

**Lawyered Ep85**

**[00:00] HUSEIN:** This is Episode 85 of Lawyered. I'm Husein Panju. And this week we're speaking about current issues in the area of pensions law, featuring our guest, Ross Gascho, who is the practice lead at Fasken's Pensions and Employee Benefits Group.

**[00:19]** First up, we speak about the controversial new federal bill, known as Bill C-228, or the Pension Protection Act. This new statute would give a super priority of the payments of pension obligations over other debts in some of its proceedings, and is raising numerous concerns about the broader implications, including that of financing and lenders.

**[00:42]** Next, we speak about a recent B.C. case regarding the fiduciary duties owed by pension plan trustees, and when a court may slip in to override their decisions. We'll also chat about some new amendments to the Income Tax Act that provide them flexibility to correct for pensions under corrections and over corrections.

**[01:00]** And finally, in our Ask-Me-Anything Segment, we'll relay the questions submitted by our listeners about pensions law issues, including alternative dispute resolution, the responsibility of plan administrators, and how much say employees actually have in the directions of the company's pension plans. All that and lots more coming up in just a bit. This is Lawyered.

[Music]

**[01:29]** Hello, everybody, and welcome to the show and thanks for tuning in for another installment of Lawyered. This episode is coming out in mid-September. And last week, I was really lucky to speak at a panel at the Law Practice Program or the LPP Program at Toronto Metropolitan University.

**[01:49]** This session was about networking and volunteer participation as important aspects for a professional career broadly. And as you may suspect, these are some of my favorite things to talk about, both generally and in a panel format. I got to meet some very thoughtful and wonderful students and licensed candidates as well. So, a big shout out to Fariya Walji and the LPP Organizing Team for inviting me and all the participants, some of whom I hope I convert it into listeners. Ancillary benefit for participating in this.

**[02:23]** On a serious note, I think I mentioned this from time to time on the show that for anybody listening, if you ever want to reach out to chat with me about your own professional growth, if you're kind of struggling with career chips or starting out as a

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lawyer or you want to kind of stress how you might want to initiate your own project like a podcast or something like that, please reach out.

**[02:45]** I really enjoy speaking to people about this, especially those who support the show. So, feel free to let me know if that was something you'd like help with or just want to bounce ideas off of. I'd love to be a sounding board for that. My contact information is very easy to find. You can find it on my LinkedIn. I can contact our main email address for the podcast [info@lawyeredpodcast.com](mailto:info@lawyeredpodcast.com). And yeah, let's stay in touch.

**[03:07]** On our last episode, we spoke about the area of bail law with criminal lawyer Trevin David. And we spoke about a bunch of very current issues in this field. There is a new live bill—or live the time of this recording—Bill C-48 that would flip the onus for serving offenses when it comes to bail considerations from the crown, the defense. We spoke about some new case law about bail delays, and then did a kind of holistic view about how the criminal bail law has adjusted since in instrumental case called Antic.

**[03:46]** The episode gives a very thoughtful look about an area that is often spoken about, but rarely understood in the mainstream, this area of bail law and bail reform. And one comment that really stood out for me is when our guest Trevin was saying that, you know, most people would agree in theory that the bail system is broken, but many people would also disagree about why that is and what the problems really look like. So without going too much away, the episode itself is a very thoughtful look as well about how social issues impact marginalized communities, bail being one of them, and how that plays out both in politics and in law as well.

**[04:30]** And one other thing I wanted to mention before we get into the show itself, as you can probably tell from my voice, I'm not feeling 100% health wise. It's not COVID. I just came down with a nasty case of something that I am still recovering from. I'm only raising this because as you will find out, I was actually sicker at the time I recorded this interview. And so for the regular listeners, my voice is going to sound kind of weird or weirder than normal in the interview that you're going to hear. Tried to fix it, was unable to. So it's going to sound weird for like a minute or so for you, but I think you will adjust, but just want to give you a heads up. So it's not a big shock to the system when it starts.

**[05:15]** Speaking of the episode that you're going to listen to, this is a great episode. It's about a very niche area of pensions law that some people may not immediately think of as being an exciting area. But I think you'll be pleasantly surprised as you'll hear as our guest will explain this area of pension law represents a neat blend of law and policy and has broader applications beyond simply what you're paid out when you retire.

