Private Pensions – A Legislative Repsonse-Nova Scotia's Pension Benefits Act

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I. Introduction

At the 1975 spring sitting of the Nova Scotia legislature an Act Respecting Pension Benefits was introduced and passed.¹ The Act, though not proclaimed in force as yet, is expected to become operative sometime during 1976. When it does, it will be administered by the Minister of Finance.²

This article is essentially a specific review of the direction of the Act and an examination of its main areas in the context of the situation which now exists in relation to private pensions — the situation to which presumably the Act is a response. As far as possible, the peculiarities of the Nova Scotia pension situation have been used as the paper’s context. However, because of the scarcity of statistics relating to the whole area of pension plans in Nova Scotia, (a scarcity which Department of Labour researchers expect will be lessened once this Act gets into operation and a more concerted effort in this area of research will evolve) the Nova Scotia “picture” will be painted with the rather “broad brush” of general observations and particular commentary by individuals “close to the scene”, notably J.K. Bell, Secretary Treasurer of the Nova Scotia Federation of Labour, CLC, the most vocal and avid supporter of government regulation over pensions, and Percy J. Fleet, Department of Finance and Advisor to the Minister on Pensions. In terms of where other jurisdictions are going in pension legislation, the recent U.S. legislation provides an approach which is distinctive from this proposed Act and those of other Canadian provinces which are substantially similar to the Nova Scotia Act. In the context of alternatives for the future, it warrants some discussion.

In 1970, 39.2% of the Canadian work force was covered by private pension plans.³ In Nova Scotia 30% of those under pension

¹S.N.S. 1975, c. 14 (The Act was assented to on March 27, 1975).
²See s. 10.
³Statistics Canada, Pension Plans in Canada, 1970 (Catalogue 74-401. Ottawa:
plans were in private pension schemes. The Finance Department estimates that there are 1,000 private plans in Nova Scotia affecting at least 40,000 workers out of a work force of 264,000. However, it seems likely that no more than one half of these 40,000 will enjoy full private pension benefits upon retirement and a great number of the 40,000 will not receive any benefits at all. This is because of high labour mobility (most estimates indicate that no more than 20% of the work force stay with the same employer during their working life and about 70% of the work force change jobs more than twice) and because most employees who do move from one employer to another do not keep up the pension plan they had in the former employ — either because they cannot due to not having met vesting requirements of the particular plan or because they choose not to and voluntarily withdraw from the plan.

Private pension plans are government regulated in five Canadian jurisdictions — Alberta, Saskatchewan, Ontario, and Quebec as well as the federal Pension Benefits Standards Act which applies to undertakings in federal jurisdiction. The Acts are all substantially similar and are designed to be — so that the minimum standards they set will be readily applicable to all plans within these jurisdictions. The Ontario Pension Benefits Act became law in 1965 and other jurisdictions have more or less adopted the Ontario Act making little more than the necessary legislative adjustments. The Pensions Benefits Act for Nova Scotia is, in essence, a rewrite of the Ontario Act — with a notable difference in relation to who is to administer the Nova Scotia Act.

Until the Act, there was virtually no legislative control over private pension plans in Nova Scotia. To be eligible for taxation deductions of pension contributions and income, a private scheme must be registered with the Department of National Revenue, and there are certain standards which must be met but other than that, control over private plans rests with the private sector. This control, in turn, is exercised virtually exclusively by the employer and/or the carrier who administers the pension funds. The quantity of

Information Canada, 1972) at 12, table B.
4. Id. at 11, chart 2.
employee or employee/representative control or participation in administration is minimal. In any case where such participation does exist, it is more illusory then real.\(^8\)

So, generally, a situation existed in which a legislative reaction was apparently necessary. Many employees have no pension plan at all. Employees, whom pensions are specifically designed to benefit, have no "say" in how pension funds are being handled when a plan does exist; and a significant number of employees under pension plans have no assurance that they will, in fact, upon retirement, receive a pension — either because there will be no funds to pay it or because, for any of a number of reasons, they will not be eligible to receive a pension.

Throughout this article's review of the Act, there will be consideration of the question: How will this legislation meet this situation in relation to regulating private pensions? — a situation which has elicited editorials like the following:

Private pension plans are a mysterious grab-bag. Many of them were designed to keep the worker with the company throughout his working life and are therefore less than satisfactory at a time when the work force is highly mobile and is being urged to be more so. Some have severe limitations. In others, if a company goes broke or bankrupt or is merged with another company, the employees may lose part or all of their benefits.\(^9\)

II. Purview of the Act

In terms of providing for private pension plans for all employees — presumably by compelling employers to so provide — the Pension Benefits Act does not require either that pension plans be set up by employers, nor does the Act require that an employer once having set up a plan continue it. The Act, by s. 17(7) defines what shall be done with benefits to which present or former employees have become entitled if the plan is terminated or wound up ("Wound up" presumably refers more specifically but probably not exclusively to the situation per s. 19(1) where the Superintendent of Pensions deems or declares a pension plan ended). It is well to note that s. 17(7) refers to employees who are entitled to a deferred life annuity and by s. 17(1) that is only those employees who have worked for ten years and reached the age of 45 unless their particular plan provides for a lower requirement before entitlement (s. 17(3) (a)).

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\(^8\) A general impression one receives from talking with Union officials.

\(^9\) The Globe and Mail, October 13, 1973 at 6 (editorial).
Section 17(8) allows for the possibility of a reduction of the benefits due under a "deferred life annuity" if the plan is one which existed before the Act comes into force and which had not provided for advance funding. Regulations will prescribe the number of years such an "unfunded" plan has to "catch up" on its funding. (In the Ontario Act which became effective in 1965, it was fifteen years or 1989 if the unfunded situation resulted from an amendment after 1965). The regulation is permissive, and the reduced rate of benefits will only apply to benefits accrued or retroactively given in relation to a time period before the Act's qualification date.

