Employer-Sponsored Pension Plans under the Charter

Claudia Losie
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Abstract
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Employer-sponsored pension plans under the Ontario Pension Benefits Act discriminate against women because their structure and design are oriented to the typical male worker. Ms. Losie illustrates this and proposes a strategy under the Charter of Rights and Freedoms to challenge the constitutionality of private pension legislation. The doctrine of discriminatory purpose and disproportionate impact are borrowed from American constitutional law and applied to the section 15 guarantees of "equal benefit of the law" and "equality under the law." Ms. Losie concludes that the narrow reading given to the American Bill of Rights can and should be rejected in favour of the broad language employed by the Charter so that discriminatory legislation might be more easily struck down.

I. INTRODUCTION

A proliferation of reports on pensions spanning years of public debate clearly indicate that women are the prime victims of the inadequacies of present systems. Despite the fact that these reports recommend a range of feasible reforms legislatures have generally failed to exercise their authority over pension schemes\(^1\) to remedy the discriminatory effect\(^2\) particularly prevalent in employer-sponsored pensions plans. These private pension plans will be the focus of this paper.

Some provincial legislation purportedly designed to improve and regulate employer-sponsored pension plans does exist. One such piece of legislation is the Pension Benefits Act\(^3\) of Ontario. However, this Act fails to afford working women the beneficial position which their male counterparts enjoy, and thereby violates the equality guarantees of the Canadian Charter of Rights and Freedoms.\(^4\) To avoid being challenged
under the Charter the Ontario legislature may have to amend certain portions of the Act.

II. HOW EMPLOYER-SPONSORED PENSION PLANS AND THE PENSION BENEFITS ACT FAIL TO BENEFIT WOMEN

A. General

The private pension system consists of employer-sponsored pension plans in the private and public sectors. In 1982, the plans operating in Canada totalled 15,232 in number and covered 4,658,000 workers or 46.8 per cent of the paid employees in the labour force.\(^5\)

The participation in private pension plans in Canada can be measured in different ways, producing different results. In 1982, 44.8 per cent of men and 30.6 per cent of women in the total labour force were covered by pension plans.\(^6\) In terms of all paid employees, these ratios increased to 50.1 per cent and 33.7 per cent, respectively. Regardless of the method of measurement, women are less frequently covered in such plans than are men.\(^7\)

Data compiled from income tax returns provide some indication of the number of private plans beneficiaries and the pensions they receive. In 1981, the average pension received by women from private plans was $3,663 while men received $5,613. Of the total number of private plans beneficiaries, 36.3 per cent were women and 63.7 per cent were men.\(^8\) Dollars from employer-sponsored pension plans are, thus, very unevenly distributed between the sexes. Although pension benefits from employer-sponsored plans are not the only source of income for our senior citizens, the above statistics leave no doubt that the inadequacy

\(^{11}\) (U.K.).


\(^6\) Id. at 13.

\(^7\) Id. One reason for the lower female participation rate is the high concentration of female workers in the trade, business and personal services industries where pension plan coverage is significantly lower than in such industries as mining, construction and most manufacturing, where male workers are predominant. In addition, this low coverage results from the tendency of women to work part-time. In September of 1984, 71.2 per cent of all part-time workers were women: Statistics Canada, The Labour Force, September 1984, Cat. 71-001, Vol. 39, No. 7 (1983), Table 31. Part-time workers are rarely eligible for employer-sponsored pension plans.

\(^8\) See Statistics Canada, supra note 5, at 90. There are certain limitations in using income tax returns as a source of data. No distinction is made between pension payments and other supplementary benefits such as disability, widows' or orphans' pensions. Also, an undetermined number of pensioners with low incomes may not have filed a tax return and would not be included in a data base.
of these plans contributed to the poverty of elderly women in Canada.\(^9\)

It is not that private pension plans generally discriminate overtly against women.\(^{10}\) Rather, it is their design and application that result in women receiving disproportionately low benefits. For example, the pension system is earnings-related. Private and public pension plans replicate for women the inequities of the existing wage system, thereby producing consistently lower pension benefits. As one report points out:

> Pension policy and work policy are inextricably intertwined . . . the pensions of women will be unsatisfactory as long as they have a [disadvantaged] position in the labour market.\(^{11}\)

Second, the pension system is orientated to the needs of typical male workers.

The prime target of employer-sponsored pensions is upper-middle-income males who worked non-stop for the same organization all their lives, rising steadily through the ranks as they got older.\(^{12}\)

In contrast, the private pension system “punishes” mothers who spend most of their lives in the labour market but stop for a few years to take care of their children.\(^{13}\) On the same note, employer-sponsored plans fail to take into account the fact that women change jobs more frequently than men.\(^{14}\) Pension rights can seldom be transferred from one

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\(^9\) Although the median income of elderly Canadian women is not known, it is known that spouseless elderly persons are the poorest of elderly Canadians and that spouseless women comprise three-quarters of the group: See Dulude, *Pension Reform with Women in Mind* (1981) at 34.

\(^{10}\) Few employer-sponsored pension plans today have different eligibility criteria for men and women. In Ontario in 1982, fifty-one private plans out of a total of 8,653 had conditions of eligibility which varied by sex. However, some plans are less subtle and simply exclude women altogether. Forty-one employer-sponsored pension plans in Ontario in 1982 were restricted to men only. Two plans were for women only. See Statistics Canada, *Pension Plans in Canada - Advance Information* (unpublished, 1982), Table F4. Insurance companies do not use unisex mortality tables. The result is that a woman who takes her pension credits to a life insurance company to purchase a life annuity will be offered a lower monthly or yearly sum than than a man because of her longer life expectancy. The workers affected are those who belong to “money purchase” types of plans. This insurance practice is unjust because, in reality, eighty percent of male and female pensioners of the same age have the exact same year of death: See Dulude, *supra* note 9, at 57. The Supreme Court of the United States recently declared it illegal for a pension plan to pay a higher annuity to a man than to a woman: *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Nathalie Norris* 103 S. Ct. 3492 (1983).


\(^{12}\) Dulude, *supra* note 9, at 19.


\(^{14}\) Statistical calculations of female turnover rates are scarce. There is data with respect to job tenure by sex in Canada which compares men and women as to length of service with their present employers. However, one of the classifications used is “six to ten years of service”; the telling analysis for the purpose here would have been a comparison of men and women who had achieved six to nine years of service with their employers. Nevertheless, in September of 1984, almost 80 per cent of female workers had been with their employer for ten years or less, while the
job to another. Workers who do not stay long enough with their employer also lose their pension rights. Because of these factors women are less frequently guaranteed a pension when they retire. Assuming that the employer does offer a pension plan, in order to qualify for it, a woman may be compelled to forego an active role as a mother and better job opportunities, and remain in a dead-end, low-paying job.

Third, the pension system perpetuates male-centred concepts of dependency. A traditional notion "which still assumes a woman is mainly protected through being her husband's dependent . . . is clearly inadequate in a world where one marriage out of three will end in divorce." Further, the view of working women as "secondary wage-earners" is rapidly losing its rationale since women, like men, are entering the labour force in order to support themselves and their families.

Finally, private pension plans are unfair to women because they fail to recognize the value of the wife's contribution to her marriage and the economic welfare of society. This is most obvious when one spouse dies. For example, in a family in which the husband is the only wage earner and the wife dies, the widower usually continues to receive a full pension from his former employer. In contrast, if the wife survives her husband, she can expect nothing at all from her husband's employer-sponsored pension plan. In addition, private pension credits accumulated during marriage are generally not divided upon divorce or separation.

B. In the Context of the Pension Benefits Act

Four major inter-related structural deficiencies in employer-sponsored plans can be identified as contributing to women receiving limited pension protection. They are: (1) long vesting requirements; (2) poor pension portability; (3) an absence of indexing for inflation; and (4) poor provision of survivor pensions. Although each of these may affect the adequacy of pension benefits which a man can expect upon retirement, their effect on a woman's benefits is much more dramatic. While considering these deficiencies, the relevant provisions of the Pension

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15 Comparable figure for men was 66.5 per cent. Only 21 per cent of all female employees had remained in their present job for eleven years or more, while 33.1 per cent of male employees had stayed more than ten years with the same employer: Statistics Canada, supra note 6, Table 25.