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[05:46] There's a lot of complexity in this and a lot of meat in there as well. And fortunately, we have a guest on this episode who is a wonderful speaker and a thoughtful voice in this area. And you might say he's got a pension for pensions. And so without further ado, here is our interview about pensions law with our guest Ross Gascho.

[Music]

[06:04] Ross is a partner at Fasken Martineau and the head of the firm's Pensions and Employee Benefits Practice. He advises clients on all aspects of the implementation, administration, funding, communication, investment, governance, and wind-up of pension, group benefit, and profit-sharing plans. And working with administrators, financial institutions, clients, sponsors, and trust fees, Ross advises on issues in federally and provincially regulated defined benefit and defined contribution plans across the private and public sectors for both union and non-union employees.

[06:37] Ross also frequently assists employers who are redesigning their broad-based plans, both measured and unmeasured, to benefit their business objectives and advises clients on pension and benefits issues in corporate transactions.

[06:50] Ross is also a member of numerous legal and pension organizations, including the National Policy Committee of the Association of Canadian Pension Management, and he also previously sat on advisory committees for federal and provincial pension regulators. So, Ross, thanks for joining us on the show today.

[07:05] **ROSS:** Thanks very much, Husein, for having me. It's a rare day that someone wants to talk to a pension lawyer.

[07:11] **HUSEIN:** Well, I'm happy to talk to you regardless of what the majority may feel. And actually, on that note, I was curious to ask you before we get into the topics. This area of pension law, I mean, it doesn't really strike me as an area that many people aspire to, at least when they're entering a law school. So, I was curious to know what your path was or what it is about pension law that excites you.

[07:37] **ROSS:** Well, like most major life decisions, there was no particular path to it. When I went to law school, pension law did not really exist as a practice area. It was just in its infancy. And of course, the extent that I knew about a pension, I think it was really Canada Pension Plan— thinking of my grandparents receiving it.

[08:03] Nonetheless, when I was articling, I thought I wanted to be a tax lawyer, so I signed up for a tax rotation, and the firm that I was articling with said, "Here's your tax

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rotation, by the way, it's split between tax and pensions." So, okay. And it turned out the tax was this sort of, okay, why would anyone ever want to spend their lives doing this? But this pension thing was really interesting to me because it played to some very macro sort of policy issues that were fairly easy to grasp onto, combined with the sort of micro work that lawyers do. So it sort of played to two sides of me, and I just found it a really interesting area.

**[08:51] HUSEIN:** And is that kind of like held up during your tenure?

**[08:54] ROSS:** Yeah, and here we are more than 30 years later and it's still interesting.

**[08:59] HUSEIN:** That's great to hear. We, believe it or not, have three very exciting topics in the area of pension law and understanding each of these topics will talk about a different type of pension as well. And the first topic we're going to speak about is a new bill called Bill C-228, which is the Pension Protection Act. Now this past May, the federal government passed a new law that's aimed to protect employees' pension plans if the employer goes bankrupt. And in particular, this law would give a super priority for the payments of pension plan obligations over other debts that the employer would otherwise owe during insolvency proceedings.

**[09:38]** And while this may seem like a big win for employees and retirees, some critics are concerned that this may also discourage lenders from providing loans to companies with these plans in effect. So, Ross, I understand that this bill is getting a lot of attention, the Pension Protection Act. If you're going to like the contents of the bill, can you tell us a bit more about what the context was that caused this Bill to be introduced?

**[10:01] ROSS:** That's a great question. Whenever there is a majoring insolvency in Canada and there is a pension plan in which pensioners have received less than 100% on the dollar of their benefits, and there have been a few. There haven't been a lot, but there have been a few. There have been questions about whether bankruptcy laws should be changed to allow, or essentially to put pensioners in front of the line to make sure that they would pay 100 cents on the dollar. So that's really the political background to it. It's an ongoing issue.

**[10:38] HUSEIN:** Okay, that's helpful to know. So let's talk about what this bill says. I know there's a lot of meat in this one. So we can kind of summarize the high points of this in plain language.

**[10:43] ROSS:** Well, as you said, what it does or attempts to do is it attempts to secure retiree pensions in the event of employer bankruptcy or insolvency. And it amends the Bankruptcy and Insolvency Act and the Companies Creditors Arrangements Act, CCAA,

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essentially in two ways. It says that if you're in bankruptcy or if you're in receivership that any proposal or the receivership has to provide for contributions to the pension fund equal to what it says are special payments determined under federal pension law and any amount required to liquidate an unfunded liability or insolvency deficiency.