In any case, s. 17(7) and (8) do not refer specifically to present employees who have not become entitled to a "deferred life annuity" i.e. those who have not met the "45-10" rule. Unless regulations are passed under s. 24(e), such employees will have to depend on their common law rights and the terms of the plan they are under to "get back" their own contributions or those of the employer. If the plan is one which has not "caught up" in its funding obligation, the employee may find that there are "insufficient funds" to repay whatever amount he may be entitled to. This is not to be unexpected if the reason for the plan winding up or terminating is the insolvency of the employer.

The unilateral power of an employer to terminate a pension plan exists. The possibility of an employer doing that just before the bulk of his employees reach the "vesting" ("45-10") period has not been guarded against. A replay of the tragedy in 1957 when Dominion Steel and Coal Company dismissed twenty employees just before their vesting date may no longer be possible¹⁰ but a revision of the same tragedy can be effected — not by unilateral dismissal — but rather by unilateral termination of their pension plan.

III. Administration

The Act will be under the administration of its chief officer, the Superintendent of Pensions (s. 5(1)) with such officers and employees as are necessary. Section 6(1) specifically gives the Superintendent the power to engage services of "counsel, accountants and other experts". In Ontario The Pension Benefits Act, (s. 2(1)) designated the already existing Pension Commission

¹⁰ Trade Union Act, S.N.S. 1972, c.19, s.51(3) (d).
as administrator of their Act. Presently, the Commission has a complement of nine, one of whom is its administrative officer, the Superintendent of Pensions and an Executive Officer. They work with a staff of nineteen. It is expected that the Nova Scotia Act will be administered by the Superintendent, an actuary and an Executive Officer. It will be interesting to observe whether even the most fundamental administrative tasks which the Act will require in relation to approval for registration and over-seeing funding requirements can be competently carried out by a three-person administration. In terms of policy orientation and innovation, it appears (from the annual reports of the Ontario Commission) that the Pension Commission in Ontario is divided seven to two — the Superintendent and the Executive Officer handling day-to-day administration and the seven functioning as a working policy committee. One gets the general impression that the non-appointment of a Commission for Nova Scotia is a reflection of the rather low priority the Act has in the legislative scheme of things rather than a reflection of any planned alternative to the Ontario administration (since in most other respects, the Ontario Act was copied slavishly). This impression is reinforced by Department officials who anticipate that the position of Superintendent will be an addition to an already existing position within the Department of Finance.

Section 13 of the Act provides for the establishment or designation of an agency for the “purpose, among others, of receiving, holding and dispersing pension benefits credits under the Act”. Such an agency could be needed when by s. 17(7) and (8) a plan is terminated or wound up and the provisions of the section regarding what is to be done with the benefits must be complied with or generally when a function arises by reason of regulations made in reference to s. 24(1).

A union official objects to the wording of the section in that an agency can be established or designated. He believes for the Act to effectively protect these benefits once a plan is discontinued, the benefits must be handled by the administrators of the Act. However, he believes, with the option to designate an agency, that is exactly what will be done. It will be (in his words): “. . . just one more political plum for government to hand out.”11 Section 10 provides for the Superintendent’s responsibility to the Minister.

11. Id.
IV. Coverage of Act

The Act is designed to cover all pension plans existing or being established by employers of employees in Nova Scotia except those plans in which an employer has no contributing obligation (s. 15(1)) unless such a plan is a supplemental one which is defined by s. 2(n) as one which has as a condition precedent membership in another pension plan (s. 15(3)). By s. 15 (1) and (2) all plans are required to be filed with the Superintendent of Pensions in order to be registered and must maintain thereafter the qualifications for registration as prescribed by the Act and its regulations. If the plan so qualifies a certificate is issued (s. 16).

The Act's provisions are designed to also apply to pension plans for each province which by s. 2(a) is a: "... province or territory of Canada that is designated by regulation as a province or territory in which there is in force legislation substantially similar to this Act." Presently, Ontario, Alberta, Saskatchewan, Quebec, and the federal government have Acts substantially similar. Section 8 gives the Superintendent the authority to work out reciprocal registration, audit and inspection agreements with these jurisdictions and to generally facilitate uniformity of pension standards.

The advantage of uniformity of legislation is obvious from the employer's vantage point. He can set up a pension deal for all his employees knowing that he will not have to meet a variety of legislative criteria in each different jurisdiction. The advantages to the employee are less obvious except in so far as he may belong to a pension plan which allows for portability of his pension funds if he happens to move from one jurisdiction to another. However, portability is only rarely included in a plan and the proposed Nova Scotia Act does not require portability.

It is debatable whether the convenience of uniformity can be achieved only by "mirror-image" sameness in legislation and in any case, it would be most unfortunate if striving for uniformity obscured the vitality of the legislation and effectively prevented innovative amendments. This may already be happening as indicated in the comments of Department officials in relation to why the Act did not consider lower vesting provisions. 12 J.K. Bell comments that uniformity objectives will be a guise for perpetrating the "typical Nova Scotia legislative attitude that we should strive to

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12. See comment by Percy J. Fleet in text following note 16, infra.
catch up with other provinces’ legislation instead of striking out on an innovative route of our own”.

V. Appeal Procedure Under the Act

Although the Act is not designed to affect the “right” of the employer to, or not to, initiate a pension plan, it will directly restrict his freedom as to what provisions exactly a plan will contain and within certain defined limits it will dictate how a pension plan will be ended. The Act provides the employer with a rather sophisticated method of appeal from decisions in relation to compliance for registration, and deeming a plan to be wound up (s. 19). Section 22 allows the employer sixty days to send a notice of objection, with reasons, to the Superintendent, and requires that the Superintendent reconsider his opinion and either confirm or vary it. By s.23 if the Superintendent confirms his opinion or does not notify him at all, the employer can after 90 days and before 180 days appeal to the Court of Appeal. The Court will have complete review authority and its decision is final. The Superintendent must abide by its decision.