16 These and other factors will be considered more fully in the analysis of the Pension Benefits Act, R.S.O. 1980, c. 373, as am. by 1983, c. 2., see text at 516-24, infra.

17 A full discussion of pension reform for homemakers is beyond the scope of this paper.

18 Canadian Advisory Council on the Status of Women, supra note 13, at 1.

19 Dulude, supra note 9, at 73.
Pension Plans

Benefits Act, will be analysed.

At the outset, it is necessary to present a brief overview of the Act. This Act, first passed in 1965, establishes the Pension Commission of Ontario, which is generally mandated to promote the establishment, extension and improvement of pension laws throughout Ontario.

Every employer who makes contributions to its pension plan is required to file a copy of the plan with the Commission for registration. The Act requires that the pension plans be organized and administered in accordance with its provisions and it is the function of the Commission to supervise and review the plans to ensure that they comply with the Act.

Although the Act makes certain improvements to the private pension system in Ontario, a closer examination will reveal that the Act does not specifically or adequately address the four key concerns of women outlined above. Indeed, the Ontario legislature must take responsibility for the creation of, or at least acquiescence in, some of the inequalities which women suffer under the existing private pension system.

1. Vesting and Locking In

Vesting refers to the employee's right to receive the contributions made by the employer on the employee's behalf. Prior to vesting, an employee is usually only entitled to the return of his or her own contributions. Locking in means that the contributions made by or on behalf of the employee cannot be reimbursed, but rather, the employee can draw on the vested benefits only in retirement.

The Pension Benefits Act attempts to improve vesting provisions in employer-sponsored plans. Section 20 provides:

(1) A pension plan . . . shall contractually provide that,

(a) a member of the plan who has been in the service of the employer for a continuous period of ten years, or has been a member of the plan for such period, whichever first occurs, and who has attained the age of forty-five years, is entitled, upon termination of his employment prior to his attaining retirement age, to a deferred life annuity commencing at his normal retirement age . . .

Section 20 also “locks in” benefits by providing that a member of a

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20 The following provinces and territories in Canada are those in which there is in force legislation substantially similar to the Ontario Act: Alberta, Quebec, Saskatchewan, Manitoba, Nova Scotia, the Northwest Territories and Yukon Territory.

21 Pension Benefits Act R.S.O. 1980, c. 373, as am. by 1983, c.2, ss. 2 and 10(1).

22 Thus, only those plans which are wholly funded by employees' contributions under the terms of the plan, are exempt from the provisions of the Act.

23 Contravention of the Act or the regulations is an offence punishable by fine: s. 39.
plan who is "vested" under clause (a) is not entitled to withdraw any part of the contributions to the plan (except voluntary additional contributions), and those contributions must be applied towards a deferred life annuity.

The "ten and forty-five" rule imposed by sub-section 20(1) is a minimum standard. Therefore, a pension plan may provide for vesting or locking in at an earlier age than forty-five years or upon service or membership in the plan for less than ten years, or for both. The "ten and forty-five" rule is, however, mandatory in the sense that where vesting provisions in a pension plan are non-existent or less generous, the contractual terms of the Act will be added to, or will replace, those already existing in the plan.

Workers who terminate their employment before meeting the vesting provisions in the Act, or in the pension plan whichever are most generous, lose the contributions made by their employers on their behalf. Employees are generally allowed to withdraw their own contributions, if any exist, plus interest which is calculated at a very low rate. However, they will not have any benefits when they retire.

Statistics are very scarce with respect to the percentage of male and female plan members who meet the legal conditions entitling them to a deferred pension. However, in 1980, based on a study carried out by Yves Balcer and Izzet Sahin, the Ontario Royal Commission on the Status of Pensions concluded that:

there was sufficient indication that present job mobility patterns, particularly for women, were such that the present vesting rule of age 45 with 10 years' service would be of little assistance in preserving pension rights for many covered workers.

The purpose of the study was to determine the comparative merits of different vesting rules. The issue was, as a function of vesting rules and termination rates how many years of an employee’s service would, on average, be pensionable?

For the purposes of the analysis, the following assumptions were made: employees would enter the work force at age twenty in the year 1980 and retire at age sixty-five; the employee would, throughout em-

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24 Pension Benefits Act s. 20(3)(a).
25 Surprisingly, some contributory plans do not refund employee contributions not locked in by legislation on termination of employment. In 1980, there were 286 such plans covering one percent of all contributory plan members in Canada: Statistics Canada, supra note 6, at 54. It is also worth noting that the Pension Benefits Act does not require that employee contributions not locked in under s. 20 be refunded to the employee upon termination.
Pension Plans

Employment, work for employers with pension plans. Five vesting rules were selected for study. For the purposes of this paper, the most relevant were the most stringent rule, that is, age forty-five and ten years’ service, and the most liberal rule of five years’ service at any age. The years of pensionable service of men and women were compared, using their respective termination rates in the public service.

Under the “ten and forty-five” rule, male employees could expect on average to have a pension based on 33.4 years of service. Thus, 74.2 per cent (33.4 years out of a possible forty-five) of an average male employee’s total service would be pensionable. As regards female employees subject to the “ten and forty-five” rule, the ratio of pensionable service to total years would be only 60.4 per cent. Thus, the female worker would be pensioned on only 27.2 years of service. If the vesting rule were five years’ service, 91.3 per cent of a male employee’s total service would be pensionable, compared to 88.9 per cent for a female employee. Therefore, under the “ten and forty-five” rule, “high turnover rates among females in the public service, as in most types of employment, mean less pensionable service in total and hence lower pensions” than males. While the model assumes that a terminating employee goes immediately to a new employer who also provides a pension plan, it must be remembered that women are more likely than men to have gaps in their work history and consequently in their plan membership due to home-making and child-rearing responsibilities. As a result, the study produces figures higher than one can expect in the real world; that is, the loss of pensionable service through job mobility is more serious for women than can be shown by the model. The important point, however, is that it is clear from the above figures that a vesting condition of five years’ service of less would better equalize the average accumulation of pensionable service for men and women.

In conclusion, the likelihood that women would achieve vested status under the “continuous ten year service or participation” requirement in section 20 of the Act is considerably lower than for a man in view of important differences between male and female career patterns. Furthermore, attainment of forty-five years as an additional vesting condition is especially onerous for women since their participation in

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27 Id. at 39-40. It was also assumed that the plans provide immediate eligibility for membership, and that the employee elects to join or is required to join when first eligible; that an employee who changes employment always goes to another employer with a similar type of pension plan.

28 Id. Table 14 at 42.

29 Id. at 45.

30 Id. at 45.
the labour force tends to fall off once they reach the age of thirty-five and over. The rule's disproportionate impact on women would dramatically diminish if all employers were required to vest benefits after perhaps one of two years of service, without regard to age.

A much shorter vesting period would also put an end to the massive subsidization of the private pension system by female workers. At present, the employer contributions for workers who leave before their pensions vest are used to lower the cost of benefits to the remaining employees. In addition, the interest a pension plan collects on workers' contributions is much higher than that which it pays employees when they leave. In a period of high inflation, it is not unusual for the interest rate on workers' contributions to be so high that some employers need make little or no contribution.

2. Portability

A portable pension is one which can be transferred from one employer to another with a change in jobs. That pension plans be more portable is of particular concern to highly mobile female workers. However, the question of making pensions transferable from one employer to another raises serious practical difficulties. One problem is that there cannot be a job-to-job transfer system unless all employers have pension plans, which is certainly not the case today. Furthermore, it can be difficult to assign a precise value to future pension rights.

Although paragraphs 38(1)(b) and (f) of the Act empower the Lieutenant Governor in Council to make regulations governing transfers of defined benefit pension plans from one employer to another, none have been enacted. Yet, the problem of portability could be avoided by having very short vesting requirements. If the Act made shorter vesting the rule, not only would more women acquire vested pension credits, but the credits of ex-employers could be retained in their original plans to be paid out only when the workers attain retirement age. The Pension Commission might then set up a central registry for the purpose of keeping track of workers' pension credits and ensuring that the appropriate benefits are paid out when they retire. Thus,

31 In September of 1984, almost half of the women in the labour force were between the ages of twenty and thirty-four inclusive. Those women between the ages of forty-five to sixty-five inclusive comprised only one-fifth of the total female labour force: Statistics Canada, supra note 7, Table 3.