**[11:43]** And it reiterates that language for the various scenarios that the BIA covers. And similarly for Companies Creditors Arrangements Act, it says that the court can sanction a compromise or arrangement, again, only if the arrangement or compromise provides for all the special payments determined under federal pension law and an amount equal to the unfunded liability or insolvency deficiency, those are the first priorities. So, the idea is that if the plan is in a deficit that it's going to be topped up. That's the idea.

**[12:23] HUSEIN:** So it's meant to give a higher priority for the contributions.

**[12:29] ROSS:** But the challenge, though, is that this is not a government bill. So it hasn't been through the Department of Finance and the sort of fine tooth drafting—fine drafting that they will do in a bill. And it ends up using terms that once you start thinking about them in different contexts, it's not clear necessarily what they mean. It's not clear exactly what plans it applies to. Let me give you an example.

**[13:00]** Historically, when we talk about pension plans and defined benefit pension plans, we think of something like Sears, where the employer had a big pension plan for its employees, the employer fell away, and the pension plan didn't have enough money to pay everybody out. That's the traditional model. That's what this bill is thinking about, but doesn't actually say it.

**[13:25]** There are other types of defined benefit plans that, for example, will provide for an employer fixed contribution. And the lever is that if those contributions aren't enough, then the benefits have to be adjusted. This bill would apply the same thing to that traditional Sears-like pension plan as it would to the multi-employer plan that we'll talk about in Larkin and Johnson. It's a very blunt implement that's aimed at some highly nuanced situations.

**[14:01] HUSEIN:** And so I know that there's—if this bill were to pass, there would be like a four year grace period. But I believe this bill is affecting a lot of controversies. Can you to tell us a bit more about what the big issue is that people have with this bill.

**[14:18] ROSS:** First of all, nobody disagrees with the idea of retirees receiving 100% on the dollar. Everybody is in favor of that. How you get to that is the open question. The worry is around this is not about saying we don't want pensioners being paid less than 100% of the dollar. It's the question, what else is this going to do to the system? I mean

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this very broadly, not just the pension system, but lending for corporate borrowers in Canada.

**[14:53]** If I'm a bank and I'm looking at a possible corporate lender, and I want to be a secured lender, if I know that there's the possibility of somebody else trumping my security, which is what C-228 will do, then I'm going to have a few reactions to it. One is, this is not a credit that I want to take on. That's one possibility. Another is that I'm going to reduce the amount that I'm willing to lend to this particular prospect.

**[15:27]** A third is that I might require a whole lot of information and disclosure. I might want to control the pension investments or otherwise have a way of making sure that the plan deficit doesn't get above a particular level. I might say to the prospective client, "You have to get rid of that plan, wind it up," and so we don't want this kind of risk.

**[15:55]** That's a big starting point that it can act as a chill on what funding is available and at what price. Then from the employer perspective, there's the question of, well, this sort of gets into the heart of our HR and how we run our business and how we try to compensate our employees. It also doesn't take into account, in the event of a CCAA filing, one of the big things that happens there is that the debtor requires debtor and possession financing, which always gets a super priority. Again, same issue. This bill is going to sit on top of the DIP lenders priority. Again, if I'm the DIP lender, I may not be interested in lending anymore if there's something on top of me.

**[16:52] HUSEIN:** You mentioned that there's all these tensions and issues in terms of the bank's new concerns about the risk. Do you see any midway solution between companies who are now subject to this new bill and banks who may want to lend?

**[17:09]** There may be some middle ground that the market gets to, simply because traditional defined benefit plans like the Sears plan are going to stop for many reasons. At the employer level, it's much rarer today to find somebody who has a defined benefit pension in the private sector than it was, say, 20 years ago.

**[17:35]** However, employers that have had defined benefit plans have typically kept the plans, they've just closed them to further accruals. But one of the things that they've been looking at for a number of years is how do we de-risk this? And there are ways to de-risk them so that once they get to a certain funded position that they can stay there. That can be through their investment portfolio, that might be through annuity purchases. So it may just be that the overall status for defined benefit plans provides the answer going forward.