It would seem that the Act provides employers with an avenue of review which is atypical among regulating Acts which almost invariably have privative clauses. The “whirl of judicial diffidence and exemptions from liability”, 13 which up to now has been an indication of the Court’s attitude, should be a source of some assurance to the employer that the “ear the Court lends” will not be an unsympathetic one.

VI. Eligibility Provisions

The Act defines an employee generally as someone who has worked for an employer for six months (s. 2(b)). However, in setting down criteria for registration, it is nowhere required that an employer of employees must make his plan available to all his employees who come under the Act’s definition. Therefore, even under the Act, two situations are possible in relation to eligibility: 1) An individual plan can specify a longer time period than six months before an employee can start participating in a plan; or 2) There can conceivably be established discriminatory eligibility criteria which will not prevent the plan from being registered.

While it is reasonable to expect that discriminatory features of a plan would result in the Superintendent’s rejection of the plan — if for no other reason than they are illegal under the Human Rights Act, it is not unreasonable to suspect that much discrimination does pass the vigilance of pension act administrators. Statistics Canada reveals an enormous disproportion between retirement age, benefit rates, and especially disability and survivor’s benefits for men as for women and these statistics were compiled in relation to all plans in Canada including the five jurisdictions which had Pension Benefits Acts in 1970. In any case, there is nothing in the Act which can regulate the level of the age criterion itself.

VII. Vesting and Locking - in Provisions

Section 17(1) of the proposed Act is designed to ensure that, under certain conditions, the pension of an employee will be preserved if either he leaves the employment or for some other reason his participation in a pension plan is terminated before he reaches retirement age. This preservation of pension rights — vesting — will result in the employee being entitled to a “deferred life annuity” (s. 2(d)) upon retirement.

Specifically, the section requires every pension plan to “contractually provide” that if a member of the plan is in the service of an employer for a “continuous period” (s. 2(1)) of ten years or has been a member of the same plan for that period and has attained the age of 45, he will be entitled to the deferred life annuity upon retirement whether he leaves the employment or stops participating in the plan. So, if an employee “sticks with” a job for ten years and reaches the age of 45, he will have vested rights to his pension funds from then on — that will include his own and his employer’s contributions. Section 17(3) (a) recognizes that this vested right may, by the terms of the plan itself, be provided at an earlier period of time or at an earlier age. The fact is that on a Canada-wide basis in 1970, 91.8% of pension participating employees — not already under legislation — did have vested rights and 76.4% of these plans had earlier vesting provisions than the “45-10” rule. Assuming the Nova Scotia situation to be roughly similar, the vesting standard laid down by the Act will ensure that additional benefits be extended to 23.6% more employees — the

14. Supra, note 3 at 44-49.
15. Supra, note 3 at 23, table 1.
8.2% with no present vesting rights and the 15.4% with later vesting rights than the Act will require.

In reality, however, the benefits of vesting rights were far less far-reaching than statistics would indicate. In practice by far the majority of workers voluntarily chose to forfeit employer contributions and withdraw their own when they left their employment before retirement — whether or not the right to the benefit was vested.\textsuperscript{16} The Act, to actually effect the preservation of pensions on a wider scale than already existed, had to somehow ensure that employees would, in fact, take advantage of these vesting provisions. This was accomplished by s. 17(c) which effectively forces an employee to be prudent about his funds. Once an employee becomes entitled to a deferred life annuity under the Act — \textit{i.e.} “45-10” requirement — he is not entitled to withdraw any of his contributions under the plan. They are “locked in” and remain there and shall be applied to his deferred life annuity. There are exceptions:

1) The employee may withdraw voluntary additional contributions (s. 2(o)) \textit{i.e.} ones which the employer does not have to “match”.

2) By s. 17(3) (b) he may receive the commuted value of the deferred life annuity to which he has become entitled — \textit{i.e.} which has vested and which includes his own and employer’s contributions — if the amount of this annuity upon retirement would be less than $10.00 a month and was only payable in his life time — \textit{i.e.} did not have any survivor’s benefits provisions.

3) He may “cash in” up to 25% of the commuted value of his deferred life annuity and receive a lump sum either upon termination of his employment or participation in the plan or at any time before retirement.

4) By s. 17(5) and (6), the deferred life annuity to which an employee is entitled may be replaced by an annuity which is not a “match up” of the employer and employee contributions (s. 17(1)) but which makes allowance for an annuity to the employee’s survivor or his estate; or allows for mental or physical disability payments, in part or total replacement of the annuity; or allows for an early retirement annuity (with certain conditions).

How realistic is a “45-10” standard in this age of high mobility — mobility of both employers and employees? Or for that matter, what is the “magic” of 45 and 10? The CBC public affairs TV program on pensions “That Wonderful Day When I Reach 65” \textsuperscript{16} \textit{Supra}, note 13 at 8.
depicted the widespread tragedy of workers deprived of pension rights even though they had worked in jobs which had pension plans for most of their lives. The Ontario Pensions Commission in its 1972 annual report issued a “Green Paper” proposing that the Act’s vesting provisions be lowered to five years of service and age 40. This working paper recognized the social arguments for changing the standard — for the sake of the individual employee and the society’s welfare. It acknowledged the logical basis for requiring immediate vesting when pensions are considered a form of deferred pay but resisted proposing immediate vesting because it would necessarily involve 1) unwarranted additional contributions from employers and employees 2) probably lower benefits to those who do not get a benefit from immediate vesting and 3) creation of a great number of small pension benefits which would be prohibitively expensive to administer. Thus far, these assumptions against immediate vesting have gone more or less unchallenged by proponents of immediate vesting. In terms of administrative efficiency, however, it would seem that ten years and age 45 (or five years and age 40) more than allows for even the most prohibitive administrative costs when one considers that an employee can amass an appreciable amount of pension credits in ten or five years. In terms of additional cost, the new U.S. Act which contains rather drastic provisions for vesting in relation to what existed in most plans before the legislation, estimates that additional cost will be moderate and cost was rejected as a factor which would impede plan growth. In any case, the cost argument can only be taken so far before it becomes a reason for no pension at all. Because of apparently negative ‘feedback’ from employers and carriers of pension funds, the proposal of the Commission which was expected to become an amendment in 1973 still remains at the proposal stage. Percy J. Fleet, Advisor to the Minister on the matter of pensions, indicates that until Ontario adopts lower vesting standards, Nova Scotia will not — in the interest of uniformity. He felt that cost to employers is an even more pressing reason for not lowering the requirement in Nova Scotia than it is in Ontario.

