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Chapter 7

Gendered risks of retirement

The legal governance of defined contribution pensions in Canada

*Mary Condon**

INTRODUCTION

This chapter examines how the governance of new employer-sponsored pension arrangements in Canada mediates the relationship between gender and discourses of economic risk. It considers the role played by these pension regimes in maintaining gendered forms of financial self-governance and economic insecurity. It asks whether evolving precepts of pension regulation assist or hinder women who wish to resist the disciplinary reach of policy restructurings in the employer-based pension sector.

The argument will be made in this chapter that legal governance of defined contribution (DC) pensions is an example of a shift away from 'command and control' forms of regulation, and that one of its effects is to redistribute economic risks away from employer pension sponsors and towards employees, particularly lower-paid women. The central objective is to examine, from a feminist point of view, several specifically legal devices for the management of employee financial risk in a DC context. A core feature of a DC pension is that it typically allows workers to make decisions about where pension contributions should be invested. At one level, the ability to make choices, and a governance regime facilitating this, is broadly consistent with feminist emancipatory goals. Choice making in this context replaces older-established, more paternalistic notions of fiduciary duties[1] owed to workers by employers or pension trustees. Indeed fiduciary duties employed as legal responsibility devices in various contexts have been critiqued from a feminist perspective (Gabaldon 1995; Nedelsky 1989). However, I argue that the detail of how this shift to facilitating choice making might play out in the pension context needs to be interrogated closely, particularly with regard to the push to embrace risk in order to self-provide financial sustainability.

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1 A fiduciary duty is usually taken to mean the requirement to act with loyalty, good faith and in the best interests of the person. or group to whom the duty is owed

In particular, feminist legal analysis of evolving pension governance may need to take more seriously research findings from disciplines such as social psychology and feminist economics, to the effect that structures of rationality and decision making may themselves be gendered, particularly with respect to the advantages and disadvantages of risk taking (Finucane *et al* 2000; Strauss 2006b). The argument is that perceptions of degrees of risk are correlated with the levels of vulnerability and control experienced by those assessing the risk (Finucane *et al* 2000). As Slovic (1999: 693) expresses it:

> . . . race and gender differences in perceptions and attitudes point toward the role of power, status, alienation, trust, perceived government responsiveness, and other sociopolitical factors in determining perception and acceptance of risk. To the extent that these sociopolitical factors shape public perception of risks, we can see why traditional attempts to make people see the world as White males do, by showing them statistics and risk assessments, are often unsuccessful . . .

The claims made in this chapter will be addressed by first placing the evolving legal regime for DC pensions in Canada in larger political economy perspective. Here the argument is that this macro perspective betrays gendered underpinnings. Then the chapter will focus in on the legal regime for DC pensions in Canada, in order to demonstrate how it is likely to reinforce gender disadvantage, and how it is based on a valorization of forms of choice making that is not sensitive to gendered rationalities about risk.

THE POLITICAL ECONOMY OF DEFINED CONTRIBUTION PENSIONS

It is widely accepted in the pension and labour studies literatures that there has been a shift in the employer-based retirement income sector away from 'defined benefit' (DB) forms of pension provision and towards DC plans.[2]

2 This shift has been occurring at varying paces in different countries. In the US, 'more than four-fifths of all workers covered by employer-sponsored pension plans are participants in DC plans' (US Department of Labor). In the UK, 'over 60% of defined-benefit schemes have been closed or replaced by defined-contribution schemes' (Ring 2003: 67). However, in Canada, 'the vast majority of DC plans are with small or medium-sized employers, representing less than \$10 million in assets each' (Sharratt 2003: 31, 36). In 2004, the Joint Forum of Financial Market Regulators noted that over three million Canadians belong to Capital Accumulation Plans (CAPs), which have approximately \$60 billion in assets, and over 80 per cent of which allow members to make investment choices (Joint Forum 2004 Backgrounder). Figures from the same year indicate that there are slightly more DC plans in Canada than there are DB plans (7,507 of the first type and 7,014 of the second), though more than

In the first type, employers remain liable for funding a calculable 'pension promise' to workers, while in the second, employers undertake only to make specific contributions, with the ultimate financial outcome for the worker being largely dictated by how well the employers' and/or employees' contributions perform when invested in various financial products. In a DC pension, individual employees usually make the decisions about where to invest the contributions. In contrast, investment decision making in the traditional DB format is centralized in the hands of pension trustees who make decisions for the fund collectively. A vigorous debate exists in the political economy literature as to whether the genesis of this policy shift is in the 'shareholder primacy' thesis of corporate organization (i.e. that corporations are more interested in providing short-term returns to shareholders than benefits to employees), or alternatively in the moral economy of state-sponsored neoliberalism (which valorizes autonomous, individualized choice making and market-based service provision) (Cutler and Waine 2001).