32 The subsidization of the private pension system by female workers has been pointed out in Dulude, supra note 9, at 21 and in Collins, supra note 11, at 199.

33 The Parliamentary Task Force on Pension Reform recommended the creation of the Registered Pension Account (R.P.A.) to which an employer would have the option of transferring the
the more important issue is the long vesting requirements, not the lack of portability of pension plans.

3. Protection Against Inflation

With the exception of public service plans, employer-sponsored pension plans are notoriously inadequate in protecting their members against the effects of inflation. In 1982, two-thirds of the members in the Canadian public sector were in plans that provided for automatic indexing of benefits for retired employees. The indexing was usually based on full increases in the Consumer Price Index. In sharp contrast, in the private sector, little more than five percent of the members were in plans that provided for automatic indexing and it was most frequently limited to an annual two or three percent, or a fixed dollar amount.\(^{34}\)

The high rate of inflation in recent years has had the effect of seriously eroding the purchasing power of pensions paid to retired employees in private plans. This rate of inflation is particularly hard on the elderly female. Since on average women live longer than men, their pensions, which are smaller at the outset, are eroded through inflation over a longer period of time.

Compensation for increases in the cost of living during the plan members’ lives is a growing concern. Some employers claim to offer a solution by, for example, using their employees’ best or final earnings to calculate pensions. However, this formula works more favourably for men than for women. Why is this so? First, women are more likely to be in the labour force when they are in their twenties and thirties. If they then leave with a deferred pension, by the time they reach age 65, inflation will have eroded their best or final earnings to practically nothing. Second, if all plans provided for full and immediate vesting, the ultimate total pension of the highly mobile female worker would be exactly as though the benefits had been based on her career average earnings.\(^{35}\) The value of pension credits must increase with rises in the cost of living, especially since short vesting might worsen the situation


\(^{34}\) Statistics Canada, *supra* note 5, at 48. Some employers in the private sector have increased pensions on an *ad hoc* basis. An *ad hoc* adjustment is a single increase in the current monthly payments to pensioners with no commitment that increases will be awarded in the future. Unfortunately, data on these *ad hoc* adjustments have not been collected and, thus, the extent of this practice is not known.

\(^{35}\) These and other criticisms of the best or final earnings formula have been made by Dulude, *supra* note 9, at 24-25.
by locking in depreciating funds which could have been profitably invested elsewhere.

The Act does not require that employer-sponsored pension plans be automatically indexed to the rate of inflation. The regulations only stipulate the funding arrangement to be used by the employer in the event that a pension plan is amended to increase pension benefits for retired former employees or their beneficiaries.36 Governments and employers might originally have based their inaction regarding indexation37 of pensions on the belief that inflation was a temporary phenomenon.38 Their prediction of economic recovery simply has not been borne out: inflation has proven to be a tenacious parasite, feeding particularly on the purchasing power of people outside the work force who are no longer able to protect themselves.

4. Survivor Pensions and Benefits

Outside of government employment,39 the provision of survivor’s pensions is a sparsely developed area in the private pension system.40 In 1980, only 6.7 per cent of private sector plans in Canada, covering only

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36 O. Reg. 746/80 as am. by O. Reg. 262/82 under the Pensions Benefits Act s.2(4). Other rather inconsequential regulations include s.14(7) (when a pension plan is terminated or wound up, unfunded adjustments are not guaranteed protection) and s. 25 (where a pension benefit may be reduced by reference to entitlements under public pension programmes, increased entitlement due to an adjustment is protected or preserved.)

37 As recent as 1983, the Task Force on Pension Reform rejected the notion of mandatory inflation adjustment in respect of already accrued pension benefits. Instead, the Task Force recommended that all plan sponsors be required to offer employees the option of taking indexed pensions, which might have a lower starting level. A further recommendation was that all future pension accruals be subject to a minimum degree of mandatory contractual updating after a plan member terminates or retires; but such a requirement was recommended to come into effect three years after enabling legislation has been adopted; supra note 32, at 46-50.

38 Employers have also used the defence of increased cost to justify their inaction in protecting pension credits and benefits payable from inflation. A number of reports have proposed that since interest rates tend to rise along with increases in the cost of living, employers could be required to use the excess inflationary interest to update deferred pensions and pensioners' benefits, instead of using the money to reduce their own contributions: See, e.g., Dulude, supra note 9, at 55; Can., Task Force on Retirement Income Policy, The Retirement Income System in Canada: Problems and Alternatives Policies for Reform (1979) at 225-31; and Can., Better Pensions for Canadians (The Green Paper) (1982) at 26-28.

39 In 1980, some seventy-one per cent of all members in the public sector were in plans that provided a survivor's pension in the event of death of the participating member before retirement. Nearly seventy per cent of all public sector members were in plans that provided a survivor’s pension in the case of death after retirement. On death before retirement, only seven public sector plans, covering a handful of all members, provided no death benefit. On death after retirement, only eighteen public sector plans, covering less than one per cent of all members, provided no death benefit: Statistics Canada, supra note 5, Tables 20 and 21.

40 It should be emphasized here that a “survivor’s pension” refers to a pension over and above the plan member’s basic pension. In contrast, the “survivor option” provides that the plan member’s pension can be reduced to provide a benefit to a survivor.
twenty-four percent of members, provided a survivor’s pension as an additional benefit in the event of the death of the participating spouse before retirement. In the case of death after retirement, only 4.3 per cent of private sector plans, covering 21.8 per cent of members, provided a survivor’s pension. All told, less than one widow in four can expect to get any regular benefits from her husband’s private employer.

In the private sector in 1980, more than 1,500 plans, covering thirty percent of the members, provided no death benefit whatsoever, not even a return of employee contributions, in the event of premature death of the employee. In the case of death after retirement, no death benefit was provided in over 1,300 plans, covering 22.4 per cent of the membership. Thus, about one widow in four will get absolutely nothing from her husband’s private pension plan.

Where there is provision for a survivor’s pension, most plans provide a life pension equal to only one-half of the deceased’s pension. It is anomalous that if the employee’s spouse dies, the employee can still look forward to a full pension, while if the employee dies, the surviving spouse, usually female, will have to make do on a drastically reduced amount. Further, most plans provide that a survivor’s pension ceases upon remarriage. The design of private pension plans perpetuates the dependency of wives upon male employees. It rarely recognizes either the responsibility of a woman for the provision of her family’s income or the contribution that a homemaker makes in enabling her husband to pursue remunerative work in the labour force.

The Ontario legislature has intervened in the problem of poor provision of survivor benefits. The Act does not, however, provide for mandatory survivor benefits in all plans. It extends a “survivor option” to employees vested under the “ten and forty-five” rule, but only where a pension plan is wound up or terminated. The survivor option is not an extra benefit like a survivor’s pension; rather, the plan member’s pension benefits are reduced in order to provide continuing benefits to a beneficiary in the event of the member’s death. However, few employees elect to take this option. In one 1979 report, by a Senate Committee on retirement age policies, it was determined that only ten percent

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41 Statistics Canada, supra note 5, Tables 20 and 21.

42 Id. In all fairness to private employers, it should be mentioned that on the death of an employee before retirement, approximately eighty percent of all plans provided for a refund of employee contributions, or vested employer contributions, or both in a lump sum, albeit at a low rate of interest. Where death occurs after retirement, eighty per cent of all plans, covering only thirty-one per cent of all members, provided pension payments to the beneficiary for the remainder of a guaranteed period of usually five years.

43 Pension Benefits Act, s.26(3).
of employees elect to take a "survivor option", whether offered by the employer or compelled by statute. However, according to Statistics Canada, the incidence of election is significantly lower with only one per cent of employees choosing the option in 1980. Clearly then, most employees cannot be relied upon to make provisions for their surviving wives, especially if it means taking a smaller pension during their own lives. Consequently, many women are dependent on the financial planning of their husbands, who will, more likely than not, gamble on their own futures. The "survivor option" is thus ineffective in providing widows with pensions.