VIII. Employee’s Lack of Control

The disproportion between an employee’s stake in a pension plan

17. Ontario Pension Commission, Ninth Annual Report (1972), Appendix B.
and his control over it was the subject of a research paper. The paper considered the employee's lack of control in terms of knowing that the pension benefits would indeed be available when he was eligible to receive them \textit{i.e.} funding security; the employee's abstraction from the actual investment performance of funds and his total lack of any decision-making power in the administration of his pension plan.

Timid unions have failed to assert the employee's rights to control the administration of his pension. The common law is a whirl of judicial diffidence and exemptions from liability. Registration under the \textit{Income Tax Act} is voluntary at the employer's discretion, and lower taxes from the employer require higher levies on other tax payers, so the value of the Act's bought virtue is questionable. The alternative to legislated protection of pensions is poverty for many retired employees. The obvious remedy is the passage of a Nova Scotia Pension Benefits Standards Act.\textsuperscript{19}

This conclusion will serve as a locus for reviewing the major provisions of the Act regarding funding, investment regulation, disclosure requirements and administrative control of pension plans.

\textbf{IX. Funding Provisions}

The "problem" with pension plans in relation to funding was that there existed two "unfunded methods" for employers to cover or meet their contributions in a fund. These two methods — 1) terminal and 2) pay-as-you-go, when used by employers, were a constant source of insecurity for the employee in terms of having a pension plan. By the terminal method the employer discharges his total liability at the date of retirement; by the "pay-as-you-go" method, the pension is paid directly from the employer's working capital when the pension becomes due. There is no fund and no carrier. This plan has been derisively referred to as the "pay-if-you-can" method. With either method, insolvency of the employer could shatter the plan. The carrier had not the money and the employee was in the position of unsatisfied debtor against an insolvent or bankrupt employer. The Act effectively outlaws both methods and each pension plan must meet solvency requirements which are premised on the requirements that there be used some method of advance funding, \textit{i.e.} assets available for all pension credits already accumulated by employees. Section 18(1) (a)

\textsuperscript{19} \textit{Supra}, note 13 at 36.
specifies that there be funds for "all pension benefits (s. 2(f)), deferred life annuities (s. 2(d)) and other benefits".

The specific solvency tests are to be prescribed by regulations. Ontario Regulation 654/4 outlines the solvency requirement "test" that Act requires. More accurately, it outlines what the administrators of the Act will require to be satisfied that a plan is solvent. There shall be a report made every three years: the report must certify 1) estimated cost benefits for the next succeeding year and the rule for computing such cost in subsequent years until the next report 2) a "run down" of any surplus or "experience deficiency" (s. 2(c) describes this as being a deficiency at that time, i.e. at review of the plan for the report) less any special payments required to be made in future because of a previous deficiency 3) special payments required to liquidate a deficiency over a term not exceeding five years and 4) any such additional information the Commission requires. Amendments to the report are to be made if the Commission is not satisfied that the report was prepared using "assumptions which are adequate and appropriate and methods consistent with the sound principles established by precedence or common usage within the actuarial profession". It should be noted that the report is to be made up by an actuary or, for certain plans, by an accountant or person authorized by the carrier of the plan. Furthermore, by Reg. 654/7, every pension plan shall be deemed to be solvent if it is fully or provisionally funded — the latter being one which is not funded but has provisions for special payments to liquidate deficiencies. Mercer and Coward indicate that the funding certification will not be seriously challenged for "... provincial pension authorities do not intend to prescribe actuarial assumptions and methods and ... normally the certificate of an actuary ... will be accepted".20

As to solvency, there is probably no reason to seriously question the standards of the actuarial profession. However, there is another very significant facet to funding which apparently the Act does not intend to regulate and that is the way in which contribution obligations to the plan are to be divided between employer and employee. Almost invariably, the employer's obligation will be flexible and will thus rise and fall with the fortunes of the fund: the employee's contribution, on the other hand, will be fixed. If the

plan performs at least adequately, the cost to the employer will probably decrease.

X. Investment Regulation Provisions

Douglas Fullerton, former Chairperson of the National Capital Commission has stated:

Many pension funds are run by company executives lacking professional investment experience. Conflicts of interest abound. Many firms use the buying power of their pension funds to strengthen their business connections; governments use theirs as a convenient dumping place for their bond issues. Few pension funds ever expose their income record to public (or even employee) view or apply the most elementary performance tests. Bad management is able to conceal its mistakes, hindering corrective action.\(^{21}\)

One labour leader states that the Nova Scotia situation is every bit as dismal if not more so. He believes that the average investment return is far lower than it could be, using even the safest investment criterion. In terms of performance review, what there is is inadequate. Unions have been able to get only meagre disclosure commitments from employers; and membership on advisory boards is as far as they have come to being able to direct how the investment will be handled in the first place. He contends that such boards have little power — being more or less “window dressing”.\(^{22}\)

Whether this may be overstating the case, or not, there is no paucity of “real life” examples which do give rise to some uneasiness about investment practices in relation to pension funds.\(^{23}\) Unions are, to some extent, involved in the administration of only about five hundred out of the more than twenty thousand private pension plans which exist in Canada.\(^{24}\) Thus, there are a great many plans whose investment practices go unregulated by any body representing the peculiar interests of the employees where

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22. J. K. Bell in personal interview.
23. Toronto and Montreal policemen pension funds yielding 4% interest subsidizing the municipalities; see Finn, *supra*, note 21 at 356. Dalhousie Fund substantially “sunk” in Cape Breton bonds returning 2 1/2%; see Fichaud, *supra*, note 13 at 21.
their interest might differ from that of the employer or carrier of the plan.