In earlier work I have argued that the political economy of the shift to DC pensions is gendered at many levels.[3] Gendered features of this shift include foundational understandings of the relationship between periods of productive work and 'non-productive' work (in retirement or for childcare) in individuals' life cycles. The idea that provision for retirement is based on a model of continuous full-time employment for a 30- or 40-year period followed by a shorter period of retirement does not tend to capture the complicated nature of the relationship between 'productive' labour and caring work in women's lives (Bezanson and Luxton 2006). Meanwhile, considering the situation of women in labour markets only, there remains ample data demonstrating that women remain more likely to have lower incomes and to engage in non-standard employment[4] than men, with adverse consequences for avoiding poverty in old age (Vosko 2000). Such economic disadvantage in employment situations has a knock-on effect for financial well-being in retirement, once it is assumed that labour market involvement is meant to provide the bulk of that financial provision. This empirical data about the gendered nature of the labour market remains relevant despite the need now to be cognisant of the fact that a new gender order has been evolving over the last several decades (Cossman and Fudge 2002). This new gender order requires that the category of gender be disaggregated, according to the extent to which women interact with the labour market.[5] The conclusion to be drawn from this material is

80 per cent of all pension plan members remain in DB plans (Kaplan 2006: 3). The preponderance of employees still covered by DB plans are in the public sector, with less than 25 per cent of private sector workers in Canada being members of DB plans (SEI Canada 2006: 2).

3 Condon (2006).

4 That is, not full-time, full-year.

5 In other words, those women who are streaming into professionalized, full-time, high-paying jobs are not necessarily economically disadvantaged compared to men.

that turning to pension structures that reduce responsibilities on employers and heighten the need for workers to interact directly with investment markets has the capacity to create 'new forms of gender inequality, new forms of discursive discipline, and new forms of gendered insecurity' (Condon 2006).

THE ROLE OF THE STATE IN PENSION PROVISION

Pension policy restructuring in the employer sector is itself embedded in a broader institutional and policy context concerning how to provide adequate levels of retirement income for all citizens. In earlier work I and others have canvassed how the discourses undergirding entitlements to retirement income have changed from being centred around norms of collective citizenship rights to being premised on neoliberal individualized responsibility (Miller and Rose 1990; Condon 2002). Specifically, I have argued that in the current era of neoliberalism, the role of the state with respect to retirement income has shifted away from a focus on the direct provision of economic benefits and towards developing the institutionalized and regulatory structures within which privatized retirement takes place. In that sense, the role of the state has become increasingly focused on strategies of risk management, often by way of reshaping regulatory norms (O'Malley 1998; Moss 2002; Braithwaite 2000). More specifically, Strauss has recently argued that various welfare states may be plotted along a continuum, according to the extent to which they seek to ameliorate what she calls 'gender inequality risk' (Strauss 2006a). Examples of welfare state policies that address gender equality risks include 'sex discrimination and equal pay legislation, individual and household systems of taxation, affirmative action programmes . . . and the treatment of unpaid caring work by pension regimes' (Strauss 2006a: 11). It is notable that many of these risk management strategies do not involve the direct payment of benefits. Specifically in relation to pensions, Strauss argues that there are 'four interrelated risk dimensions associated with gender'. These are 'the public/private mix and commitment to redistribution, basis of entitlement, treatment of unpaid work and caring, and access to income' (ibid: 13). While the preoccupation of this chapter is more directly with the role of the 'private' employment sector rather than the state in ameliorating pension risk based on gender, it is clear that issues of the basis of pension entitlement and the mix of public and private provision of retirement income are central to the analysis of the legal governance of gender-based pension risk in Canadian labour markets.

Yet, it is true that Canada's uptake of Keynesianism after the Second World War was still organized around the idea that direct public provision of individual benefits would be supplemented significantly by retirement benefits payable by employers (Deaton 1989). In this sense, Canada is more closely aligned with the UK than any other European country plotted on Strauss's continuum of national pension regimes (Strauss 2006a). There is a universal state-provided retirement benefit (Old Age Security) as well as a further retirement amount payable to all who participated in the paid labour force on the basis of contributions made by employers and workers (Canada Pension Plan). However, these two benefits taken together are expected to provide only 35 per cent of pre-retirement income for those earning the Canadian average wage or less. Any retirement income beyond this must come from a third tier of benefits payable by individual employers or personal investment resources.

Importantly, this third tier has always been assumed to be voluntary on the part of employers. Thus, individual employers will provide employer-specific pension benefits (either DB or DC) only if they consider it beneficial to retaining or attracting a qualified labour force. Nonetheless, the state has attempted to provide incentives to employers to provide these benefits, by according favourable taxation status to money accumulated in so-called registered pension plans (RPPs).

HOW IS LEGAL GOVERNANCE OF DEFINED CONTRIBUTION PLANS ACCOMPLISHED?