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**[18:18] HUSEIN:** It's well established that trustees of a pension plan owe a fiduciary duty to plan members. However, a recent decision for the British Columbia Court of Appeal provides some further guidance on the extent of this duty. And this ruling describes the parameters in which pension plan trustees can make discretionary decisions and the extent to which there's a general duty to warrant.

**[18:40]** So, Ross, before we get into the case at hand, I know this case involves this term called fiduciary duty. So for those that may be unfamiliar, what does this mean when we say that pension plan trustees have a fiduciary duty?

**[18:54] ROSS:** That's a great starting question. Fiduciary duty is the highest duty that is owed under law. It's essentially the duty of a trustee. That's the way that it's most frequently expressed. And the obligation is to act solely in the interests of the beneficiaries, whether they're planned beneficiaries or trust beneficiaries, not to be conflicted in your advice, not to profit from your position, etc, etc. So, the key though in the pension world, I think is looking solely to the interests of the planned members and not to, for example, my own interests in a better way.

**[19:42] HUSEIN:** That's helpful in context. So the case that we're going to speak about now is called Larkin and Johnson. We'll have the case link in our show notes as well, but the citation here is 2023 BCCA 116, the case from the British Columbia Court of Appeal. I'm hoping you can start by telling us about the facts that led up to this case getting appealed all the way up.

**[20:05] ROSS:** As pension plans go, there are lots of different types of plans. In this particular plan, it's called a multi-employer pension plan. And what that means is that the employers who have employees in the plan, they're unaffiliated employers. So, in this case, there are 25 different employers. They have nothing to do with each other, except that they're all in the same industry.

**[20:29]** The plan has had a troubled history. In 2009, after the great financial crisis, they make various amendments, for example, to increase the normal retirement date, the date at which the pension will commence from age 60 to 62. They increase contribution rates. They reduce the early retirement benefits that are available. That's the background to it.

**[20:53]** What happens in this case, though, is that in 2015, the plan administrator, the board of trustees, sees that there is more trouble ahead and they come down to two options. What should they do to fix the problem? One was to change that normal retirement date yet again from 62, this time to 65.

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**[21:18]** The other alternative was to essentially remove a subsidy that applies to members who have a spouse when they retire. They decide that if they remove that subsidy for spouse to retire, it's actually not going to help the plan financially. It won't help the contribution rate. But if they change the normal retirement date to 65, that will help the employer contribution rate from going higher and further. And so they decide on that.

**[21:47] HUSEIN:** I know some of the client members had some issues with us, so that's how it got to the speed of it.

**[21:54] ROSS:** The members alleged that the trustees breached their fiduciary duties to the members, that in setting the new normal retirement date that the trustees failed to consider all relevant factors or, alternatively, that they considered irrelevant factors. And second, the plaintiffs alleged that the trustees failed to warn the members about what was called solvency deficit in the plan. And the solvency deficit basically means that if the plan were to be wound up at that moment, that it wouldn't have enough assets to meet the liabilities.

**[22:27] HUSEIN:** So I know that this dot appeal to the British Columbia Supreme Court and then the Court of Appeal. And you mentioned kind of flag what some of the issues were. Can you give us a summary of how the court came down on this?

**[22:44] ROSS:** Yeah. With respect to the setting of normal retirement date and whether they looked at all relevant factors or considered any irrelevant factors, the court looked at British law that has been supported in Canada that is described as being an authoritative statement on the discretionary powers of trustees.

**[23:10]** And that case says essentially that a judge will not overturn a discretionary decision that's been made by fiduciaries, even if it disagrees with their decision. The only time that a court will overturn the trustees' decision is if they've taken into account irrelevant, improper or irrational factors or on a sort of standard of care basis, the decision is one that no reasonable body properly directing themselves could have reached.

**[23:41] HUSEIN:** So, it's not an exact analog but this analogy about standard review it self about whether a court overview or tribunal.

**[23:51] ROSS:** That's right, that's right. And so they're being highly deferential to what the trustees do. And they looked at all of the evidence as to what the trustees had been through in terms of the advice that they had received and couldn't find anything that suggested that there was anything improper and in fact that they had looked at



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everything that they should have looked at, and that included historical things like the fact that interest rates had been dropping for years. And the result of that is that when that happens is the liabilities increase and therefore the contribution requirements increase.

