8 percent of employed women were covered by collective agreements, compared to 30.4 percent of men. Sharanjit Uppal, “Unionization 2010” (2010) 11:10 Perspectives on Labour and Employment (Statistics Canada) Table 1.

pension coverage — may be due less to women’s gains than to men’s losses. Some scholars, including Judy Fudge and Leah Vosko, have labelled the generally deteriorating conditions of work in Canada the “feminization of work”:

The restructuring of the labour market in Canada has led to the disintegration of the standard employment relationship and the ‘feminization of employment relationships’, a phenomenon whereby a growing proportion of work arrangements carry wages, benefits, terms and conditions of employment resembling those conventionally associated with women and other marginalized workers.<sup>97</sup>

While male workers are now more likely to share the pain, the job profile of the pensionless worker still fits women better than men.<sup>98</sup> Labour market trends working against decent workplace pension provision for all employees will do nothing to improve the pension situation of women.

The convergence hypothesis also ignores the fact that women’s current income from private pensions includes not just “earned” pensions, but also survivor benefits, pension credits acquired from a spouse on marriage breakdown, and portions of a spouse’s pension that has been split for tax purposes pursuant to 2007 income tax amendments.<sup>99</sup> These types of “family” benefits are very vulnerable to changing work and family patterns. As male pension coverage declines, the availability of survivor benefits for women will decline with it. As family structures become more complex, it cannot be automatically assumed that spouses will be co-beneficiaries of a male partner’s benefits; it is not uncommon for two or more surviving

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97 Judy Fudge & Leah Vosko, “Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy” (2001) 22 *Economic and Industrial Democracy* 271 at 272.

98 See Pat Armstrong & Hugh Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work* (Toronto: McClelland & Stewart, 1994); Cynthia Cranford, Leah F Vosko & Nancy Zukewich, “The Gender of Precariousness in the Canadian Labour Force” (2003) 58 *RI* 454.

99 The mechanics and gender implications of this 2007 tax change are discussed by Claire Young in “Pensions, Privatization and Poverty: The Gendered Impact” (2011) 23 *CJWL* 661 at 671, 678-679. Young argues, at 671, that pension-splitting for tax purposes is a regressive measure primarily benefitting heterosexual couples with a high-income male spouse and a female spouse who does not work outside the home.

spouses to make claims on the value of a single male pension benefit.<sup>100</sup> In addition, the very concept of survivor benefits has come under attack in recent years from a variety of political perspectives.<sup>101</sup> As women's increased participation in the labour market arguably undermines much of the justification for the "family" approach to pensions, women may lose these types of ancillary benefits without any compensating increase in benefits earned by their own labour market activity.

**(b) Employer Incentives and the Limits of Regulation in a Voluntary Employment-Based Pension System**

The invisible hand reflected in labour market trends is therefore unlikely, any time soon, to deliver employment pensions to women who do not now have them — a problem which is compounded by women's increasing exposure to unequal labour market earnings that detrimentally affect their retirement income. Nor, as we have seen, can we count on that invisible hand to shape pension instruments, where they do exist, in a way that will mitigate gender risk. The reasons are not hard to find. As discussed in Part 3 above, employers historically offered pension plans to attract and retain the most desirable

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100 Strictly speaking, pension legislation permits only one "survivor" to claim the survivor pension, usually a legal spouse unless there is a supervening and extant common law relationship at time of death. However, former spouses may have claims under provincial matrimonial property laws which reduce the value of the pension. For some of the complexities that can arise in adjudicating competing spousal claims, see *Ontario Teachers' Pension Plan Board v Ontario (Superintendent of Financial Services)* (2004), 236 DLR (4th) 514 (Ont CA) (*sub nom Stairs v Ontario Teachers' Pension Plan Board*); and *Carrigan v Carrigan Estate*, 2012 ONCA 736, leave to appeal denied, March 28, 2013. Ontario has recently amended both its *Family Law Act* and its *Pension Benefits Act* to simplify the division of pensions on marriage breakdown.