Section 18(1) (c) states that a pension plan shall contractually provide for "investment of pension fund monies in the securities and loans prescribed by the regulations".

Ontario Regulation 654/14 basically prescribes that funds can be invested in or loaned to those same investments and loans that are open to an insurance company governed by any of the appropriate regulating acts. In addition, 1% of the fund may be invested in real estate or leaseholds in Canada but only for the producing of income; 7% may be invested in investments or loans not authorized by the Act. Certain "improper" loan practices are prohibited — those to wives and children of employers or directors, or to corporations controlled by them (presumably this would include the husband of such employer or director?!) to officers, employees or administrators of the funds, and to employees of the employers except for mortgages on their principal residence. Diversification is encouraged by limiting investment in and loans to any one business entity or person to 10% of the total value of the fund.

However, the apparent thrust of the regulation to prevent the concentration of funds in any one investment or loan and to prevent investments or loans likely to give rise to conflicts of interest is not carried through to a) pooled, segregated or mutual funds; or b) the shares of a corporation if its assets are at least 98% cash, investments and loans, if it does not issue debt obligation and obtains at least 98% of its income from investment and loans — and these funds generally would "fit under" the restrictions this regulation imposes. In effect then, investment up to any percentage of the total value of the fund may conceivably be invested in the company of the employer or administrator. J. K. Bell is not impressed by the investment regulations of the Ontario Act since by this latter provision he believes the Act is reneging on the very control which was required to prevent the self-serving investment of pension funds. He states that the requirements of the regulation can easily be complied with while still continuing the very practices which made the Fullerton statements an accurate picture of investment practices which now abound.

Nowhere do the Act or the regulations under it attempt to impose any performance standards on the investment practices; certain unwise practices such as too great a concentration of funds and certain conflict of interest loans and practices are prevented but in so
far as Fullerton’s statement is an accurate picture of the performance of most pension funds, the Ontario Act does not change the “picture” nor will the Nova Scotia Act if it adopts the Ontario regulations (which it is expected to do).

XI. Disclosure Requirements

The Act provides that each employee must be given a written explanation of the pension plan in which he participates — its terms and its conditions and an explanation of his rights and duties with reference to benefits available to him — and any other information as may, by regulation, be prescribed (s. 18(1) (b)).

The experience of the Ontario Pension Commission was that this subsection (precisely similar) was ineffective. Members were not receiving the information to which they were entitled. In 1973 it was repealed and a more strictly worded subsection replaced it.25 The new provision requires that the employee receive the information within a certain time and when he leaves the employment entitled to an immediate or deferred pension he shall receive a written statement showing the pension benefits to which he is entitled. Whether the adoption of the old subsection was by design or inadvertence could not be ascertained. Whichever, it would appear that the objective of the subsection should be able to be met either way. Section 25(1) makes it an offence punishable on summary conviction to contravene any of the provisions of the Act or the regulations. A fine of between two hundred and ten thousand dollars ($200-$10,000) could be used as a rather effective deterrent.

Section 18(1) (b) is clearly confined to disclosure requirements in relation to description of the plan and the benefits rights of the employee under the plan. The Act contains no specific reference to disclosure requirements by an employer or carrier to the employee in relation to funding or investment practices or fund investment performance. Section 15(4) requires that information returns be filed with the Superintendent but these returns are not required to be made available to the employee. In any case, the Ontario regulation requirement is a simple bookkeeping and general information profile. If by s. 7(2) the Superintendent should choose to exercise his powers of inspection and inquire into an employer’s or administrator’s investment practices and performance there is no

25. Supra, note 17 at 4; see now The Pension Benefits Act, R.S.O. 1970, c.342, s.23(b) as am. by S.O. 1973, c.113, s.6.
provision that the employee will see any such information. J.K. Bell feels that the lack of any provisions making the employer or administrators of a fund responsible to the employee — at least by requiring them to keep him informed of how his fund is being administered — is indicative of the most serious weakness of the Act. That is, its attitude that the employee is somehow “incidental” in the over-all scheme of pensions — he “pays up” and he gets a pension — maybe — and that is the extent of his role.

It is certain that the Act — as far as disclosure requirements are concerned — is not responding to a recommendation of the Nova Scotia Federation of Labour CLC in its 1973 presentation to the Legislature. At that time they proposed as part of a pension regulation Act “[a] disclosure requirement to all employees showing at least annual receipts, disbursements, investment earnings, portfolio of investments and the assets and liabilities of the plan”.26

Certain government officials expressed the view that such disclosure requirements have low priority with individual employees who do not really care to know or find out how their funds are being administered. It may have been interesting to verify this assumption by providing them with the opportunity and the mechanism to find out.

XII. Portability

One area which is frequently discussed in relation to the state of private pension schemes has not been dealt with by the legislation — that is portability of pension funds.

Portability is basically the ability of an employee to carry his pension benefits with him when he leaves one employer for another. Presently, pension plans rarely contain provisions for portability. The most cited reason for not providing for it has been the administrative difficulties and inconvenience involved in transposing of funds from one plan to another. However, the magnitude of the difficulties has probably been overstated. The leading Canadian authority on private pension schemes has stated:

... This procedure is portability in a literal sense and to carry it out the various pension plans involved do not need to be similar. The actuaries of the first employer calculate the reserve held in the fund in respect of the employee, and all or part of this reserve ... is paid directly to the pension fund of the second employer.