**[24:37]** And in 2015, it looked like those increase, those interest rate drops would never end. They saw that employer contributions had been increasing for almost 20 years, that the plan's financial position had gone from, at one point, it had assets of 170% relative to its liability. So, it was 70% overfunded. At the time the trustees were making the decision, the plan was only 82% funded and which meant that half of employer contributions were going just to pay a deficit.

**[25:16]** They also looked at the impact of increasing mortality tables, people who live longer, which raises the cost of pension. And they also looked at, gosh, what happens if one or more of our participating employers drops out, that that could be really ruinous for the plan. And looking at all of those things, the court said, "Nothing to see here. Given what British law says to us that we're not going to be able to pay a deficit to disturb a trustee's decision unless they've taken into account improper factors or it's just a decision that no reasonable body could have reached, we can't touch this decision.

**[25:53] HUSEIN:** And what do you think? Like, as someone who is practicing in this area like day to day, what do you think about this differential approach to trustees?

**[26:02] ROSS:** I think that's right. When I look at some of the hard decisions that plans have to make, it's very difficult to replicate for a third party to come in after the fact, knowing what happened after the fact in the future and revisit the decision. It's really an exercise in speculation at that point. So unless the decision seems wildly wrong, for example, you ended up reaching the statute as a result of the decision that you made, then it's really hard to touch it. We can say we don't like the decision as much as we want, but at absent evidence of impropriety, I think it's really hard as a practical matter to lay challenge to decisions. These are really hard, hard things to come to a landing on.

**[27:05] HUSEIN:** And you don't have to give specific cases, but can you give us an example of things where you think a court may actually step in and play Monday morning court back on? What kind of decisions were we talking about?

**[27:17] ROSS:** Something like...being so extreme as to, in this case, they could have cut the benefit accrual rate as well because they controlled both benefits and contributions.

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They could have said, “Well, we just won’t have any accruals this year.” That would be an unprecedented decision from a design perspective.

**[27:43] HUSEIN:** Given that we have this case, I know it’s fighting in BC, but likely instructive in other provinces. What are things that pension lawyers should be thinking about in a lighted case like this?

**[27:55] ROSS:** I think a lot of it comes down, frankly, to how does the plan administrator record his decisions, particularly tough decisions? The defendants had excellent, excellent meeting minutes. They had very detailed reports prepared by their advisors. So it wasn’t a case that the record showed only, “Hmm, we have this financial problem, let’s increase normal retirement date by three years.” It was very clear in the written record that they had really been through a lot of analysis as to what was appropriate.

**[28:38]** And I think that that, in going through a difficult decision in particular like this, that that behooves any plan administrator very well. But it goes to the more general issue as well, that pension governance is really about process and making sure that you have process in place, that you have decisions that are well considered and that are not subject to subsequent challenges.

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**[29:15] HUSEIN:** In early 2022, the federal government introduced a new set of amendments to the Income Tax Act to provide some greater flexibility on defined contribution pensions plans to correct for under-contributions and over-contributions. And although these amendments may seem merely technical, the tangible impacts could be quite significant.

So, Ross, I know that before these amendments, there wasn’t really a mechanism to address over-contributions or under-contributions. So, you if can tell us, first of all, what do we mean when we talk about these terms over or under-contributions?

**[29:48] ROSS:** In addition to over and under contributions, we need to talk as well about what’s a defined contribution pension plan. A pension plan is really just an arrangement that’s going to provide income for life. That’s the key. And we usually think of pension plans as being defined benefit where there’s essentially a formula that says, here’s how much you’re going to get when you retire. Defined contribution looks at it from the other side. It says, here’s how much we’re going to put away as contributions and then however much you can generate off of that as retirement income, that’s what your pension is. So it’s the input that is defined in a defined contribution plan rather than the output as it is in a defined benefit plan.

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**[30:39]** Usually, or frequently the benefit promise is a percentage of the members earnings each year. So, it might be saying we will contribute 10% of your earnings each year into an account on your behalf. It's surprising how easy it is to make an error on that and either contribute too much or too little on your behalf.