101 Both liberal and feminist commentators have critiqued survivor benefits. See, for example, Newman Lann, James Cutt & Michael Prince, "The Canada Pension Plan: Retrospect and Prospect" in Keith G Banting & Robin Boadway, *Reform of Retirement Income Policy: International and Canadian Perspectives* (Kingston: Queen's University School of Policy Studies, 1997); Monica Townson, "Pension Reform for Women" in David W Conklin, Jalynn H Bennett & Thomas J Courchene, eds, *Pensions Today and Tomorrow: Background Studies* (Toronto: Ontario Economic Council, 1984) 412.

types of employees, and to implement other management goals such as inducing older and less productive employees to retire. Calls to include more women-friendly benefit design features in private plans, such as the “child drop-out” features found in the CPP/QPP, typically meet with the response that because employment pension benefits are “deferred wages,” they must be pegged directly to earnings and there is no room for “redistributive” features. This response is more than a little disingenuous; as we have noted, employers have not hesitated to use the mechanics of benefit plan design to redistribute benefits away from less valued employees (e.g., those with shorter service and less valued skills). But such regressive forms of redistribution are market mechanisms that serve employer human resource objectives. In contrast, redistribution from male to female employees performs no such market function; indeed, employers see it as undermining recruitment and retention goals.

If it is not realistic to expect gender-equal pension design features to emerge unaided from the labour market, can we treat the problem as a “market failure” which can be addressed through regulation? Will more and better legal rules work to reduce or eliminate the gender inequality in employment pensions? As we saw in Part 4, policy-makers turned to regulation in the past as a tool to promote gender pension equality. While there have been no comprehensive studies evaluating the gender impact of the law reforms of the 1980s, those reforms have likely been of some benefit to women workers — for example, by opening pension plans to part-time workers and by requiring shorter vesting periods.<sup>102</sup> Could better use of regulatory

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102 Andrew Luchak, T Fang & Morley Gunderson, “How Has Public Policy Shaped Defined-Benefit Pension Coverage?” (2004) 25 *Journal of Labor Research* 469-484. It is not a foregone conclusion that these legal changes have improved the pension situation for women overall; the obligation to cover part-time workers may have dissuaded some employers from offering any pension coverage at all. See René Morissette & Marie Drolet, *The Evolution of Pension Coverage of Young and Prime-Aged Workers in Canada* (Ottawa: Statistics Canada, 22 December 1999) at 4, n 9. The study by Morissette and Drolet did not measure the direct impact of legislative changes such as earlier vesting, because it could not account for seniority. The authors (at 2) attributed growth in women’s coverage to “their greater propensity to hold relatively well-paying jobs, which have a high likelihood of having pension coverage,” at least for older women. For the youngest women in the study, they found declines in coverage comparable to those of male counterparts (at 11).

standards produce more gender-equal outcomes within the existing legal framework governing employment pension plans, or does the problem go deeper, to the core of the relationship between employment and pension income?

To answer this question, we must first ask what kind of reforms would be needed to produce gender-equal employment pensions. Good pension plans pool and share as much of the general risks of retirement (health, investment and generational risks) as is feasible and consistent with other social and economic goals. In a society that aspires to gender equality, pensions would also be honed to pool and share gender risk. Now that law reform has eliminated most of the direct discrimination in pension coverage and benefit design, the challenge is to correct for the systemic factors that disproportionately consign women to labour market roles in which their pensions are depressed by both their lower earnings and their work patterns. Some of these systemic factors almost certainly correlate with pay differentials and employment practices that contravene existing laws; better enforcement of those laws would help. However, much of the gendered impact of current pension systems flows from the complex interaction between women's patterns of labour market engagement and their role in families — from their continuing unequal share of care work and its influence on their ability to earn the labour market rewards that generate good pensions. To reshape employment pension plans to pool gender risk, it would be necessary to apply regulatory correctives to how those interactions affect women's pensions — or, in other words, to change how those pension plans value and reward market work and market work patterns.

But what will happen if we do this? The gendered outcomes of employment pension plans reflect their market-based distributive logic — the logic that led employers to adopt employment pension plans in the first place. Reforming pension plans to compensate for the impact of unpaid care work on labour market earnings would require careful analysis of how such work affects earnings over time as well as difficult normative choices about how to value it for pension purposes. There are a range of possible outcomes. But they would all have one feature in common: they would distribute benefits differently than current plans do. *Voluntariness* is a defining feature of Canada's Pillar 3 pension plans. Employers do not have to provide such plans, but if they do, they must abide by the legal rules that govern them. If those rules require the plans to be reshaped so drastically

that they cease to meet employer needs, employers will respond by opting out of the system.<sup>103</sup> Because pension plan regulation that takes gender equality seriously must depart significantly from market norms and values, it will lead employers to move to less regulated forms of pension provision (for example, from DB to DC plans, or from DC plans to group RRSPs), or to move out of pension provision altogether. Instead of gender-equal pensions, women (and men) will get no pensions at all.