The actuaries of the second employer calculate the amount of pension or the number of years of credited service which may be reasonably granted the new employee in respect of the transferred funds. Usually the details of the calculation method are contained in a reciprocal transfer agreement between the funds involved in the transaction.\textsuperscript{27}

The problem of jurisdictional differences among provinces cannot be seriously raised as an objection — at least in those jurisdictions where there exists uniform pension benefits legislation, \textit{i.e.} federal government jurisdiction, Alberta, Saskatchewan, Ontario, Quebec, and now Nova Scotia.

One writer suggests a further reason for why portability is not included in pension schemes: ‘‘... as an inducement to retain an employee by fear of his losing something to which he otherwise would have been entitled ...’’.\textsuperscript{28} If this is true, his reference to it as ‘‘archaic and morally indefensible’’ would seem appropriate.

The advantages to the employer and the employee seem obvious. The employer, in effect, gets rid of a liability which he may otherwise have to keep a record of for many years — until either the retirement or death of the employee; the employee enjoys the enormous financial advantages of his benefits being involved in the dynamics of a ‘‘live’’ pension plan.

On a larger view, in terms of an employee having some ‘‘say’’ in the fate of his benefits — whenever and by whatever means he achieves this — portability of funds would seem almost essential. In fact, if the objective of an employee participating in administration of his funds is ever deemed to be desirable or necessary, the administrative convenience argument can be turned on its head, and it will obviously be most inconvenient to \textit{not} have portability of pension benefits when the employee leaves a plan. It is interesting to note that unions — in Nova Scotia at least — place a low priority on ‘‘pushing for’’ portability. However, their’s is a tactical concern.\textsuperscript{29}

\textbf{XIII. Administration of Funds and the Employee}

The concept of a pension being a form of deferred wages is now a

\textsuperscript{27} \textit{Supra}, note 20 at 43.
\textsuperscript{28} The Law Society of Upper Canada, \textit{Labour Law Part II}, Part D \textquote{Pension Plans} at 16.
\textsuperscript{29} J.K. Bell says portability, with 75\% of salary at age 60, is what unions want to \textquote{press for} in the Canada Pension Plan and therefore they want to concentrate their efforts in that direction.
generally accepted proposition — the idea of pension schemes as "grace-and-favour" arrangements bestowed by an employer upon his employees no longer stands up in law or in principle. The deferred wage concept is at least implicit in the Canadian pension benefits legislation — although it may be inconsistently followed through in the provisions of an Act (especially in relation to vesting as a superimposed "right" which a pension plan must provide for rather than simply a logical consequence of a wage earner having a "right" to his earned wages).

In so far as wages once earned are subject to an ownership right on the part of the earner — and even if it is accepted that this right somehow does not arise until the benefits are vested — it should follow that anyone in possession of the funds has a duty to look after them. (In relation to those "deferred wages" not yet vested, the duty is no less so for it can not be said that the wage earner — the employee — has no interest in these funds until then — anymore than it can be said that a purchaser, for example, whose ownership is delayed until the full price has been paid can be said to have no interest in the article purchased — he does whether he or a third person possesses it). The administrator of a pension plan is, in effect, holding these benefits for the employer and owes to him a duty of care. The validity of this concept should in no way be affected or tempered by either of two situations 1) the administrator of the funds also happening to be the employer or 2) the funds having been placed directly into the plan by the employer (rather than the two step process of some going through the employee’s hands first).

Two possible ways that this duty of the administrator to the employee could be effectuated are: 1) a kind of fiduciary duty upon the administrator to handle the funds generally in the best interests of the employee and more particularly in accordance with certain conditions placed upon him by a) the contractual relationship between him and the employee or b) legislative standards imposed upon him. And 2) a measure of control in the actual administration of the funds a) by the employee which would, in effect, enable him to make sure that his best interests are being served or b) by government regulation for the same purpose.

As to the administrator’s fiduciary duty to the employee, Mr. Fichaud’s research has indicated that outside of legislative regulation, there is at best a begrudging concession that there is a duty at all and there is hopeless confusion as to just what standard of
care is imposed by this duty. The Act does impose upon the employer *qua* employer a certain minimum standard of care. However, the Act is effectively silent as to what duty exists towards the employee once the funds from a registered plan are in the hands of the administrator — be it the employer or an "independent" carrier of the funds. Provisions are there in relation to fund investment and dispersal but the general duty that an administrator must handle funds in the best interest of the employee cannot be extrapolated from these specific and confined regulations.

It could perhaps be expected therefore that the legislation, cognizant of the employee's stake in making the funds perform in his best interests and choosing not to impose a comprehensive standard of care on the administrator, would instead provide for some measure of on-going administrative control either by the employee — if he wished to exercise it or by government taking on a continuing role in the administration of the funds as a "stand-in" for the employee.

In terms of employee control, the Act does not make any allowance for it—neither "encouraging" it nor making it a pre-requisite for registration that a plan provide for it. Outside the Act, it was noted that the position of the employee in the administrative set-up of his plan is innocuous. What participation he experiences has been obtained through half-hearted union pressure; the fortuity of employer's "good graces" and recourse to the courts after a problem has arisen.

In terms of government being involved in the administration of pension funds, the Act does not explicitly provide for this except in so far as the Superintendent has the authority and the duty to require the trustee or insurer of a plan to furnish information necessary to ascertain whether the Act is being complied with (s. 7(2) (b)) and to "promote the improvement" of pension plans (s. 7(1)). It would require a fair bit of administrative elasticity to stretch these provisions so that they would cover the situation of the Superintendent adopting a continuous role in the administration of pension funds—likewise the authority of the Governor-in-Council to establish an agency (under s. 13) could not be used as a basis for such a role. The extent of government control in the administration of funds is restricted to its "watch dog" role in relation to investment practices. And this role is more or less confined to approval of the practices of the administrator — as long as they are actuarially and financially sound.
The energies involved even in this role may prove to be overwhelming (on top of the rather more involved function of controlling funding practices) if indeed the administration of the Act remains with only three persons — as Mr. Fleet anticipates it will. The Ontario Act provides for a Commission of nine and a specialized actuarial staff and, yet after nine years of operation under the Act, the Commission Report in 1973 stated that it has just recently been able to shift its emphasis and energies from supervision of funding to comprehensive supervision of investment practices.30

XIV. Other Provisions

The following is a cursory look at some other sections of the proposed Act which, while important, are not easily incorporated into a discussion of the legislation as a “response to unfavourable conditions which existed in relation to private pension plans”.