III. A STRATEGY FOR CHANGE: CHALLENGE OF THE PENSION BENEFITS ACT UNDER THE CHARTER

As demonstrated in the preceding section of this paper, the design of employer-sponsored pension plans dramatically favours men over women. The poor pension protection afforded women is attributable, in part, to four major deficiencies in many private pension plans. An analysis of the Pension Benefits Act establishes that the provisions do not succeed in improving pension plans with respect to women. The Ontario legislature has failed to intercede to make necessary remedial changes and has thereby condoned the continued existence of sexual inequality in the private pension system. This section will address the manner and extent to which it might be argued that certain provisions of the Act violate the equality rights guarantee contained in sub-section 15(1) of the Canadian Charter of Rights and Freedoms.

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44 Can., Retirement Without Tears: Report of the Special Senate Committee on Retirement Age Policies (1979) at 60 and 91, as referred to in Dulude, supra note 9, at 24.

45 Statistics Canada, supra note 5, Table 21.

46 Two provinces have taken a more liberal approach with respect to survivor benefits. In Saskatchewan, all plans, which do not already provide survivor benefits, must provide a "joint and survivor" feature. The reduction of the married workers' own retirement benefit, in order to provide a survivor's benefit, is also mandatory unless it has been renounced or waived in writing by the employee and his or her spouse. The Manitoba legislature has gone even further. Every pension is deemed to belong "jointly" to the married employee and his or her spouse unless waived in writing by both. Moreover, the legislation stipulates that, where no waiver is taken, the joint pension may decrease by not more than one-third on the death of either the member or the spouse. As Dulude has commented, a stipulation that the pension would be reduced whichever spouse died first would not only treat the spouses equally, but would also save a great deal of money which could be used to keep the retirement benefit at a higher level: supra note 9, at 84-85. With regard to pre-retirement survivor benefits, the Task Force on Pension Reform recommended that all private pension plans be required to provide a joint life and last survivor benefit, declining to sixty per cent on first death, with provision to choose an alternative form of annuity on consent of both spouses: supra, note 32, at 55.
A. The Threshold Questions: Sub-section 32(1)

The threshold questions which must be answered are:

1. Are employers, who offer pension plans to their employees, bound by the terms of the Charter?
2. To what extent is the Pension Benefits Act challengeable under the Charter?

Some assistance can be sought from the text of the Charter itself. Sub-section 32(1) provides that the Charter applies
(a) to the Parliament and Government of Canada in respect of all matters within the authority of Parliament . . . ; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The references to “Parliament” and “legislature” in sub-section 32(1) suggest that the Charter applies to governmental, rather than private action. It appears that the Charter will only bind private actors where a connection to government can be established. While the Charter regulates the relationship of an individual with the government by invalidating laws and governmental activities which infringe upon the guaranteed rights, the relationships between individuals will continue to be regulated by human rights codes. Admittedly, the establishment of pension schemes by employers for the benefit of their employees is a private activity. As such, it is highly unlikely that a court would entertain an application for relief against private employers on the ground that the terms of their pension plans breach the provisions of the Charter.

Nevertheless, the Ontario legislature has intervened in the private pension system by enacting the Pension Benefits Act, and the Charter applies to the law-making activity of both the provincial legislatures and Parliament. However, as already noted, the Ontario legislature

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47 The importance of the enforcement mechanisms in human rights legislation has been recognized by the Supreme Court of Canada in Board of Governors of Seneca College v. Bhadouria (1981), 124 D.L.R. (3d) 193, 17 C.C.L.T. 106 (S.C.C.), where the court rejected a woman's attempt to seek judicial protection through a tort of racial discrimination. The philosophy of the court was made clear. Discriminatory conduct between individuals is normally regulated through human rights legislation and administrative solutions.

48 It is arguable, however, that the Ontario Government as employer may not establish pension plans for its public servants in violation of the rights guaranteed in the Charter. By virtue of s. 32(1), the “government” of each province is made subject to the Charter.

49 Support for the proposition that the Charter applies to statutes, and probably to regulations as well, can be found in s. 52(1):
has failed to impose legal obligations upon employers with respect to three of the four deficiencies earlier identified in employer-sponsored pension plans. There are, as yet, no regulations governing portability of pension plans. The Act does not oblige employers to increase pension benefits in keeping with inflation. Rather, in these two areas, the Ontario legislature has left it up to individual employers to contractually provide for such terms in their pension plans. Similarly, with respect to the third deficiency, the "survivor option," the problem is that it is an option, which the eligible employee may exercise. Individuals have, traditionally, been free to discriminate against others and to infringe on another's rights to the extent that such conduct is not restrained by legal obligations. The Charter does not contemplate imposing positive obligations on legislative bodies to eliminate private sexual discrimination, nor to ensure the protection of fundamental freedoms from private intervention. In the words of one commentator, "because the Charter's purpose is to restrain government action, not to generate legislative action, protection from reluctant legislatures does not exist." Thus, the Ontario legislature's inactivity, or permissive law, with respect to portability, indexation and survivor benefits will likely raise no issues under the Charter.

However, it may be argued that the "ten and forty-five" vesting requirement embodied in paragraph 20(1)(a) of the Act is a law which must be consistent with the provisions of the Charter or risk being declared unconstitutional and therefore of no force or effect. The "ten

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

By virtue of s. 52(2), the Charter is made a part of the Constitution of Canada.


If, however, the "ten and forty-five" rule were declared of no force or effect by virtue of s. 52(1) then the situation of women under the private pension system would be worse. Less generous vesting criteria in pension plans, which the "ten and forty-five" rule now replaces, would again be operative. Employers would be unrestrained either in making no provision for vesting or in making conditions even more stringent than before. The remedy to be sought under the Charter is legislative amendment to shorten the vesting period to allow more women to acquire pension rights. Section 24 may provide the answer to the apparent dilemma created by s. 52(1). It reads:

Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The "appropriate and just" remedy in these circumstances would be judicial guidelines or directions to the legislature as to how regulatory vesting conditions must be drafted to avoid the exclusion of women as a class from the benefit of the law. One might think this highly interventionist approach is inappropriate for a court, yet similar "quasi-legislative" judgments have been written by the Supreme Court of the United States in the protection of constitutional rights. See, e.g., Brown v. Board of Education (Brown II), 349 U.S. 294, 75 S. Ct. 753 (1955); and Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).
Pension Plans

and forty-five” rule imposes mandatory legal obligations upon employers who establish contributory pension plans for their employees in Ontario. A legislature may not pass laws which would perpetuate inequality and discrimination in the workplace. To the extent that the Ontario legislature has done this by enacting the “ten and forty-five” rule, a constitutional challenge of the law lies under the Charter. The question then becomes: how might one argue that the vesting requirement in the Act violates the Charter?

B. Equality Rights: Sub-section 15(1)

The provision of the Charter with which the “ten and forty-five” rule is, prima facie, inconsistent, is sub-section 15(1). Sub-section 15(1), entitled “Equality Rights,” reads:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Sub-section 15 employs a variety of phrases to express the idea of equality and each will be analysed separately.

1. “Equal Before and Under the Law”

In response to a large number of representations by women before the Special Joint Committee of the Senate and House of Commons, the language of sub-section 15 was changed to include “equal . . . under the law.” This phrase was intended to ensure that judicial review extended to the content of the law, and not merely to the manner in which the law is administered.

Under the Canadian Bill of Rights, the Supreme Court of Canada adopted a Diceyan interpretation of “equality before the law”; that is, equality of treatment in the enforcement and application of the laws of Canada. The phrase, “under the law,” as used in sub-section 15(1) is an attempt to overrule this restrictive conception exemplified in the Lavell case.