The voluntary nature of employment pension plans is therefore the Achilles heel of any serious attempt to regulate gender equality within the existing employment-based system. Does the solution lie in making private employment pension plans mandatory? We could try. But economists argue that this will have negative labour market effects as long as pension plans are confined within the boundaries of individual workplaces.<sup>104</sup> Despite decades of women's labour market participation and anti-discrimination laws, work in Canada still tends to be segregated by gender.<sup>105</sup> Because women live statistically longer

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103 The observation that regulation is a tool that can backfire, working at cross-purposes with regulatory objectives and producing unintended consequences, is obviously not an original one. See Cass Sunstein, "Paradoxes of the Regulatory State" (1990) 57 U Chicago L Rev 407. The vulnerability of voluntary pension systems to "over-regulation" has frequently been identified by commentators on similar systems outside Canada. See World Bank, *Averting the Old Age Crisis*, *supra* note 11 at 199; Barr & Diamond, *supra* note 10 at 20, 157, 304; Leslie Hannah, "Similarities and differences in the growth and structure of private pensions in OECD countries" in E Duskin, ed, *Private Pensions and Public Policy*, Social Policy Studies, No 9 (Paris: OECD, 1992) 21 at 27; Andre Laboul & Juan Yermo, "Regulatory Principles and Institutions" in Gordon L Clark, Alicia H Munnell & J Michael Orszag, *The Oxford Handbook of Pensions and Retirement Income* (Oxford: Oxford University Press, 2006) 501 at 519. The charge that too much regulation is killing employment pensions in Canada was found by Ontario's Expert Commission on Pensions to be unproven. *A Fine Balance*, *supra* note 26 at 47.

104 See George J Benston, "The Economics of Gender Discrimination in Employee Fringe Benefits: *Manhart* Revisited" (1982) 49:2 U Chicago L Rev 489 at 532-536; Merton C Bernstein & Lois G Williams, "Title VII and the Problem of Sex Classifications in Pension Programs" (1974) 74:7 Colum L Rev 1203. Sydney J. Key argues that the potential for negative labour market impacts has been exaggerated: "Sex-Based Pension Plans in Perspective: *City of Los Angeles, Department of Water and Power v. Manhart*" (1979) 2 Harv Women's LJ 1 at 17-25.

105 Ferrao, *supra* note 38 at 21.

than men, pensions of the DB variety come at a higher actuarial cost for female employees than for male employees, and Canada's pension laws require employers to bear that cost.<sup>106</sup> Employers who provide pensions in workplaces where women predominate have three choices: to pay higher overall pension costs, to provide lower DB benefits than in male-dominated workplaces, or to move to DC plans. If, as is most probable, employers take the second or third options, the pensions of workers in female job ghettos will be inferior to those in male-dominated workplaces.

We could try to tackle this problem too by regulation; we could mandate a uniform benefit level that must be provided by every plan.<sup>107</sup> This would produce less gendered pension benefits across workplace boundaries, but at the price of imposing higher pension costs on employers with a predominantly female workforce. At best, this strategy would create incentives not to hire women, or would put downward pressure on women's non-pension wages. At worst, it would drive marginal female-dominated operations out of business. The fact is that most individual Canadian workplaces are simply too small to operate as efficient pools for sharing and distributing gender risk. To spread that risk efficiently, we must break down the walls of gendered job ghettos and establish pension plans whose boundaries extend beyond individual workplaces.

## **6. POOLED REGISTERED PENSION PLANS: A STEP BACKWARDS FOR WOMEN**

To produce good, gender-equal employment pensions, three major steps must be taken: make employment pension plans mandatory, impose a uniform benefit formula that accommodates for and values women's patterns of engagement with the labour market, and make plans broad-based enough to provide efficient risk-pooling. The plans that would result would bear almost no resemblance to the types of employment pension plans that have evolved on the market — but

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106 Shilton, "Insuring Inequality," *supra* note 47 at 417-421.