1. Provision in Relation to Payment Into and Out of a Pension Fund

Section 17(9) requires that a pension plan shall provide for calculation of contributions and benefits according to a formula prescribed by regulation. Section 20 specifically prohibits any “accrual of benefits” method which is not gradual or does not allow for spreading out of accrual in relation to the employees’ years of contributions. Also, the contributions by the employer and those out to employees must be set down and unless the Superintendent specifically approves, there will be no variation at the employer’s discretion.

The Ontario Act does not contain a section 20 but the same is accomplished by use of their regulation - making authority and their comparable section to s. 17(9) — Reg. 654/10, 654/11, 654/12 are, in fact, simply a reiteration of what the Nova Scotia Act lays down in s. 20.

2. Restrictions on Employee’s Use of Pension Benefits

Section 17(1) (b) provides that an “employee, his personal representative or dependant, or any person” cannot assign or otherwise alienate the pension benefits or deferred life annuity to which that employee is entitled. Effectively, this subsection

30. Supra, note 17 at 2.
prevents the benefits or annuity from becoming a security for any indebtedness of the employee and so saves his pension from the employee's possible financial imprudence.

Section 17(2) (a) and (b) control the relationship of the employee and employer in relation to the employer divesting himself of either his annuity or pension benefits by surrendering them or having them commuted. By s. 17(2) (c) an employee cannot withdraw his contribution while still employed with that employer or while the plan still exists even though his entitlement to an annuity has not yet arisen (i.e. not yet vested).

XV. A Further Comment

In 1973, the Ontario Pension Benefits legislation was amended and five major changes were effected.\(^3\) The Nova Scotia Act has adopted one of these provisions in the Ontario Act and therefore it is likely by design that the others were not adopted. Reference has already been made to the adoption of the old Ontario provision in relation to written explanations of a pension plan to employees instead of the new amended one.\(^3\)

Their s. 21, which is equivalent to Nova Scotia's s. 17, has an added subsection which provides that, when an employee becomes entitled to an annuity upon retirement or a deferred annuity upon termination of either his employment or the plan and it is found that his benefit credits under the annuity are less than the total of his contributions to the plan, his credits shall be increased at least to the level of his contributions.

The Ontario Act also contains a provision deeming that employer and employee contributions are being held in trust for payment into the fund. The section is designed to clarify the "status" of these contributions if the employer becomes bankrupt or is placed in receivership.

The Pension Commission had experienced some difficulty in ensuring that the status of a member in a plan did not change simply because the employer company merged or otherwise underwent major reorganization. Thus a declaratory type of section was added to state that "the employee members of the plan would not lose their pension rights".

Sections 17(9) and 18(2) of the Nova Scotia Act contain cross-references to pension plans filed for registration as required by

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31. *Id.* at 3-4.
Finance Department officials state that this is, indeed, a clerical error and should be reference to s. 15 instead of s. 14.

**XVI. United States Pensions Legislation**

The *Federal Employee Retirement Income Security Act* (Pension Reform Act) became effective law in the United States in September of 1974. The purview of this legislation is basically similar to that of Canadian pension benefits legislation, *i.e.* its approach is to set minimum standards to which private pension schemes must conform — yet in its setting of some standards, it has gone significantly further than any of the Canadian legislation. And none of them appear to be less comprehensive. The context in which the legislation was enacted is not inherently different from the general Canadian or particular Nova Scotian picture. The preexisting conditions which brought on the legislative response may have been more dramatic — because of sheer size — but the problems to which it is a response were much the same. Furthermore, the usual constitutional distinctions which are posited as making an American legislative approach inappropriate to the Canadian political situation are not a prevailing factor in relation to regulation of private pensions — this is especially so in view of the priority given to uniformity and reciprocity in the various provincial acts.

Like the Canadian legislation, the U.S. Act is "constrained to recognize the voluntary nature of private retirement plans"; and the standards which were felt to be an improvement of the pension system were nonetheless balanced against the added cost these standards would represent to individual plans.

As to added cost and the adverse effect it would have on the number of plans now available as well as the discouraging effect it would have on the growth of more private schemes, the approach of the legislators seemed to have been 1) a comprehensive cost analysis of what each standard would entail to determine if, in fact, the cost would be prohibitive, thus making the advantage the imposed standard would effect not worth it; 2) if the cost was prohibitive but only to a certain group, *i.e.* the "small employer", to build in flexibility to make special provision for them instead of "scraping" the standards altogether.

Some of the major features of the minimum standard legislation are:

Eligibility: Once an employee has worked for an employer for one year and has reached twenty-five years of age, he must be allowed to participate in the pension plan. If he has worked for more years than one before reaching age twenty-five, he must be credited with each year after the first year requirement up to a maximum of three years. The only exception to this past services benefits is if upon reaching age twenty-five the employee has immediate vesting of pension rights.34 Our Act does not establish any restriction on eligibility requirements.

Vesting: The legislation provides for three optional methods of plan vesting but all of them are designed so that an employee’s rights are at least 50% vested after ten years of service and 100% vested after fifteen years — whatever his age.35

Formula A: Gradual vesting — 25% of benefits are vested after five years of service, increased by 5% for each of the succeeding five years; 10% for each of the succeeding years after that so that after fifteen years of service, the employee has his pension benefits 100% vested.