As noted above, the underlying premise from which the regulation of employer-sponsored pension plans springs is one whereby there is no legal requirement on employers to provide them at all. If the financial or legal obligations attendant on maintaining a plan become too onerous, employers may terminate them, though detailed procedures must be followed to do so (Kaplan 2006: Chapter 9). It is no surprise then that the legal discourse surrounding the development of a regulatory framework for DC plans in Canada emphasises so-called 'decentred' or voluntary forms of governance such as codes of conduct, best practices, contractual arrangements and the like.[6] This is most obvious in the recent Guidelines for Capital Accumulation Plans (CAPs), promulgated in Canada by the Joint Forum of Financial Market Regulators (Joint Forum) in May 2004. These guidelines open with

6 The same philosophy underlies the recommendations of the 2001 Myners report in the UK, (Institutional Investment in the UK: A Review) advocating codes of practice and robust disclosure requirements (see Chap 11). An important feature of the evolving regulatory landscape is the way in which the growth of DC pensions provide a case study of global political economic influences on law. Thus, '[G]lobally the DC pension plan industry is moving towards more common regulatory standards and practices . . . global harmonization of DC governance practices assists multinational companies in introducing a common global DC risk management approach, which is appropriate in each local jurisdiction' (Felix 2005: 11). But differences which persist in governance requirements as between different countries, such as Australia and the UK, illustrate the continuing importance of local variation here (DC Forum December 2005 at 10 and 11).

the sentiment that they are 'intended to support the continuous improvement and development of industry practices (s.1)'. Indeed, one of the stated revisions to the final version of the CAP guidelines was that 'any language suggesting mandatory requirements has been eliminated to reduce confusion regarding the voluntary nature of the Guidelines'.[7]

In terms of the background to these guidelines, the Joint Forum worked between April 2001 and May 2004 to develop a final version. While it invited written comments and held focus group sessions across the country, it is notable that almost no workers provided input into the content of the guidelines.[8] The difficulties for individuals in penetrating regulatory discourses monopolised by repeat players and 'experts' has been well documented in the literature, and is a particular difficulty for advocacy groups supporting marginalized interests. As Condon and Philipps argue with respect to various arenas of economic governance, 'a particular challenge is to increase the participation of women in market governance and to problematize the use of gender-blind analytic frameworks by economic policymakers' (Condon and Philipps 2005: 128).

The focus of the remaining sections of this chapter, then, is to unpack further the legal and conceptual underpinnings of the Guidelines for Capital Accumulation Plans (CAP guidelines), as the primary source of regulatory structure for the operation of DC plans in Canada. In undertaking this examination, we should be alert to whether this legal regime – designed to facilitate choice making – is sensitive to the possibility of gendered consciousness with respect to risk.

HOW DO THE GUIDELINES WORK?

The players and their risks

The primary goal of these guidelines is to create a division of labour among the roles and responsibilities of the plan sponsor (the employer), the service

7 Joint Forum of Financial Market Regulators, Summary of Stakeholder Comments and Regulators Responses From Consultations on Proposed Guidelines for Capital Accumulation Plans, May 28 2004, at 2.

8 Twenty-six written responses were received to the Joint Forum's request for comments, all except one from organizations. While two comments were received from an organization called Canada's Association for the Fifty-Plus (CARP) and a third from a similar organization based in Quebec, the rest came from institutions and organizations such as insurance companies, investment funds, consulting firms and industry lobby groups. The Joint Forum held 12 focus group sessions across the country, which were attended by plan sponsors, service providers and pension plan members. It also met with 'representatives of industry associations throughout the consultation period' (Backgrounder: 2).

provider (typically, an insurance company) and the members (the employees). Service providers are defined as 'any provider of services or advice required by the CAP sponsor in the design, establishment and operation of a CAP (s.1.1.3)'. Although sponsors may delegate their responsibilities to service providers, they are initially responsible for setting up and maintaining the pension plan, and 'providing investment information and decision-making tools to CAP members (s.1.3.1)'. Meanwhile, the guidelines make clear that plan members are 'responsible for making investment decisions within the plan and for using the information and decision-making tools made available to assist them in making those decisions'. Thus, in contrast to typical DB pension plans, where investment allocation decisions for the plan are made by fund trustees or delegated by them to investment managers, the regulatory scheme for DC plans responsibilizes individual workers to engage in the investment enterprise. Pension fund trustees, with their attendant legal fiduciary responsibilities to beneficiaries, are thereby removed from the equation in a DC context (Davis 2004).