107 This is the approach taken by the CPP/QPP; within the confines of the program's maximum and minimum annual earnings, every dollar earned and every full or partial year of service worked yields the same monthly benefit for all contributors.

they would closely resemble the existing CPP/QPP. A policy-maker positively disposed to gender equality might well conclude that since effective regulation to promote gender equality would distort private employment pension plans beyond recognition, it would be more rational and more straightforward to tackle the problem by enhancing the CPP/QPP.

As noted earlier, however, the federal government has not taken that route but has chosen instead to pursue a new market-based Pillar 3 instrument: the Pooled Registered Pension Plan (PRPP). The *Pooled Registered Pension Plans Act*<sup>108</sup> (*PRPPA*) lays out the framework for PRPPs applicable to federal employees. However, before PRPPs can be widely utilized, the provinces will have to enact similar legislation making PRPPs available to employees within provincial jurisdiction and to the self-employed. It is not clear that this will happen. To date, Quebec and British Columbia have been the only provinces to table PRPP legislation.<sup>109</sup> Unlike the federal version, Quebec's version, known as a Voluntary Retirement Savings Plan (VRSP), would have been mandatory for employers with five or more employees who did not already offer a pension plan or group RRSP.<sup>110</sup> The VRSP legislation died on the order paper with the 2012 election call in Quebec, and the defeat of the Charest government in September 2012 puts its future in some jeopardy. British Columbia's version tracked the federal model; it too has now died on the order paper pending the May 2013 general election in that province.<sup>111</sup> To date, the Ontario government has shown some resistance to implementing the federal PRPP prototype, at least as long as it remains unaccompanied by enhancements to CPP/QPP.<sup>112</sup>

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108 SC 2012, c 16 [*PRPPA*] (in force as of 14 December 2012).

109 In its March 2013 budget, Saskatchewan announced plans to table PRPP legislation: [http://www.benefitscanada.com/pensions/other-pensions/saskatchewan-to-introduce-prpp-37327?utm\\_source=EmailMarketing&utm\\_medium=email&utm\\_campaign=Daily\\_Newsletter](http://www.benefitscanada.com/pensions/other-pensions/saskatchewan-to-introduce-prpp-37327?utm_source=EmailMarketing&utm_medium=email&utm_campaign=Daily_Newsletter).

110 See "VRSPs, Pension Plans for Two Million Quebecers," online: <[http://www.budget.finances.gouv.qc.ca/Budget/2012-2013/en/documents/Communique\\_11\\_en.pdf](http://www.budget.finances.gouv.qc.ca/Budget/2012-2013/en/documents/Communique_11_en.pdf)>.

111 Online: [http://www.benefitscanada.com/news/prpp-bill-dies-in-b-c-37218?utm\\_source=EmailMarketing&utm\\_medium=email&utm\\_campaign=Daily\\_Newsletter](http://www.benefitscanada.com/news/prpp-bill-dies-in-b-c-37218?utm_source=EmailMarketing&utm_medium=email&utm_campaign=Daily_Newsletter).

112 See March 2012 Budget, ch IV, "Tax and Pension Systems," online: <<http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch4b.html>>.

The *PRPPA* describes its purpose as follows, in section 3:

The purpose of this Act is to provide a legal framework for the establishment and administration of a type of pension plan that is accessible to employees and self-employed persons and that pools the funds in members' accounts to achieve lower costs in relation to investment management and plan administration.

PRPP products will be offered by financial service providers licenced by the pension regulator.<sup>113</sup> Employers will not be required to make them available to their employees. An employer that does choose to do so will enter into a contract with a licenced PRPP provider. The employer will then auto-enroll employees, followed by a 60-day window within which employees may opt out of membership altogether.<sup>114</sup> Plan members will also have the option of suspending their contributions from time to time.<sup>115</sup> The auto-enrollment feature is an attempt to marry behavioural economics and market mechanisms in order to expand coverage without compromising the principle of voluntarism; the theory is that inertia will lead most employees to stay in the plan and continue to contribute. The purpose clause in the statute makes it clear that the PRPP framework is designed to permit all workers (whether employed or self-employed) to join PRPPs. Strictly speaking, however, the limits of federal legislative jurisdiction mean that the *PRPPA* applies only to employees who work within federal jurisdiction and whose employers offer a PRPP.<sup>116</sup>