Most commentaries on optimal vesting requirements have stated that even ten years is prohibitively high in terms of most employees who are classified as “mobile” or “highly mobile” — the seeming advantage of partial vesting after five years may be offset by the likelihood that this gradual “piece offering” of pension benefits will be used to make it decidedly non-profitable for an employee to leave his place of employment — a more subtle method of “pension slavery”.

Formula B: 100% vesting after ten years of service — no age requirement and no graded vesting.

Formula C: 50% vesting when years of service plus age total forty-five — increasing at 10% per year for the next five years thereafter — subject to a minimum of five years of service and a maximum of ten years for the initial 50% vesting.

Funding: Like the Nova Scotia proposed legislation, some form of advance funding which is “actuarially sound” must be provided for by each plan. The regulations covering these requirements are more specific than the Ontario regulations, for example, but the over-all standards set are similar.

Disclosure Requirements: Disclosure requirements seem to be more

34. Id., s.202.
35. Id., s.203.
cognizant of the place of the individual employee in the pension plan scheme of things. The administrators of the plan have a duty imposed upon them to:

1. File with government (specifically the Department of Labor) a detailed description of each plan and an annual report containing an independent public accountant audit and opinion and an actuarial statement of complete valuation. Government in turn makes these reports available to public inspection as matters of "public information".

2. Provide each participant with a description of the plan — such description being first subject to the approval of the Secretary of Labor, and each participant is to be furnished with a summary of the annual financial report.

**Portability:** There is no requirement that plans be portable. A task force is to study the situation in relation to portability and report within two years. However, there is a kind of "encouragement" for a plan to provide portability in that the Department of Labor will hold the funds on a tax-free basis until an employee finds a plan which will accept the funds and in addition the Department will provide the actuarial assistance required to have the benefits transferred.

There are two areas in which the U.S. legislation is decidedly distinct from the proposed Pension Benefits Act.

1. **Termination Insurance**

   Pension benefits legislation still leaves the participating employee with his greatest source of insecurity — that of not knowing whether the pension plan to which he belongs will continue in existence until his retirement or remain existent throughout his retirement. The U.S. legislation provides a new level of protection for pension participants whose benefits are vested — pension insurance.

   A Pension Benefit Guaranty Corporation has been set up under the authority of the Department of Labour. The pension insurance is compulsory and must be purchased for each employee by the administrator of the plan (eventually payments will be in relation to a company's "unfunded" risk, but initially there is a flat rate of one dollar per employer or $.50 if the plan is a multicompany union negotiated one). If an employee loses his vested pension rights because of termination of a plan, he will be entitled to receive either

36. *Id.*, ss.102-107.
100% of his average wages for five of his highest paid years of employment or a maximum of $750.00 monthly.37

2. Fiduciary Responsibility of Administrators

The legislation explicitly establishes a relationship of legal responsibility of the administrators of pension funds to the employee whose fund it is. Every fund is deemed to be a trust held for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable administrative expenses.

A fiduciary is widely defined as anyone who “exercises any power of control, management or disposition with regard to a fund’s assets or who has the authority to do so . . . ”. The standard of care for which any fiduciary is liable is the duty to discharge their duties with respect to the fund “solely in the interest of the participants and with the care, skill, prudence and diligence . . . that a prudent man . . . would.” There are specific “do’s and don’ts” for the administrator in relation to investment which indicate that at least the “most elementary performance tests” will be applied to an administrator’s actions.38

The liability of a fiduciary for a breach of duty involves civil or criminal prosecution; any “equitable or remedial relief as a court may deem appropriate”; and specifically personal liability to make good any losses to the plan and restore any profits which reasonably would have been made if the breach had not occurred.

XVII. Conclusion

The Pension Benefits Act is a legislative response to a situation. The situation is the anomaly of private pensions plans which are inherently designed to provide the employee with financial security being instead a major source of the employee’s greatest insecurity. There exists in relation to employees and their pension plan an inherent conflict which in great part created the anomaly in the first place. That is the conflict between commitment to the view that pensions benefits are a form of deferred wages earned and owned by the employee and yet in reality they are not only administered solely by the employer or a body designated by the employer but there is also resistance to any effort to have employers relinquish control

37. Id., ss.401-406.
38. Id., s.111.
over the funds. Problems were bound to arise. The employer’s interests, are, for the most part, not the same as the employee’s and often are directly contrary. And in any case, the dynamics of the employee’s self-interest in the funds can not be infused by another body.

In this writer’s opinion, the Act has responded to some of the effects of this conflict but has not provided for any steps to resolve the conflict itself. It is more or less a response to the symptoms but not the ailment. The Act prevents many of the prevailing practices which worked against the interest of the employee—including some of the employee’s own practices; and has prescribed a number of practices which will enhance the employee’s pension security. Throughout this paper it has been indicated that these measures, while they are positive steps, are less than comprehensive and too often political expediency in favour of employers has resulted in inadequate legislative control.

However, in the final analysis, the greatest weakness of the Act lies not with the inadequacy of the standards it imposes but rather its non-response to the basic issue—where does the employee “fit” into his pension plan. J.K. Bell says the Act considers the employee as a “merely incidental” member in the pension scheme. A complete review of the Act indicates that this is indeed the case. There is no provision for employee representation in the administration of the plan; no serious attempt to keep the employee informed of how his pension plan is performing; no concept of fiduciary responsibility of the administrator to the employee. Government itself has refrained from taking a role in the administration and control as representative of the employee’s interest.

Therefore, if, indeed, the “problems” with private pensions stem from the basic contradiction of having the primary interest in and right to the funds in one party — the employee — and yet control over the funds in another—the employer— the problem will remain unaltered by the Act. The negative effects may be lessened but the problem remains.

Unless concentrated pressure on government can force a reassessment of their role, employees are left to resolve the conflict — though the concerted effort of their existing unions or employee associations or through the initiation of an alternative method of pension planning free of employer involvement and free from the need for government protective legislation.