**[31:05] HUSEIN:** And this is just to be clear, this is an error by the employer, right, or the employee?

**[31:09] ROSS:** It's by the employer. It's a payroll error that can come up for all sorts of reasons, including, for example, "Oh gosh, we thought we had enrolled you in the plan and we didn't." So it comes up remarkably frequently. The challenge is that the tax rules for pension plans have been around since about 1990, the current rules. And they were originally drafted as contemplating perfection. There was no possibility of an error and therefore, there was no provision in them for how to correct an error. And of course, anybody in the pension business said, but things happen, things go wrong.

**[31:54]** And so the Department of Finance was pushed for many, many years to do something about this. And first in 2014, there was a very minor,--well, I shouldn't say minor, but a small amendment to the Income Tax Act to allow for refunds of contributions in some very limited circumstances. But the bigger reform, frankly, is what you described at the outset of this, these new rules to allow refunds over contributions and correcting contributions for under contributions.

**[32:29] HUSEIN:** Okay, so let's start by talking about the amendments that were referred to under-contributions. How did that always work?

**[32:35] ROSS:** First of all, they don't apply to every defined contribution plan. It's only certain plans that will qualify. The plan has to have at least 10 members or no more than half of the plan's contributions in the year are for what the Income Tax Act calls Connected Persons or people whose compensation is this year more than about \$166,000 or two and a half times the Canada Pension Plan years maximum pensionable earnings. So, this is for broad-based plans for rank and fund employees that is available.

**[33:15]** In the event that there has been an under-contribution in the last 10 years, the employer or the members, the case may be, is allowed to make what's called a permitted corrective contribution that essentially corrects what brings their contributions up to the correct amount. They can include interest on that if they wish. And it's limited essentially to 150% of what's called the money purchase limit, which is the maximum that would normally be contributed to a defined contribution plan in a year. It's about \$46,000. That 150% is about \$46,000 this year. And certainly, when

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we've seen corrections in the past, 46,000 per member has been enough to fix virtually every error that we've seen. So this is a real reform.

**[34:17] HUSEIN:** Great. So, tell us about how over-contributions work. How would this work now if there's an over-contribution scenario that needs to be corrected?

**[34:26] ROSS:** Over contributions, if we go back to our scenario of a plan where contributions are supposed to be 10% of your pay each year, something went wrong and in fact, 12% of your pay went into the plan each year. So now you've over contributed. The first result of that over contribution is that your RRSP room as calculated by the CRA is going to be too low because DC pension contributions directly offset your RRSP room. So you've now got too little RRSP room because too much went into the pension plan. So the over contribution mechanism allows for the withdrawal of those contributions, the excess contributions, again, up to 150% of the money purchase limit over a period of up to 10 years.

**[35:26] HUSEIN:** So then, so this helps to like restore the contribution room for the taxation year?

**[35:30] ROSS:** That's right. It restores the contribution room. The plan administrator has to notify the CRA that it's doing this so that the CRA can adjust your RRSP room correctly. And the nice thing about it is that even if you have, say, used up all of your RRSP room and now your RRSP room is being restored, that you're just going to get that new room. So it's a very unique mechanism that they came up with after what I suspect was a lot of hard thinking about what to do.

**[36:09] HUSEIN:** For sure. So, it seems like it's helpful, you know, clear about amendments. What are the impacts that these might have on the pension's lawyers or even administrators of those in the area?

**[36:18] ROSS:** Well, for administrators, it's going to make their lives a whole lot easier. The prior system was extremely frustrating both for the administrators and for their advisors because the cost of fixing an over-contribution or under-contribution was in some cases more than the dollar value of the error itself. This is a much more streamlined system and frankly it allows people to get back to their more valuable work and that they can deal with this I think in most cases relatively quickly and efficiently.

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**[37:00] HUSEIN:** And before we wrap up today's episode, we're going to do our Ask-Me-Anything segment with Ross to speak about questions related to pensions law. As our

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listeners know, one of the bonus awards members of our Lawyer, Patreon crowdfunding community is the opportunity to submit questions that they want to hear our guest answer on the show about our guest area of expertise. We do a call for these questions about a week or so on our platform before the recording. So if you want to learn more about how you can become a supporter of our show and submit your own questions and get other awards as well, you can check out our crowdfunding website, which is [www.lawyerepodcast.com/patreon](http://www.lawyerepodcast.com/patreon). That's [www.lawyerepodcast.com/patreon](http://www.lawyerepodcast.com/patreon) for more information.