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113 The *PRPPA* does not spell out which financial services providers will be licensed to provide PRPPs. The *Pooled Registered Pension Plans Regulations*, SOR/2012-294, which came into force on 14 December 2012, provide only very general criteria for licensing providers: see s 7. Competition for the business is heating up among insurance companies, banks and existing large pension funds. See Brown & Meredith, *supra* note 8 at 19. A government publication, *Backgrounder: Key Features of Pooled Registered Pension Plans*, suggests that large public-sector pension plans are among the types of administrators contemplated. Online: <[http://www.fin.gc.ca/n11/data/11-119\\_3-eng.asp](http://www.fin.gc.ca/n11/data/11-119_3-eng.asp)>.

114 *PRPPA*, *supra* note 108, s 41(5).

115 The criteria governing the right to suspend contributions are not detailed in the Act: see *ibid*, s 76(1)(m). The *Regulations* contemplate considerable flexibility; members may suspend contributions for periods of 3 to 60 months, and may do so as often as they choose, once they have been plan members for at least 12 months (see *supra* note 113, s 21).

116 In the three territories (the Yukon, the Northwest Territories, and Nunavut), it also applies to the self-employed and to employees whose employers have not chosen to provide a PRPP. See *PRPPA*, *supra* note 108, ss 3-4.

While the *PRPPA* does not mandate any particular form of benefits, it is clear that these plans will not be DB plans but will offer pure DC benefits based on an “individual account” model. Proponents argue that PRPPs will have two significant advantages over existing DC plans. First, they predict that more employers will offer PRPPs because they do not impose on employers the expense, administrative burden and potential exposure to fiduciary responsibility that come with traditional single-employer plans.<sup>117</sup> Second, economies of scale should provide individual employees with access to expert financial management at fees lower than they could obtain on the RRSP market as individual consumers of financial services. Government spokespersons described this as the “bulk buying” of financial services.<sup>118</sup> Disturbingly, the *PRPPA* does not guarantee that this crucial feature will materialize; instead, it proposes to rely on market forces — competition — to produce superior products at lower cost.<sup>119</sup>

A very important attribute of PRPPs is that they will not require employer contributions.<sup>120</sup> Indeed, this has been one of their key selling points to the business community.<sup>121</sup> To date, a requirement for

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117 See Government of Canada, *Background: How Pooled Registered Pension Plans Will Address Gaps in Canada's Retirement Income System*, online: <[http://www.fin.gc.ca/n11/data/11-119\\_2-eng.asp](http://www.fin.gc.ca/n11/data/11-119_2-eng.asp)>.

118 *Ibid.* The language of “bulk buying” was frequently used by government members in the parliamentary debates and committee discussions on the Bill, almost certainly to highlight the commodified nature of the product.

119 *Hansard*, *supra* note 7. Market forces may well not produce this result: see Gerry Wahl, “PRPPs: The Unintended Consequences,” *Benefits Canada*, 3 January 2012. Section 26 of the *PRPPA* provides only that “[a]n administrator must provide the pooled registered pension plan to its members at a low cost.” “Low cost” is not defined, although section 76(1)(f) contemplates regulations “establishing criteria for determining whether a pooled registered pension plan is low-cost for purposes of s. 26.” The *Regulations* require that costs must be the same for all members of a PRPP, must be “at or below those incurred by members of defined benefit plans that provide investment options to groups of 500 or more members,” and must be the same for all members of a PRPP (see *supra* note 113, s 20).

120 See *PRPPA*, *supra* note 108, s 29. Although employer contributions are not required, they are permitted. If an employer does contribute, its contributions, like employer contributions to other types of pension plans (but unlike employer contributions to RRSPs), will be tax-deductible.

121 The point was frequently mentioned by government members in the parliamentary debates and committee discussions on the Bill.

employer contributions has been a defining feature of employment pension plans;<sup>122</sup> the absence of such a requirement makes PRPPs much more like RRSPs than like pension plans.