62 By virtue of s. 32(2), s. 15 does not come into force until April 17, 1985, presumably to give the federal and provincial governments time to amend their laws to conform with s.15.
63 1960, c. 44 (Can.)
64 A.G. Can. v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, holding that s. 12(b)(1) of the Indian Act, R.S.C. 1970, c. I-6, which provided that an Indian woman, but not an Indian man, would lose her Indian status upon marrying a non-Indian, was not rendered inoperative by the equality rights guarantee in s. 1(b) of the Canadian Bill of Rights.
65 The Lavell interpretation of the Canadian Bill of Rights as guaranteeing only procedural equality and not substantive equality was a regression from the previous Supreme Court of Ca-
The phrase, "under the law," may also reverse the reasoning in the pre-Charter Supreme Court of Canada decision in Bliss v. Attorney General of Canada. The Court, in that case, not only reiterated the Lavell version of "equality before the law," but also offered another test; discrimination would be allowed if it was necessary to further a "valid federal objective." One study of the Bliss decision suggested that the "valid federal objective" test is nothing more than a "distribution of powers" test. If the legislation was validly enacted by the federal government pursuant to its authority under section 91 of the Constitution Act, 1867, then it could be said that the law has a "valid federal objective," which would inevitably result in the law being upheld.

However, the blow struck to equality of rights in the Bliss case was later softened by Mr. Justice McIntyre of the Supreme Court of Canada in the McKay case. He enunciated a more promising conception of equality, albeit only in principle, since the challenge was unsuccessful. McIntyre J. stated that a valid federal objective must not only fall within the field of constitutional legislative competence, but also, must not offend the Canadian Bill of Rights. The judicial inquiry to be undertaken was articulated by McIntyre J. as follows:

In R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473. Drybones is the only case in which the Canadian Bill of Rights has prevailed over another statute with regard to guaranteed rights. In Drybones, s. 94(b) of the Indian Act, which made it an offence for an Indian to be intoxicated off a reserve in the Northwest Territories, was held to be discriminatory against Indians under the Bill. Mr. Justice Ritchie, speaking for the majority, stated at 297 (S.C.R.), 484 (D.L.R.):

[A]n individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

Surely this was a case where the content of the law was scrutinized. Ritchie stated also that he could not agree with an interpretation of "equality before the law" which would lead to the result that "the most glaring discriminatory legislation against a racial group" would not offend the Bill so long as all members of the group are being discriminated against in the same way. This view is clearly a rejection of the Diceyan approach to equality rights.

56 [1979] S.C.R. 183, 92 D.L.R. (3d) 417. In Bliss, a pregnant woman was refused unemployment insurance benefits even though she would have qualified for them had her reason for unemployment not been pregnancy. Bliss was recently applied in Stuart v. A. G. Can (1982), 44 N.R. 320, 13 C.L.L.C. 324 (Fed. C.A.) where the pregnant woman applying for unemployment insurance benefits had become unemployed due to an unrelated illness. The Court refused to consider an argument based on s. 15 of the Charter since it had not yet come into effect.

57 Note that the Canadian Bill of Rights applies only to federal laws: s. 2.

58 See Gold, Equality Before the Law in the Supreme Court of Canada: A Case Study (1980), 18 Osgoode Hall L.J. 336 at 346-47.

59 Mackay v. R., [1980] 2 S.C.R. 370, 114 D.L.R. (3d) 393. In Mackay, trial by Standing Court Martial under the National Defence Act for a criminal offence was held not to constitute a denial of equality before the law.

60 Id. at 405-405 (S.C.R.), 422 (D.L.R.).
As a minimum it would be necessary to inquire whether an inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective.61

Thus, McIntyre J. takes the view that the court must pass judgment on both the means employed and the ends pursued by the law, similar, as shall be seen later, to the kind of inquiry that is contemplated by section 1 of the Charter.

Returning to the Pension Benefits Act, the court is guided by the words “under the law” in section 15 and the dicta of McIntyre J., to question the wisdom of the “ten and forty-five” rule to examine not only the procedural aspects of the law, but also its substance. A challenge of the Act under the Charter cannot be dismissed by the Court on the ground that the law, as worded, applies equally to men and women, or, in other words, that the conditions to be fulfilled are the same no matter whether one is male or female. Furthermore, the court must consider the impact of the “ten and forty-five” rule. Lastly, the Charter demands that the court look behind the age classification employed in the “ten and forty-five” rule to see whether or not it is arbitrary.

2. “Equal Protection of the Law”

To assert that the equality rights guarantee in section 15 applies to the content of the law and its administration does not provide the courts with a standard of review. Equality rights demand that there be some connection between classifications and objectives. McIntyre J. speaks of a requirement that the means and ends be “rationally” connected, while at the same time proposes that the distinction must be a “necessary departure” for the attainment of “some necessary and desirable social objective.” The standard of review to be applied, therefore, is still imprecise.62

Since “equal protection of the law” is a concept borrowed from the Fourteenth Amendment of the American Constitution,63 American ju-

61 Id. at 407 (S.C.R.), 423 (D.L.R.). Although McIntyre J. was in the minority, concurring with Ritchie J., his inquiry was later considered by Deschênes, C.J.S.C. in Que. Assoc. of Protestant School Boards v. A.G. of Que. (No. 2) (1983), 140 D.L.R. (3d), 33 at 77, 3 C.R.R. 114 at 158 (Que. S. Ct.).

62 See also, the discussion of s. 1 of the Charter, infra "The Limitation Clause: Section 1."

63 U.S. Const. amend. XIV, s. 1: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
risprudence is applicable to adjudication under the Charter.\cite{note64}

a) The American Levels of Scrutiny

Prior to 1971, the Supreme Court of the United States employed a two-tier standard of review. On the upper tier were classifications which either infringed fundamental rights or were “inherently suspect” as suggesting racial prejudice, and which triggered strict scrutiny; the highest level of judicial review. Such classifications were presumed to be invalid unless the government could satisfy the court that the particular classification was “necessarily related to a compelling state interest” and that there were no alternative ways of achieving the state objective.\cite{note65} In practice, the test was so difficult to meet that all classifications falling within the upper tier were declared unconstitutional.\cite{note66}

In contrast, the lower tier includes all classifications that were not “suspect” racial classifications or did not impinge on fundamental rights and thus, attracted minimal scrutiny coupled with a strong presumption of constitutionality. As long as the classification could be said to be “rationally related to a legitimate government purpose,” the court held it constitutional.\cite{note67} This test almost invariably resulted in the impugned law being rubber-stamped by the court. Age-based distinctions fell within this lower tier. Despite the analogy that can be drawn between race and sex,\cite{note68} classifications based on gender also attracted only minimal scrutiny.

However, some progress was made in 1971 in a case called Reed v. Reed\cite{note69} where the Supreme Court struck down legislation which classified on the basis of sex. One commentator pointed out that only if one

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\cite{note64} Laskin, C.J. in Morgentaler v. R., [1976] 1 S.C.R. 716, 54 D.L.R. (3d) 161, implies that because the Bill of Rights is only an Act of Parliament, American jurisprudence is inapplicable to its interpretation. This view can no longer stand because the Charter, like the American Constitution, is a constitutionally entrenched document.

\cite{note65} See Tribe, American Constitutional Law (1978) at 1000-60 for a critical analysis of the case law from which the standard of strict scrutiny developed.

\cite{note66} In only one case did the Supreme Court of the United States uphold explicit racial discrimination after applying strict scrutiny: Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944), sustaining a military order excluding Americans of Japanese origin from designated West Coast areas following Pearl Harbour.

\cite{note67} See Tribe, supra note 65, at 994-1000.

\cite{note68} There are two main reasons why the Supreme Court of the United States treats race classifications as “suspect” and, therefore, subject to strict scrutiny. There has been a long history of prejudice against racial minorities, and race as a trait can never be altered by a simple act of will. Thus, stereotyping these individuals as less worthy or less suited for certain roles by virtue of an immutable trait has been singled out as unjust by the court. It is apparent that gender-based discrimination shares this unjust-stereotyping flaw. See Tribe, supra note 65, at 1060.