The guidelines further indicate that CAP members should 'also consider obtaining investment advice from an appropriately qualified individual in addition to using any information or tools the CAP sponsor may provide'. Not only is the obtaining of investment advice also downloaded to individual employees, but the guidelines contain an explicit acceptance of the idea that the information to be provided by the sponsor may be inadequate or subject to a conflict of interest (s.1.3.3). In distributing to workers the risk of making inadequate or inappropriate contribution investment decisions, and thereby ending up with an inadequate pension, the guidelines take no account of variation in the willingness or ability of individual workers to assume these risks. No account is taken of the possibility that the willingness to assume risk is itself gendered or racialized. We have noted above Slovic's contention that risk perceptions and attitudes reflect race and gender differences. This gender-variable acceptance of risk occurs in a context in which there is no enforcement mechanism provided by the guidelines themselves to assist with the actual carrying out of the various responsibilities assigned to the relevant parties.

According to the guidelines, responsibility to employees in a DC context is satisfied if various disclosures are made to them. While this issue is discussed in more detail below, one stakeholder comment made in the process of discussing these guidelines before they were implemented was that '[T]he Guidelines underplay the aspect of risk. CAP sponsors should be required to sensitise members to risk factors'. The Joint Forum's response to this submission was that this issue was already adequately addressed in the guidelines, pointing as an example to the disclosure to be provided to workers about the characteristics of specific investment funds and the risks associated with investing in them. This response is limited to issues of the risks associated with specific investments, as opposed to more global risks of this form of pension provision or those that flow from interaction with financial markets more generally. Revealingly, a participant in a 2005 discussion among sponsors of CAPs across Canada noted that

> My focus is very much on the employee group. From a DC perspective, getting them to clearly recognize what their role is vs. what their employer's role is. I think too many of them still have the DB mindset that the organization is going to look after them. We have to make sure they know it might not be a happy ending.
>
> (Richards 2005: 22)

These guidelines participate in and facilitate the assignment of a more intense form of pension risk to workers. At the same time, they rely on assumptions about the enthusiasm and competence with which employees will process information about the relative risks of various investment vehicles, to enable them to manage the possibility of increased financial insecurity. No distinctions among workers in terms of how variables such as gender, race or class impact on dispositions towards risk are contemplated in the overall legal governance framework.

Constructing the universe of choice making: employer selection of investment options

The idea of making investment choices is built into the very definition of a CAP; we turn now to look in more detail at the parameters established by the guidelines for making those choices. The first significant issue is that they provide that it is the role of the *sponsor* to select the investment options to be made available in the plan. While the guidelines indicate that the sponsor should 'ensure a range of investment options is made available', it is clear that from the perspective of the worker, the much-vaunted autonomy being accorded to them is not unlimited, but constrained by prior choices made by the sponsor. The guidelines further provide that some considerations that should factor into the resulting menu of choices provided by the sponsor include the fees[9] associated with the various options, as well as the liquidity,[10] degree of diversification, and level of risk associated with them, and the sponsor's ability to review them. There is no encouragement provided to sponsors to assess the levels of investment risk that employees would be comfortable with assuming. The risk characteristics intrinsic to the investment *options* are given much more prominence than the risk characteristics of

9 Such as transaction or management fees.

10 The degree of liquidity of an investment refers to the ease with which it may be resold. An investment that will be hard to resell is described as illiquid.

the ultimate *consumers* of the options. Although reference is made to an additional factor to be considered, which is described as 'the diversity and demographics of CAP members', there is little attempt to explicitly acknowledge the worker's gender or race as a relevant factor in decisions about the menu of investment options to be made available (e.g. low risk versus high risk) that will have the effect of structuring individualized choice.[11]

As noted in the introduction, the psychological and behavioural economic literature suggests that gender and race are significant constructs for choice making. In particular, feminist and behavioural economists have begun to point to the masculinity of rational utility-maximizing decision paradigms (Fineman 2005; Barber and Odean 2001). From the perspective of feminist economics, England distinguishes between the 'separative' and the 'soluble' self. She argues that the 'separative self, for whom relations are fundamentally irrelevant, is the assumed *homo economicus* of the Market model' (Nelson and England 2002). For 'economic man', rationality is equated with the maximization of wealth and the pursuit of self-interest. In contrast, 'soluble' selves – generally female or of a subordinate class or race – are those whose 'individual identity is effaced in the service of dependents and . . . allegedly autonomous actors' (Nelson and England 2002). While feminist economists are interested in the way these stereotypes influence the methodologies and value systems of economics as a discipline, as opposed to a claim that this is an accurate description of how actual men and women behave, it suggests that economically acceptable forms of rationality (especially in an investment choice-making context) tend to be coded masculine rather than feminine.