PRPPs have attracted enthusiastic support from the financial services industry, which will benefit from a whole new line of business.<sup>123</sup> Analysts not aligned with the industry are much less supportive.<sup>124</sup> As evidence that the retirement savings deficit has not resulted from a shortage of tax-assisted individual savings vehicles, they point to the fact that Canadians currently have many billions of dollars in unused RRSP contribution room.<sup>125</sup> They see the advantages of PRPPs over individual and group RRSPs as being quite marginal for both employers and employees. Robert Brown and Tyler Meredith argue that the absence of a mandatory employer contribution, far from being a positive feature, is a critical omission in PRPP design. In their words:

While [the PRPP's] adoption may induce greater coverage across the labour force, it will not do much to provide greater financial security for those employees who already participate in group RRSPs. Without active employer contributions, employees will find in PRPPs nothing more than a potentially more efficient personal savings vehicle through greater pooling of assets and reduced investment fees.<sup>126</sup>

Some critics argue that while PRPPs are not likely to lead many employers who have not already done so to offer pension plans, they will give employers who already offer DB or DC plans significant inducements to “downgrade” them to PRPPs — inducements in the form of relief from the obligation to make contributions and from the costs of regulatory and fiduciary compliance.<sup>127</sup> This is perilous

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122 Canadian pension statutes do not currently regulate plans to which employers do not contribute. See, for example, *PBSA*, *supra* note 46, s 4(2).

123 See, for example, the statement of the Canadian Life and Health Insurance Association, online: <[http://www.clhia.ca/domino/html/clhia/clhia\\_lp4w\\_Ind\\_webstation.nsf/resources/PDFs/\\$file/PRPPs\\_An\\_Industry\\_Perspective.pdf](http://www.clhia.ca/domino/html/clhia/clhia_lp4w_Ind_webstation.nsf/resources/PDFs/$file/PRPPs_An_Industry_Perspective.pdf)>.

124 See, for example, Brown & Meredith, *supra* note 8 at 15-17; Townson, *Pension Breakdown*, *supra* note 3 at 13-15.

125 In 2010, Canadians had about \$633 billion in unused RRSP contribution room, averaging over \$30,000 for each eligible contributor. Statistics Canada, CANSIM Table 111-0040.

126 Brown & Meredith, *supra* note 8 at 17.

127 See Wahl, *supra* note 119.

from the perspective of national retirement income policy, as it may hasten the decline of conventional employment pension plan coverage, thereby reducing rather than increasing the overall level of pension savings in Canada. The Ontario government appears to share this negative view; its March 2012 Budget observed, among other criticisms of the PRPP model, that “PRPPs may simply replace one form of retirement arrangement with another, instead of expanding retirement income savings and coverage.”<sup>128</sup>

Compounding the other frailties of PRPPs is the fact that they clearly offer no remedy for gender inequality. As DC plans, they will tie individual pensions firmly to personal labour market earnings. They may indeed pool investment funds for money management purposes — a form of financial risk-sharing no more pension-like than any ordinary mutual fund. However, they are the antithesis of social risk-sharing, leaving their members exposed as individuals to health, investment and generational risks. As vehicles for managing gender risk, they are a step backward from DB plans in almost every important respect, leaving women entirely at the mercy of their own unequal career earnings and longevity risks. The purported advantages of PRPPs over existing DC plans (that they will be more often used and less costly) will simply not address gender risk.

In addition, by exempting PRPPs from legislation regulating conventional pension plans,<sup>129</sup> the *PRPPA* appears to have abandoned some of the important gender correctives introduced into the pension landscape in the reforms of the 1980s. Although PRPPs will of course be subject to general human rights codes, which prohibit direct and indirect sex discrimination, the *PRPPA* itself provides much scantier explicit protection against sex discrimination than existing pension benefits statutes. It prohibits sex discrimination in *member* contributions,<sup>130</sup> but not in *employer* contributions, presumably because no employer contributions are envisaged. The *PRPPA* does not require employers to treat part-time employees in the same way as full-time

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128 Ontario Budget March 2012, ch IV, “Tax and Pension Systems,” online: <<http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch4b.html>>, at 277.

129 *PRPPA*, *supra* note 108, s 84, amending s 4(2) of the *PBSA*, *supra* note 46.