\cite{note69} 404 U.S. 71, 92 S. Ct. 251 (1971), invalidating an Idaho statute requiring that males be preferred to females as administrators of estates.
assumes that the court was being especially suspicious of sex as a classifying factor can the result be understood.\(^7\)

In 1973, the Supreme Court came close to treating gender classifications like race classifications when a plurality of justices in *Frontiero v. Richardson*,\(^7\) held that sex-based classifications should be treated as suspect. However, the fifth justice needed to constitute a majority on this point concurred only in the result.\(^2\) The hesitancy of the other justices can be explained, in part, by the pendency of the Equal Rights Amendment.\(^2\) Three of the justices stated that the court should not “appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.”\(^2\)

In 1976, in *Craig v. Boren*,\(^5\) the Supreme Court openly adopted for the first time a standard of review based on *intermediate* scrutiny; that is, classifications based on gender must “serve important governmental objectives and must be substantially related to the achievement of those objectives.”\(^8\) This standard was further enhanced in *Wengler v. Druggists Mutual Ins. Co.*,\(^7\) where the court held that the government carries the burden of demonstrating both the importance of its objective and the substantial relationship between the discriminatory means and the asserted end.

Three propositions derived from American jurisprudence are useful in successfully arguing that the “ten and forty-five” requirement violates sub-section 15(1) of the Charter. First, the Supreme Court of the United States does not consider administrative convenience to be an “important” governmental interest. The Ontario legislature may not be able to justify the “ten and forty-five” rule on the grounds that it was


\(^7\) 411 U.S. 677, 93 S. Ct. 1804 (1973), holding unconstitutional federal statutes providing that females spouses of members of the armed services were “dependents” for the purposes of obtaining military benefits, but that male spouses of members were not “dependents” unless so proven.

\(^2\) Stewart J., the fifth justice, found simply that the statutes “work[ed] an invidious discrimination.” *Id.* at 691 (U.S.).

\(^2\) Section 1 of the Equal Rights Amendment (ERA) declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” H.R. Res. 208, 92nd Cong., 2nd Sess. (1972). Although the ERA was passed by Congress, not all of the legislatures have ratified it and, therefore, the amendment is not yet in effect.

\(^2\) *Supra* note 71, at 692.

\(^5\) 429 U.S. 190, 97 S. Ct. 451 (1976), invalidating state statutes prohibiting the sale or beer to males under the age of 21 and females under the age of 18.

\(^6\) *Id.* at 197, and see Tribe, *supra* note 65, at 1060-99 for a discussion of the development of the intermediate standard of review.

\(^7\) 446 U.S. 142, 100 S. Ct. 1540 (1980).
less expensive or easier to frame the vesting requirements as it did. To be sure, the Ontario legislature must be sensitive to the imposition of increased financing on employers. However, our courts may follow the American example by establishing that cost will not be a decisive factor.

Second, Reed establishes that where the impugned legislation is inspired by old and stereotypical notions about the proper allocation of roles in the family, assigning to women the role of dependent, childbearer and housekeeper, and to men the role of breadwinner, the legislation will fail.78 Certainly, the vesting conditions in the Pension Benefits Act inhibit the exercise of liberty, by both men and women, in the choice of social roles by penalizing any one who temporarily leaves their employment to raise children, and by making it exceedingly difficult for a woman to obtain a pension in her own right.

Third, intermediate scrutiny, although not as fatal to a law as is strict scrutiny, is a powerful standard of review.79 Moreover, in the context of the Charter, gender-based classifications may trigger strict scrutiny, even though they do not under the American Bill of Rights. The specification of “sex” as a prohibited basis of discrimination should be interpreted to render it suspect. Because sub-section 15(1) expresses specific disapproval of sex-based classifications, it should follow that they will attract a strict standard of review.80 Also, the Charter contains an additional guarantee of sexual equality in section 28:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The opening language, “notwithstanding anything in his Charter,” may

78 See notes 69 to 77, supra and accompanying text.
79 However, the American cases are often decided by a closely divided court, and some of the justices, most notably Rehnquist J., see clear differences between the sexes. Rehnquist J. captured the majority in two cases in 1981: Rostker v. Goldberg, 453 U.S. 57, 101 S. Ct. 2646 (1981), upholding the law establishing the male-only requirement for registration for the draft; and Michael M. v. Superior Court, 450 U.S. 464, 101 S. Ct. 1200 (1981) upholding California’s statutory rape law under which underaged men, but not underaged women, can be prosecuted for engaging in consensual sexual intercourse. For a cogent criticism of these cases, see Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism (1983), 7 Women’s Rights L. Rep. 175 at 180-86.
80 At the same time, there may be a problem with this argument because s. 15(1) contains a diverse list of bases on which the government cannot discriminate. Should the same standard of review apply to all of them? Doubtless, not all age-based classifications warrant strict scrutiny. Nevertheless, it seems reasonable to suggest that the specified categories in s. 15(1) were intended for different and more serious treatment than categories not singled out.

For other works which also argue for strict scrutiny of gender differentiations based on the specification of “sex” in s. 15, see Seale, Can the Canadian Pension Plan survive the Charter? Section 15(1) and Sex (In) Equality (as yet unpublished, 1983) at 22-23; and Williams, Sex Discrimination Under the Charter: Some Problems of Theory (1983), 4 Can. Human Rights Rep. 1 at 4-5.
be interpreted as meaning that the equality rights guarantee is unconditional and can neither be limited by reference to section 1 nor overridden by a legislature pursuant to section 33,81 thereby providing a strong argument for applying strict scrutiny to sex-based distinctions. Finally, section 28 of the Charter closely resembles, if not in words then undeniably in spirit, the proposed Equal Rights Amendment in the United States. It has been contended that the passage of the Amendment would mandate the “compelling state interest” test used in race cases,82 just as section 28 should.

b) The Discriminatory Purpose and Disproportionate Impact Doctrine

It has been argued that gender classifications should trigger strict scrutiny under the Charter. However, the “ten and forty-five” rule appears on its face to be neutral with respect to gender. The only overt classification in paragraph 20(1)(a) of the Pension Benefits Act is one based on whether an employee has served an employer or participated in a pension plan for ten continuous years and has attained the age of forty-five.83 But, as statistics have shown, the rule masks sex discrimination in that it overwhelmingly favours men.

The Supreme Court of the United States has recognized that laws may superficially apply to all persons but in reality they discriminate by causing an adverse impact upon a particular class. Judicial recognition of such laws initially occurred in cases of racial prejudice, but recently the doctrine has been extended to cases of sexual bias as well.

81 For an argument that the unconditional guarantee contained in s. 28 as applied to s. 15(1) equality rights will effectively withdraw s. 15 from the operation of s. 1 when sex equality is at issue, see Seale, id. at 36-42.

82 See, e.g., Williams, supra note 80, at 4; and Ginsburg, Sexual Equality Under the Fourteenth and Equal Rights Amendments (1979), Wash. U.L.Q. 161. Some commentators have even suggested that gender classifications would be treated as illegal per se under the ERA. See Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women (1971), 80 Yale L.J. 871.

83 The second limb of the legislative test for vesting, that is, whether or not one has attained the age of 45, offends s. 15(1) by discriminating on the basis of “age”, which is a ground for discrimination expressly referred to in s. 15(1). Recall, however, that in the United States, age-based classifications attract only minimal scrutiny and are inevitably upheld by the court. Under the Charter, the standard of review applied to such classifications might be higher for two reasons: (1) “age” as a classifying factor is specifically identified in s. 15(1) and, therefore, might be given special status by the court; and (2) when an American court applies the standard of minimal scrutiny, the burden of demonstrating that the law was not justified lies on the challenger, while s. 1 of the Charter places the burden of justification on the person defending the law and, therefore, affords greater protection of equality rights when an age-based classification is challenged.

Nevertheless, a successful challenge to the age condition of the “ten and forty-five” rule would not solve the whole problem; the onerous service and participation requirements would still remain.
However, the leading racial case in this area, *Washington v. Davis*, established that a law is not unconstitutional solely because it has a racially disparate impact. The invidious quality of the law must ultimately be traced to a racially discriminatory purpose. *Washington* also stands for the proposition that a showing of discriminatory intent is necessary to trigger the standard of strict scrutiny. Failure to meet this burden results in only minimal scrutiny being applied, in which case the claim almost certainly fails. The court in *Washington* did, however, qualify its reasoning with statements to the effect that discriminatory intent may often be inferred from all the relevant facts, including the fact that the law affects one race more adversely than another, and that, in proper circumstances, the racial impact of the law, rather than its discriminatory purpose, is the critical factor in determining a constitutional violation. The court did not elaborate on the circumstances necessary to tip the scale the other way.