Finally, the menu of investment options available in a DC plan may be considerably circumscribed by the decision of the plan sponsor about involving a service provider. The guidelines make clear that in some cases, the choice of a service provider will 'define or limit' the type of investment options available to a plan. Again the discourse of choice is constrained by the prior decisions of employer-sponsors, which may be made on utilitarian, cost-effectiveness grounds, or because of a pre-existing relationship with the service provider. Workers may ultimately have some legal remedies to counteract the disadvantage of being provided with inadequate investment choices. However, these will likely be mobilized only after financial losses have been sustained, and may do little to destabilize the prevailing ideology of the benefits of rational choice making in the mould of the masculinized 'heroic financial risk-taker' (de Goede 2004).

11 An earlier version of the guidelines had contained a reference to sponsors taking into account 'any preferences voluntarily indicated by members' in designing overall investment options. The final version removed this reference to member preferences, substituting a request to sponsors that they consider member complaints in subsequent monitoring of the investment options provided (Stakeholder comments: 11).

What forms of regulatory support for choice making are provided?

It is generally acknowledged among pensions academics and industry participants that there is considerable resistance among large numbers of workers to the alleged opportunities being provided via DC plans to make pension-related investment decisions (Mitchell and Utkus 2004; Blake 2003). The suggestion has also been made that the appetite for engaging in this form of decision making may vary culturally. David O'Brien, a vice president with McCain Foods Ltd in New Brunswick, who oversees 34 pension plans in 56 countries, points out that 'employees in many countries in which he has set up DC plans are simply not interested in a vast array of investment options' (Davis 2005: 9). He elaborates; 'This live free or die mentality in the U.S. isn't replicated in a lot of countries around the world and employees don't want choice . . . In Brazil, for example, we had an awful time trying to get employees to make decisions. They simply didn't want to' (ibid). As I have argued elsewhere, the repeated finding in the burgeoning 'personal finance' literature as well as academic research about the greater 'risk aversion' of women as compared to men may obscure the possibility that the unwillingness to enter into the financialized risk discourses required of individual workers is in fact an exercise of gendered agency rather than a sign of lack of agency. In other words, this systemic unwillingness should be taken seriously on its own terms as opposed to being considered a 'problem' to be overcome.[12] It is against this background that we should return to the question of how the legal governance of CAP choice making is presently accomplished.

Information disclosure

The CAP guidelines place a heavy emphasis on disclosure of information as the predominant form of support to workers faced with investment choice making. As Kaplan points out, the focus of the CAP guidelines is 'to ensure that employees in a defined contribution plan have adequate and informed access to investments. This is because the adequacy of that access can necessarily affect the quality of the employee's pension' (2006: 107). The approach taken here is quite consistent with the demise of traditional command and control forms of regulation that might be more prescriptive in terms of the menu of choices to be offered to employees or that would require the provision of impartial advice. We have already noted the limitations of an approach to information disclosure that focuses on disclosing the risks of specific investments to workers, as opposed to a more global definition of

12 Condon (2006).

pension risks as they relate to workers' situations. Such a more holistic approach to disclosure might emphasize the vulnerability of pension results to the state of the financial markets, or the relative inefficiency of disaggregating pension funds into individual plans as opposed to large collective arrangements, or the emerging evidence that large groups of people, including many women, exhibit systematic tendencies to make decisions (or to refuse to make them) that deviate from what the norms of rational utility-maximizing would predict (Mitchell and Utkus 2004; Nofsinger 2005).

In the evolving regulatory regime of DC pensions constructed by these guidelines, one of the primary responsibilities of sponsors to employees is that of providing them with investment information and decision-making tools. The guidelines indicate that the documentation provided should be prepared using 'plain language and in a format that assists in readability and comprehension'. Section 3 elaborates that in deciding what types of information and decision-making tools sponsors should provide – a decision for them to ultimately make – they should consider issues such as access to the internet and the 'location, diversity and demographics of the members'. Again there might have been an opportunity here to consider whether information retrieval and processing might be gendered, but the guidelines do not specifically advert to this. For example, do interactions and comfort levels with technological tools for obtaining information about investment options vary by gender? Do women employees systematically prefer specific types of information about investments (for example, the labour practices of a multinational firm)? Should women with fewer financial resources to invest in retirement vehicles (as a result of lower wages) choose different investment strategies than more affluent women or men? The issue of whether the information people want to make investment decisions or the ways in which they use that information varies by gender is not raised.

Instead the guidelines suggest that examples of appropriate investment information include glossaries explaining investment terms, information about investing in different types of securities (stocks and bonds), information about the 'relative level of expected risk and return associated with different investment options' and performance reports for any investment funds offered in the CAP. Meanwhile, examples of decision-making tools include asset allocation models,[13] retirement planning tools, projection tools to help members determine contribution levels and project future balances, and investor profile questionnaires.