**[37:39]** Okay, so Ross, a bunch of interesting questions this week. And the first question that we have for you is about division of powers issues in a sense. The question is, “How do provincial and federal legislation differ concerning pensions and benefits plans in Canada?”

**[37:56] ROSS:** That’s an interesting question because they look conceptually very similar. If you look at the common law provinces, the statutes are conceptually similar. They differ in small details and in some cases, larger details as well. Quebec, of course, being civil law, takes a completely different approach, but even its principles are consistent with the other provinces.

**[38:25]** Where it gets more complicated for anybody who’s providing a pension is, well, if I have employees across the country, what rules do I apply? And so, for example, if the plan would be registered where the plurality of members is located, and there is a cross-country jurisdictional agreement that allows for the application of the jurisdictions of registrations, rules in some areas, and then in other areas, it differs to the province of employment. So, it’s a bit of a mix. So, you end up applying similar rules sometimes on one set of rules applies to everybody, sometimes jurisdiction of employment, a very Canadian solution.

**[39:17] HUSEIN:** Yeah, fair enough. And so in terms of like how they look, you said they conceptually look very similar, like, are there errors in which they differ?

**[39:27] ROSS:** They differ in terms of where they focus, just as an example. And this is not about the Feds versus all the other problems that I’m just doing a one-off comparison. The federal legislation says very little about how you transfer assets between plans. So, for example, if you and I sell each other a business and buyer is supposed to take a pension plan, some pension assets with it, how do you move those assets? You need regulatory approval, but the federal legislation says very little about it.

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**[40:06]** By comparison, if you look at Ontario, Ontario has a very detailed code around what has to be done when in order for the regulator to grant its consent to the movement. And similarly, the federal marriage breakdown rules are very small. What do you do with your pension entitlement in the event that you and your spouse separate or divorce? Federal rules are very, very confined. The provincial rules tend to be highly prescriptive, saying exactly how you go about valuing them and what you can do, can you transfer to your spouse or not.

**[40:45] HUSEIN:** Next question is how about say, if any, do employees have the direction and strategy of their employer's pensions plan?

**[40:54] ROSS:** It varies. In some cases, the employees have no say in it. So, for example, in a traditional defined benefit plan, the employees would typically have no say in it. The employer does everything, just does it on its own. If you look at a defined contribution plan, the employees will frequently have some say in it, particularly in what they invest in. The plan will have a menu of options that they can choose from and they can choose within that.

**[41:30]** And then there are other ways that employees get involved. In the private sector, some plans have what are called advisory committees, which are member committees that essentially are a pipeline into information of various kinds of other plan. And they're created by statute.

In the public sector, then, and in some union plans, you get into true joint governance, where the administrator is, say, 50% member representatives, 50% employer representatives. And it's not direct member democracy, but there are representatives there who are there specifically to advocate for the members what their interests are.

**[42:19] HUSEIN:** I know that it's directly analogous, but this kind of makes me think of like how there's corporations and there's like shareholders, and shareholders have some rights, but they don't get to kind of run the show per se. Have there been issues where some of the plan members or the representatives have taken issue with the overall direction strategy of the board?

**[42:44] ROSS:** I can't think of any plans that have had something as large scale as that. There are lots of situations where plan members or group of plan members is concerned about a particular issue as opposed to the overall direction of the plan. The Canadian plans, frankly, are pretty well run. I think that plan administrators really do try to listen to the stakeholders, whether they're formally required to or otherwise.

**[43:20] HUSEIN:** The next question is, tell us more about the role and responsibilities of pension plan administrators and the potential liabilities.

**[43:28] ROSS:** The easy way to think about what an administrator does is to think first about what an employer does in a pension plan. The employer's obligation is to contribute in accordance with the plan terms. And if it's a private sector plan, the employer typically also determines or has control over what are the plan terms and are we going to change them and are we going to terminate the plan? That's really all the employer does.

**[44:00]** Everything else falls to the administrator. So that's typically referred to as administration and investment. Investment, we can get a handle on as to what that is. Administration is things like enrolling members, processing all of their personal information, calculating pensions, calculating pensions on marriage breakdown, paying out benefits correctly and on time, whether it's on retirement, on termination, or on death. So, it's essentially all of the minutiae of learning a plan.