*Washington* was applied in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. *Arlington Heights* contained *dicta* which might assist someone challenging the Pension Benefits Act under the Charter. According to that case, the discriminatory purpose need only be a motivating factor and not the sole purpose of the law. In addition, a search for intent calls for a "sensitive enquiry into circumstantial and direct evidence," which can include, aside from disproportionate impact, legislative history and contemporary statements of decision-makers. Further, where a clear pattern emerges from the effect of the state action, unexplainable on grounds other than race (or sex) this may be determinative of discrimination.

Another major case, *Personnel Administration v. Feeney*, in-
volved an unsuccessful allegation of sex discrimination. Despite a mas-
size adverse impact upon women, the court found that a Massachu-
sett’s statute giving preference to veterans had not been adopted to
disadvantage women. The case might stand for the proposition that as
long as the legislation was passed in spite of its effect on women, rather
than because of its effect on women, it is not sex discrimination. The
court also relied on the fact that a number of men were adversely af-
fected to negate any inference that the law was a pretext for preferring
men over women. This case does not bode well for a challenge of the
vesting criteria in the Pensions Benefits Act. However, Marshall J., dis-
senting in Feeney, stated,

[W]here a particular statutory scheme visits substantial hardship on a class long
subject to discrimination, the legislation cannot be sustained unless carefully
tuned to alternative considerations.

The requirement that discriminatory intent be shown has come under
attack by commentators who favour a pure impact test. The funda-
mental problem with the requirement of discriminatory intent is that
proof is exceedingly difficult, if not impossible. Direct evidence is rare,
and the use of circumstantial evidence requires the court to draw infer-
ences. As one American Supreme Court Justice has stated,

[a]n approach based on motivation creates the risk that officials will be able to
adopt policies that are the products of discriminatory intent so long as they suffi-
ciently mask their motives.

Of equal concern is that apparently neutral legislation is often
driven by social systems, structures and patterns which reflect far more deeply
than overt gender or race classifications, the social divisions and allocations made
by societies to benefit those traditionally in power and, however inadvertently or
unconsciously, to disadvantage those whose needs and perceptions have not been
represented in the decision-making process.

civil service jobs, even though the vast majority of veterans were men. By law, the U.S. armed
services have, until very recently, placed a two percent quota on the number of women allowed to
serve in the military, thus, laws preferring veterans for public employment overwhelmingly favour
men.

Williams, supra note 80, at 6.


See, e.g., Tribe, supra note 63, at 1028-32; Farish, The Intent Requirement at the Cross-
roads: Racial Discrimination and City of Memphis v. Greene (1982), 34 Baylor L. Rev. 309 at
lished) at 10-11; and Seale, supra note 78, at 26-30.

Note here that in cases brought under Title VII of the Civil Rights Act, 1964, the complain-
ant need only show disparate impact to establish a prima facie case; the burden then shifts to the
employer to justify the facially-neutral rules.

City of Mobile v. Borden, 446 U.S. 55, 100 S. Ct. 1490 (1980), per Marshall J.,
dissenting.

Williams, supra note 80, at 6.
If the discriminatory intent requirement is retained, then certain forms of sex (and race) discrimination by government will be unchecked. For these reasons, the establishment of a disproportionate impact should, at minimum, result in the burden shifting to the government to justify legislation neutral on its face.

The words “without discrimination” as used in sub-section 15(1) raise the question of whether the establishment of discriminatory intent is a necessary element in an equality rights claim under the Charter. Some commentators think not. Nonetheless, the meaning of discrimination must be explored if Canadian courts, like those in the United States, require that those who challenge a facially-neutral law must allege discrimination. There must be a move beyond the limited concept of discrimination as an act of wilful malice to an understanding that gender or race distinctions, whatever their motivation, perpetuate a dual system of laws which define women and racial minorities as second-class citizens, and should therefore cast a significant burden of justification upon the government.

In the context of the “ten and forty-five” rule, its adverse disproportionate impact on women must be closely examined because one’s economic security, although not the subject of a fundamental right, affects one’s ability to exercise personal freedoms in society. The element of discrimination might be established by arguing that the “ten and forty-five” rule was motivated by out-dated, unjust stereotypes about the roles and capacities of women, or that the needs and the essential worth and dignity of women as a class were ignored in the legislative process. Apart from the statistical evidence of disproportionate impact, support for the argument that the “ten and forty-five” rule is discriminatory might be found in its legislative history. One might also rely on the historical pattern of discrimination directed against women.

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98 See, e.g., Gold, A Principled Approach to Equality Rights: A Preliminary Inquiry (1982), 4 Sup. Ct. L. Rev. 131 at 145-47; and Seale, supra note 80, at 28 and 33. Seale contends that to establish discrimination one need only show that a distinction has been made on the basis of a suspicious ground of differentiation. Gold, however, disagrees on this point. He argues (at 146) that “discrimination” must mean something more than classification; “at a minimum it entails that the particular group identified in the law must suffer adversely by virtue of the law.”

99 Recall that in the United States, gender classifications based on the dichotomous view of men as “breadwinners” and women as “homemakers and dependents” were struck down. See text accompanying note 78, supra.

100 This argument implies that equality in group status or treatment should be the dominant equal protection value. The right to “treatment as an equal” requires that government treat each individual with equal regard as a person, while the right to “equal treatment” demands that every person have the same access to the interests as every other person. Both concepts figure in the arguments made in this paper. The right to equal treatment is the value behind the argument for full and immediate vesting. For a discussion of these equal protection principles, see Tribe, supra note 63, at 991-94.
as well as women's relative powerlessness in the political process to argue that their interests have been overlooked by the Ontario legislature.\textsuperscript{101}

The Ontario legislature will, of course, offer a benign and salutory purpose for the "ten and forty-five" requirement, for example, to improve employer-sponsored pension plans, or to reward employees who provide long service.\textsuperscript{102} One article suggests that "the court might be able to infer a discriminatory motive from the fact that the reasons advanced in justification do not explain adequately the means chosen to achieve the stated purpose of the law."\textsuperscript{103} If the Ontario legislature advances the purposes suggested, the connection between the means and the ends will be far from close. As statistics have shown, reducing the vesting condition from, say, twenty years to ten years means nothing to someone who changes jobs every five years. The legislative vesting requirement might assist men in acquiring vested pensions, but it does little to benefit women, who now comprise almost fifty per cent of the labour force. In defence of the under-inclusiveness of the legislation, the government might argue that reform may take one step at a time. However, when the under-inclusiveness of the law, in effect sets apart women as a class, the means employed by the government should immediately become suspect.\textsuperscript{104}

As regards the government justification of rewarding employees for long service to their employers, the Ontario government might add that women, as seen by their high rate of turnover, do not exhibit the loyalty to their employers for which pensions are the payoff. This justification blames the victim for the poor quality of jobs available to her. Furthermore, a woman who works all her life for the same employer, but who stops periodically to bear and raise children, certainly cannot be called "disloyal". Finally, the notion that a pension is a reward or gift from the employer is open to criticism. The better view is that pension benefits are "deferred wages" to which all employees are entitled. In negotiating a collective agreement, it is not unusual for employees to sacrifice higher wages in exchange for a better pension plan.

\textsuperscript{101} See Gold, \textit{supra} note 98, at 145.

\textsuperscript{102} Gold, \textit{supra} note 98, at 136, asserts that the court must impose some limits on the objectives pursued by legislation, and require that the purposes invoked in legal argument before the court actually be the purposes that informed the enactment of the legislation.

\textsuperscript{103} \textit{Id.} at 146.

\textsuperscript{104} It has been reasoned that where unequal results were the reasonably foreseeable consequences of the challenged government action, a failure on the part of the government to correct these results once they became apparent is itself proof of discriminatory intent. Thus, the standard of proof is negligence. For a review of this test and others, see Lettner, \textit{supra} note 95, at 4.
Once it is determined that the government's articulated purposes are not met by the "ten and forty-five" rule, then it becomes relatively easy to draw the inference that the hidden purpose of the Act was to benefit the typical male worker.