It is clear that the information considered relevant to members is considerably technocratic, despite the fact that empirical evidence suggests that even professionalized pension trustees, to whom responsibility is delegated to make centralized investment decisions for much larger pools of money in

13 Such as, for example, the allocation of contributions as between shares and bonds.

a DB context, do not always have the expertise required to make those investment decisions (Clark 2000). Again these forms of support for investment choice making seem of ambiguous value, when viewed through a feminist lens. While some feminists may applaud the apparent move away from reliance on 'expert knowledges' inherent in the decline of centralized decision making by trustees, it is unclear just how preferable it is for women who are members of CAP plans to now be required to familiarize themselves with similar technocratic information in order to make individualized pension investment choices (Condon and Philipps 2005).

Nor do the guidelines address the issue of whether employers need to take additional steps to encourage members to access these choice-making tools at all. In this sense, employees are required to be self-motivated to take advantage of the information and assistance provided. Indeed, a frequently expressed concern among sponsors is that they not be perceived by their employees as providing them with pension *advice*. This is because the provision of advice might legally be considered to place the employer in a fiduciary relationship with the employee, opening up the possibility that the sponsor could be sued by plan members for inadequate advice giving. This fear is argued by some commentators to have a chilling effect on interactions between sponsors and employees, and is a major source of the alleged 'legal risk' faced by sponsors of DC plans (Kaplan 2006). It should be reiterated that the broader context here is that one of the central effects of a shift from DB forms of pension provision to DC forms is the *removal* of traditional fiduciary responsibilities formerly imposed on pension trustees, who have traditionally exercised centralized investment decision making on behalf of worker-beneficiaries as a group.

In the U.S., the damaging effects on the pensions of Enron employees of over-investment in Enron securities in their 401(k) plans, following the corporation's bankruptcy has been documented (Blackburn 2002). In this context, it is not surprising that the Canadian guidelines provide that additional information must be provided to members of a plan where securities of the employer itself or a related party are included as an investment option. This additional information includes 'the risks associated with investing in a single security'. Again the influence of the Enron debacle may possibly be discerned in the regulation of the process of making transfers among investment options in section 4.3.[14] This process requires that sponsors should provide members with information about 'any restrictions on the number of transfers among options a member is permitted to make within a given period,

14 As Blackburn describes it, part of the damage to Enron employees' retirement portfolios occurred because they were prevented by a company-imposed transfer freeze from selling the Enron stock in their 401(k) plans, at the same time as Enron management were able to dispose of their stock options. See Blackburn (2002).

including any maximum limit after which a fee would be applied'. The sponsor should also provide 'a description of possible situations where transfer options may be suspended'. The possibility for sponsors to download expenses associated with operating the pension plan is signalled by the guideline that the sponsor should indicate 'all fees, expenses and penalties relating to the plan that are borne by members' including any costs that must be paid when investments are bought and sold. By s.5.3 of the guidelines, sponsors are required to provide performance reports for each investment fund to members at least annually. This requirement for ongoing performance reports, as well as periodic review by sponsors of the investment options offered (s.6.3), is taken by some commentators as an incentive to sponsors to provide 'more limited' investment options in the future (Austin 2004). This systematic effect of how the guidelines are framed runs counter to the express goal of introducing DC pensions, which is to expand the universe of pension choice making available to workers.

Again, the question raised by the foregoing discussion is whether these disclosure norms adequately respond to the insights from various academic disciplines about actual decision-making practices. There is considerable empirical data emerging from the field of behavioural economics examining the ways in which individual decision making is 'skewed' by phenomena like framing, anticipatory regret, pride, endowment effects,[15] mental accounting, decision paralysis and herd behaviour (Barber and Odean 2001; Nofsinger 2005). For example, Mitchell and Utkus argue that there are framing effects that result from the very detail of how a menu of options is superficially presented to employees, even beyond the design of the underlying investment alternatives (Mitchell and Utkus 2004: 16). Mitchell and Utkus also report in detail on research dealing with the importance of plan design in driving participant decision making (ibid: 31). The findings of these types of investigations by cognitive psychologists all bear on the question of the extent to which behaviour, such as investing behaviour, deviates from a rational profit-maximizing model.

Meanwhile, from an economic geography perspective, Strauss has argued that 'the fact remains that people make decisions about their pensions in the context of a web of social relations, networks, institutions, and structures of power that for them constitute the "real world" of everyday life' (Strauss 2006b). Thus she argues that the model of 'assisted rationality' that grounds the provision of the type of technocratic information enumerated above will not be enough to produce useful choice making for many workers. More empirically, Greenwich Associates in the US report that 'only a small

15 This is the idea that people often 'demand much more to sell an object than they would be willing to pay to buy it' (Nofsinger 2005). Cognitive psychologists have run a number of experiments designed to find out why this is. One theory is that people are affected by the 'pain associated with giving up' an object (ibid).