**[44:37]** The potential liabilities are, first of all, on the financial side that they somehow missed that an employer should have made a contribution but didn't. That's a big potential exposure. Pension plans are subject to various regulatory filings that are all the administrator's obligation. This includes things like audit financial statements, annual information returns. If those are missed or they're late, there can be fines for those.

**[45:13]** The legislation imposes all sorts of requirements in terms of things like if you're retiring, you have to receive a statement of your options. What goes into that statement? When does that statement have to go to you? When you send it back, how long does the administrator have to process it? So, there are time limits on everything and requirements for content. If any of those are breached, that can give rise to potential liabilities. So it's on and on.

**[45:48] HUSEIN:** Last question that we have is what sorts of ADR, and ADR stands for Alternative Dispute Resolution, mechanisms are typically used to resolve pension-related disputes?

**[46:00] ROSS:** I think of there being two principal kinds of disputes. The first one is between member and spouse, where we're separating or divorcing, and what's the pension worth and who gets to have it. That is an area that has become much more developed in the last, say, 15 or 20 years that the rules under the applicable pension statute are far more detailed in terms of how you value the pension and what the various options are at heart for payment. So some of the ADR type work that has

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happened in those areas has probably fallen away. But there still is some because there's nothing worse than separation or divorce and trying to sort out who gets what, it's a highly emotional time.

**[46:54]** The second area is where a member disputes something about how the plan works. So, for example, I may read the plan and say, I get to join the plan immediately, but the administrator might read the plan and say, well, you get to join the plan after three months, let's say. A lot of very large plans have an informal mechanism for members to be able to come forward with a claim that something is wrong and to have it resolved, essentially offline that some people who weren't involved in the decision will look at what they have to say, they'll talk to the people who are involved in the plan and try to come to a solution that fits everybody.

**[47:45]** Though those plans, of course, tend to be larger, a 50-person plan just doesn't have those kinds of resources to bring to bear, but when you've got many thousands of people in the plan, you've got a large organization or a series of large organizations, and they together have the resources to do that.

**[48:04] HUSEIN:** So Ross, I think I speak for a lot of our listeners when I say that I really appreciate your thoughts and insight on these topics. With our aging population, thinking about pensions and pensions law is becoming a bit more top of mind for a lot of people. You help to illustrate some of the interesting aspects that you find about pensions law. As you mentioned, a lot of these cases and the values are becoming a bit more high-profile as well. So, we appreciate your thoughts and look forward to seeing you in touch in the future.

**[48:33] ROSS:** Thanks very much. This has been great fun. I really enjoyed this thing.

[Music]

**[48:43] HUSEIN:** And that's a wrap on our interview for today. Thanks for listening. On today's episode, our guest was Ross Gascho. You can learn more about him and his work at his firm's website, which is [www.fasken.com](http://www.fasken.com). And from about today's show, in relation to all the cases and legislation that we spoke about today, you can find those on our website, which is [www.lawyeredpodcast.com](http://www.lawyeredpodcast.com).

**[49:04]** And on our next episode will be releasing whatever bonus episodes, featuring Gina Alexandris. If you are one of the few people in the legal space who does not know Gina, she's an absolute icon in the professional development space. She's currently a certified coach and has held important lead roles at pretty much everywhere she's worked at, including the major of the attorney general.



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**[49:29]** She was the assistant dean at Osgoode Hall Law School. She was the senior director of the LPP program at Toronto Metropolitan University, a whole bunch of great experience and some great insights in the episode as well. So we're going to be speaking about lifelong learning and professional development, areas that she's very well-faceted to speak about.

**[49:47]** And because it's about this episode, we're going to be releasing a short version for the general public and a full extended cut for Patreon crowdfunding members. So if you want to listen to the full episode next week, check out our crowdfunding website. It's [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon). That's [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon). If you're subscribing, you'll hear all of our full bonus episodes, be able to get early access to all episodes and a bunch of other neat and affordable rewards as well, including the opportunity to make questions on our show as well.

**[50:18]** And we'll give a quick shout-out to some of our patrons both past and present, which include Mohamed Abbas Amarshi, Mark Asfar, Mike Rusek and Michelle Koerssen. Thanks so much for keeping the lights on at the podcast. And thanks more importantly for helping to share this knowledge on a wider scale.

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