3. "Equal Benefit of the Law"

The inclusion of the concept "equal benefit of the law" in sub-section 15(1) is generally viewed as a response to some of the reasoning of the Supreme Court of Canada in Bliss. One writer suggests that "equal benefit of the law" was intended to ensure that the provision of governmental benefits (like unemployment insurance) was not insulated from judicial review merely because such benefits are creations of the legislature. If the phrase was intended to encompass only governmental monetary benefits, then only women employed by the Ontario government can challenge the "ten and forty-five" rule on the ground that the rule, in effect, prevents female employees from participating equally with men in a deferred government pension. Such an interpretation would leave women employed in the private sector without a constitutional remedy.

One can argue that the court should not accept elusive legislative history as being decisive of the question of interpretation. Moreover, a broader view of "equal benefit of the law" can be supported by reference to the text of sub-section 15(1), which uses the word "benefit" and not "benefits". If the drafters of the Charter truly intended that the phrase be interpreted in its narrowest sense, they could have expressly provided that only the distribution of government benefits would be reviewable under sub-section 15(1).

In summary, the language of sub-section 15(1) will likely overcome the narrow view of equality rights adopted by the Supreme Court of Canada under the Canadian Bill of Rights. American jurisprudence pertaining to standards of review and the doctrine of "discriminatory purpose and disproportionate impact" will assist women in adjudication under sub-section 15(1) of the Charter. It has been demonstrated that in the Canadian context, given that the provisions of the Charter place primary importance on sexual equality, certain modifications of the American tests are reasonable and appropriate. If, under the Charter, the strictest standard of review is applied to laws which impact dispro-

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106 See, e.g., Hogg, Canada Act 1982 Annotated (1982) at 51; and Gold, supra note 98, at 134.
107 Gold, supra note 98, at 134.
portionately on women, and if discriminatory intent may either be inferred from all the relevant facts or does not need to be established by the challenger under sub-section 15(1), then a challenge of the “ten and forty-five” rule contained in the Pension Benefits Act must succeed. This might be the end of the analysis if it were not for section 1 of the Charter.

C. The Limitation Clause: Section 1

Section 1 of the Charter provides that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 makes clear that the rights and freedoms guaranteed under the Charter are not absolute. Even though a law has been shown to breach the provisions of the Charter, there is a possibility that it will be upheld under section 1, if the government can demonstrate that the law is justified.
the Charter, including equality rights, it would be preferable to give operative meaning to section 1.

The structure of the inquiry might be as follows; where it is established that a facially-neutral law has an unequal impact, as between the sexes, then sub-section 15(1) is deemed to have been violated. The burden then shifts automatically under section 1 to the government to defend the law by showing that the means chosen are relevant to a legitimate, non-discriminatory purpose. If the purpose articulated by the government is found to be discriminatory, then the case is won by those challenging the law. Assuming, however, that the government has made out a *prima facie* case, then the onus shifts back to the challenger to explain the under-inclusiveness of the law by offering a purpose which is discriminatory or otherwise impermissible. Evidence of such a purpose could be circumstantial, though direct evidence, where available, would be stronger. Finally, if the person challenging the law has made out a *prima facie* case that there is a more plausible rationale for the law than that which was articulated by the government, then the burden should shift back to the government to refute the claim.\(^{110}\)

The judicial inquiry as structured in this way would not only give section 1 a meaningful function, but would also significantly shift the burden to the person seeking to uphold a facially-neutral law such as the “ten and forty-five” rule. The effect of the proposed inquiry is that only a showing of disproportionate impact is needed to establish violation of sub-section 15(1). Although this inquiry is different from the American “purpose and impact” test where the burden remains on the person challenging the law to establish discrimination, as already argued, it is not unreasonable to expect that the Charter will require a modification of less protective approaches to sexual equality rights.

With respect to the standard of review under section 1, no clear consensus has been reached in cases decided thus far under the Charter. The Supreme Court of Canada considered it unnecessary to address the question of the impact of section 1 in two of the three Charter cases it has decided to date.\(^{111}\) The Canadian judiciary has acknowl-

\(^{110}\) The structure of inquiry proposed here is a slightly modified version of that recommended by Gold, *supra* note 98, at 151-52.

\(^{111}\) In *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161, 8 C.R.R. 193, the Supreme Court of Canada held that s.28(c) of the *Law Society Act*, R.S.O. 1980, c. 233 was not inconsistent with s. 6(2)(b) of the Charter, thus, an analysis of s.1 of the Charter was unnecessary. In *Hunter v. Southam*, *supra* note 108, Dickson J. at 37 decided to leave to another day the difficult question of the relationship between [s.8 and s.1] and, more particularly, what furthering balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s. 8.
edged that section 1 enlarges the jurisdiction of the courts by investing them with the power to examine the "rationality" of the law.\textsuperscript{112} Although a number of cases establish that the standard of persuasion under section 1 is a high one, the tests applied under section 1 have varied.\textsuperscript{113} Perhaps there is no one pure test for the justification of a limit. Flexibility may be necessary under the Charter, particularly with regard to sub-section 15(1) which lists classifications, some of which appear to be less relevant to the achievement of a legitimate government purpose than others. Ultimately, the standard of review chosen may depend upon the right being threatened and the kind of differentiation used.

IV. CONCLUSION

It has been shown that employer-sponsored pension plans benefit men more than women because their structure and design are oriented to the typical male worker. The Ontario Pension Benefits Act, although enacted for the purpose of improving pension plans, does not adequately address the four key areas of concern to women; that is, vesting, portability, inflation adjustment, and survivor benefits. A strategy has been proposed to challenge the Act's "ten and forty-five" vesting conditions under the equality rights guarantee in section 15 of the

\textsuperscript{112} See, e.g., the Bill 101 case, supra note 108 at 48-50 (D.L.R.) per Deschênes C.J.S.C.

\textsuperscript{113} In the Bill 101 case, id., at 77 (D.L.R.), 156 C.R.R., Deschênes C.J.S.C., speaking for the majority, after canvassing various authorities, derived the following propositions:
1. A limit is reasonable if it is a proportionate means to attain the purpose of the law;
2. Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and
3. The courts must not yield to the temptation of too readily substituting their opinion for that of the Legislature.

Although the "proportionality" test bears resemblance to the "rational relationship" test applied in the United States under the standard of minimal scrutiny, Deschênes C.J.S.C. actually applies a much stricter test when he asks (at 85): "Is the law necessary to achieve the legitimate aim set by the legislature?" In the result, Bill 101 did not stand up under s. 1. On the other hand, in Federal Republic of Germany v. Rauca (1983), 38 O.R. (2d) 705 at 715, 141 D.L.R. (3d) 412 at 423, the Ontario High Court of Justice determined that "reasonable limits" imports an objective test of whether there is a "rationale basis" for a limitation, "a basis that would be regarded as within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society." The court also states that the standard of persuasion to be applied is a high one, which seems to the author to be incompatible with a mere "rational basis" test.
Charter. The “ten and forty-five” requirement, though facially-neutral with respect to sex, is discriminatory in its effect in that more men than women can achieve vested status under the legislative conditions. Women are, thus, denied “equal benefit of the law” as guaranteed by section 15. According to American jurisprudence, the challenger of such a law must allege discriminatory intent before the fatal standard of review known as “strict scrutiny” is triggered. It has been argued, however, that section 1 of the Charter would shift the burden to the government to show that the “ten and forty-five” rule is relevant to a legitimate, non-discriminatory purpose. Furthermore, the existence of the unconditional equality rights guarantee in section 28 of the Charter provides a strong argument for applying strict scrutiny under section 1 to a law which overwhelmingly favors one sex over another.

The Charter may prove to be the catalyst of needed reform in the private pension system, especially in the area of vesting. A successful constitutional challenge of paragraph 20(1)(a) of the Pension Benefits Act would prod reform by other provincial jurisdictions which have enacted mandatory vesting conditions based on the “ten and forty-five” rule. Although litigation under sub-section 15(1) of the Charter may not bring about the fundamental restructuring of the private pension system which women in Canada rightfully demand, a series of expedient measures taken by the courts could go a long way to ensuring that women’s pension needs are recognized and addressed by both governments and employers. It will be necessary for women and their representative groups to continue to lobby the decision-makers in the legislative branch. However, women now have a powerful and influential instrument in the Charter, which proclaims that sexual equality is an essential and paramount value in Canadian society.