fraction of participants [in 401(k) plans] use the Internet advice tools available to them' (March 2005). The limits of education as a response to the need to make DC choices are well articulated by Mitchell and Utkus (ibid: 32), who point to endemic problems of inertia and lack of 'rationality'.[16] We have noted above that the apparently applicable norms of rationality may themselves be gendered and racialized. Thus, for example, feminist critiques of corporate and securities law have argued that the elevation of norms of corporate profit maximizing over other plausible goals of business activity or organizational decision making (for example, social responsibility) is gendered (Sparkes 2002; Gabaldon 1992; Condon 2000). This empirical information casts doubt on the usefulness of regulating information disclosure as a risk management strategy for workers in a pension context. The question from a feminist perspective is whether there are might be more gender-aware forms of information disclosure that could be effective to mitigate the gender-based risk of economic insecurity in this area. A first step would be an openness to the possibility that the unwillingness to engage in risk-based decision making is not because of a lack of education about the positive features of risk, but rather a rejection of the premises of this discourse.

Advice provision

The CAP guidelines explicitly acknowledge the possibility that employees may need to access the 'expertise' of investment advisors in addition to utilizing the investment information provided by their employer. This decision is presented as one for the individual employee to make, in a context in which there is 'no requirement that the plan sponsor test the investment knowledge of its members' (Austin 2004). Indeed, one of the effects of the deployment of DC plans is to produce an 'increasing involvement of third-party vendors of protection, investment and savings instruments' (Shuey and O'Rand 2004: 464; Miller and Rose 1990).

The CAP guidelines exhort sponsors to periodically review service providers to whom they have referred members to help them make their investment decisions (s.6.2). Possible criteria to be used to frame such reviews include any complaints arising from members about the service provider or from the sponsor itself. However, the guidelines caution that 'Because the primary relationship of a service provider who provides investment advice is with each member, it will not be possible or practical for the CAP sponsor to directly review the quality of the advice being provided'. This creates an accountability gap with respect to the practices of service providers in a

16 See also Stabile (2002).

pension context, with employer sponsors assuming little oversight responsibility for providers' interactions with employees.[17]

That the provision of advice by service providers may itself be gendered is suggested by the following excerpt from the financial planning literature. Yao and Hanna state (2005: 75):

> Although clients should ultimately decide whether they would like to take a certain level of financial risk, as a fiduciary of the client, a financial planner has the duty to act in the client's best interest – to evaluate the client's situation and make appropriate recommendations. It is the job of financial planners to educate clients (especially unmarried females) who choose inappropriate investments with low financial risk about their need to take more risk; and to educate male clients who have inappropriate investments with high risk about the importance of preserving wealth.

The reference to the 'education' of clients about 'appropriate' risk levels based on gender and wealth suggests that advice givers do not take seriously the possibility that refusing to interact with risk discourses is a reasonable exercise of investment rationality. Significantly for the role of legal governance in the process of valorizing financial risk taking, the gender-based disciplining of investors outlined in the above quote is justified by invoking a fiduciary duty imposed on financial planners with respect to their clients. In a DC world the fiduciary duty of financial planners operating within the financial services industry is substituted for a similar duty that used to govern employers themselves in their pension dealings with workers.

Sponsor monitoring

An important aspect of the Canadian CAP guidelines is the exhortation to plan sponsors to engage in periodic review of their service providers, their investment options, their records maintenance and the decision-making tools provided to members. It is clear, however, that, for example, with respect to reviews of the adequacy of service providers, it is for the sponsor to decide what action to take in the event that a provider fails to meet the sponsor's expectations. Thus, the accountability of service providers is downloaded to employers rather than being regulated centrally, in a context of an ongoing business relationship that is more consensual and contractually oriented than the traditional regulatory command and control model would be. We have seen already that this decentred monitoring of service providers is considered

17 Kaplan takes a somewhat different view of the employers' exposure to claims for negligent misrepresentation here. See Kaplan 2006: 368–370.

particularly important where the employer has engaged the service provider to provide investment advice to employees. Meanwhile, the guidelines suggest that reviews of investment options provided by the plan should be undertaken at least annually, though again no further guidance is provided to sponsors as to whether or what action to take if particular investment options are no longer considered maintainable. This model creates incentives to streamline the investment choices being offered, since fewer choices mean less employer resources devoted to monitoring; nor is any direction provided as to the consequences of inadequate monitoring.

Whither fiduciary duties?