130 *PRPPA*, *ibid*, s 56.

employees.<sup>131</sup> Very importantly, unlike conventional pension statutes, it does not prohibit financial institutions from using sex-based mortality tables for pricing annuities purchased out of the proceeds of PRPPs, leaving open the distinct possibility that (as now happens with RRSP proceeds) women may face higher annuity costs than men because of the statistical probability that they will live longer.<sup>132</sup>

In sum, PRPPs have little to offer. They may give individual Canadians more access to low-cost savings vehicles, although it is by no means certain that they will. Their auto-enrollment feature may be beneficial to individuals whose “failure to save” reflects a lack of discipline, but it will do little to retain those for whom this “failure” is simply a matter of meeting day-to-day survival needs. If PRPPs proliferate, it may be at the expense of existing pension vehicles that require employers to share the risks of employee retirement at least to the extent of making pension contributions. By design, PRPPs are not adaptable to risk-pooling. Rather than move us closer to gender equality in the retirement income system, they will almost certainly increase the gender pension gap. Like other market retirement instruments before them, PRPPs reflect market logic, not social logic. They are a step backwards for Canadian women.

## 7. CONCLUSION

Canada’s current voluntary employment pension model tethers pension plans and pension benefits to employment relationships, leaving largely in the hands of the employer such key decisions as whether employees will have a pension plan, what kind of plan it will be and what benefits it will provide. This model has not worked well to address the problems posed by gender risk. The current trend toward more individualistic pension instruments augurs for even worse times ahead. Despite their shortcomings, conventional DB plans offer a way to pool and share retirement risks, including the

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131 Employers are expected to enroll those part-time employees who fall into a class of employees for which a PRPP is offered, but only after they have completed 24 months of continuous service (ss 39-40), whereas full-time employees are enrolled immediately. Section 40(2) contemplates the possibility of regulations extending this 24-month period.

132 Shilton, “Insuring Inequality,” *supra* note 47 at 397-404.

longevity risk that is an important component of gender risk. As DB plans move off centre-stage, the DC plans that are taking their place are much less effective at mitigating retirement risk. Even DC plans, however, do not leave employees entirely to their own devices for retirement income provision; they require employers to contribute. The new federal PRPP, which loosens the links between pensions and individual employment relationships, does leave employees less vulnerable to employer decisions about whether to provide any pension coverage. But as we have seen, the value of potential increases in pension coverage resulting from PRPPs will be significantly undermined by a benefit design that does not address the real welfare risks of retirement. By abandoning the last vestige of employer risk-sharing — the requirement of employer contributions — PRPPs will move us closer to a world in which each person is solely responsible for his or her own retirement income security. This trend has negative implications for most Canadians, and particularly for women.

As sociologist and pension expert John Myles has argued, it is true that achieving gender equality in retirement requires achieving gender equality across a working life.<sup>133</sup> Pension plan design alone may not eliminate gender risk in retirement. However, this is no excuse for refusing to use the policy tools available to mitigate the retirement income risks which are linked to the unequal burdens borne by women in labour markets and in families. Pension design choices have “far-reaching normative, political and tangible economic implications for women (and men).”<sup>134</sup> Design features that value reproductive work, integrate periods of paid and unpaid work, correct for gender differentials in compensation for market work, and pool longevity risk across gender lines would go a long way toward achieving retirement income equality for women. Such features are attainable within collective risk-sharing vehicles such as the CPP/QPP. They are not attainable within a voluntary employment-based system, and

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133 John Myles, “A New Social Contract for the Elderly?” in Gøsta Esping-Andersen, Duncan Gallie, Anton Hemerijck & John Myles, *Why We Need a New Welfare State* (Oxford: Oxford University Press, 2002) at 147-148.

134 Bernd Marin, “Gender Equality, Neutrality, Specificity and Sensitivity – and the Ambivalence of Benevolent Welfare Paternalism” in Marin & Zólyomi, *supra* note 2, 203 at 210.

even less so within an individualized system that abjures risk-sharing and expects individuals to provide entirely for themselves.

In the midst of the continuing pension debate, we must remind policy-makers that pension design choices are not merely technical; they are value choices. Decisions about how to treat women's paid and unpaid work for pension purposes reflect normative judgments about what that work is worth to us as a society, no matter what it is worth on the market. If gender-equal pension design features disrupt entrenched distributive outcomes (as they almost certainly will), so be it. Pension law reform should not settle for less.