A noteworthy issue in the contemporary legal regulation of DC pensions in Canada is the ambiguity associated with the treatment of fiduciary responsibilities towards employees. Traditionally, in a DB form of pension plan, it is clear that the trustees of a pension fund have a fiduciary responsibility to maximize the interests of the employee-beneficiaries.[18] Where employees make investment decisions pertaining to their own pension account, the trustees' fiduciary responsibility to make appropriate investment decisions on behalf of employees is removed. It may even be speculated that the removal of the legal liability risks associated with being a pension fund trustee is one of the subsidiary purposes of the shift from DB forms of pension provision to DC forms. Yet, as Kaplan notes in his contemporary treatment of Canadian pension law, it is possible that legal decision makers may find there to be residual fiduciary responsibilities expected of employer sponsors in a DC context. This concern on the part of Canadian employers is heightened by the contrast with the legal construction of DC plans in the US, where the Employee Retirement Income Security Act of 1974 (ERISA) specifically provides that no fiduciaries have any liability for any losses incurred in plans that permit participants to exercise control over the assets in their individual accounts. No such 'safe harbour' removing participant-directed pension plans from the fiduciary realm exists in Canadian pension law, nor is it adverted to in the CAP guidelines.

Thus, Kaplan locates the sources of continuing legal risk for employers in the uncertainty surrounding fiduciary liability for both inadequate plan communication and inadequate investment choice. Similarly, Ahing argues that 'DC plan sponsors may continue to face risks arising in at least 4 primary areas (1) insufficient plan information provided to members (2) incorrect plan

18 Though the extent of that responsibility in the context of a DB plan, and in particular whether it may facilitate the making of fund investment decisions so as to achieve corporate social responsibility goals is currently the subject of intense academic and legal debate. See Davis (2004); Yaron (2001); *Cowan v. Scargill* [1985] 1 Ch D 270, [1984] 2 All ER 750.

information provided to members (3) improper choice of service provider in delegating responsibilities (4) insufficient monitoring of those service providers'.[19] Even more specifically, does having a default investment option for employees who do not exercise their own choices create the possibility of liability for the sponsor who selected it? The argument would be that having a default option (e.g. a low risk, low return money market fund) presumes that the investor is not making her or his own choices, and opens up for legal scrutiny the adequacy of the option created by the sponsor (Benney 2004). The format this legal scrutiny would take is likely to flow from litigation engaged in by a group of employees as a class, alleging that the employer had breached a fiduciary duty to them.

In this apparent atmosphere of uncertainty as to the application of residual fiduciary responsibility norms to employer sponsors, the question that might be raised from a feminist perspective is whether the legal device of creating a fiduciary relationship to mitigate worker pension risk is one to be supported or rejected for its gender-based consequences. Is fiduciary responsibility (either of employers in a DC context or trustees in a DB context), as a legal device for the management of risk, to be preferred over more enlightened forms of information disclosure? The argument of this chapter has been that women and minorities are more likely to be economically disadvantaged by the ideology of individualized, technocratic choice making that underlies the shift to DC pensions. Yet some problems from a feminist perspective with the invocation of protective fiduciary norms should also be flagged. These include the dangers of paternalism, centralization of power, excessive reliance on expert knowledge, the privileging of some interests over others, as well as the possibility that fiduciaries' conflicts of interest will in fact influence their decision making (Gabaldon 1995: 19–20; Davis 2004).[20] We have also noted above the way in which fiduciary duties may be invoked as a reason for 'educating' women to accept more risk in pension decision making. This issue of which legal risk management strategy is preferable for women is one that should be taken seriously by feminists engaging in gender-based advocacy in the retirement context.

CONCLUSION

At a material level, the gendered risks of pensions are ultimately deeply connected to persistent inequalities in labour markets. The shift to DC pensions is gendered in that it removes economic security from vulnerable, lower-paid

19 Ahing (2004).

20 For a detailed non-feminist case in favour of paternalism in the context of DC plans, see Stabile (2002).

workers, and lauds individualized and masculinized risk taking, while at the same time reducing the financial risk exposure of employers. Emerging legal norms – as exemplified by the CAP guidelines – that govern the allocation of material risks among employers, service providers and employees, can be seen to promote flexibility and choice for employers rather than workers. They are light on substantive regulatory requirements to be fulfilled by employers, and backstopped mainly by the possibility of workers launching suits for damages as a result of negligence or breach of fiduciary duty.

At the discursive level, the prevailing legal conceptual universe tends to support the idea of the individual heroic risk taker, by attempting to situate risk taking in the context of partial and decontextualized information disclosure, rather than to offer alternatives to those employees, especially women, who do not wish to participate in the discourse of risk taking (Peggs 2000; Strauss 2006b). But not participating in decision making means that the locus of decision making shifts elsewhere, either back to trustees, or to employers. Presented with the option of the capacity to choose or paternalistic choice making on her behalf by others, many feminists would be likely to support choice over paternalism. The question being raised in this chapter is whether this approach is still the right answer in the contemporary world of pension provision. Thus, alternative approaches for feminist advocacy could include either agitating for more effective gender-aware support for choice making and expanding the categories of 'rational' decision making, cautiously reopening the debate about the merits of creating fiduciary relationships among employers or trustees and employees, or, more radically, problematizing the foundational and deeply gendered link between labour market participation and adequate retirement security.

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