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Pensions: A Primer For Lawyers

I. Introduction

This paper has two objectives: first to describe the elements of a pension plan and, secondly, to illustrate the disproportion between the employee's stake in a pension and his control over the pension plan. The paper is concerned only with private pension plans, which covered over one-third of the Canadian work force in 1970.[1] It must be borne in mind, however, that many pensioned employees, for example, seventy percent in Nova Scotia, belong to public plans.[2]

Ontario, Alberta, Quebec, Saskatchewan and the Dominion have enacted minimum standards for private pension plans. As the statutes are substantially identical, this paper refers only to the Federal Pension Benefits Standards Act,[3] which applies to undertakings in the federal jurisdiction. The pensions of Nova Scotians not in the federal jurisdiction are regulated only by the Income Tax Act,[4] which specifies the standards required of pension

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1. Statistics Canada, *Pension Plans in Canada, 1970* (Catalogue 74-401. Ottawa: Information Canada, 1972) at 8.

2. *Id.*, at 11, chart 2. The following statutes are relevant: British North America Act, R.S.C. 1970 (App.) No. 5, s. 94A; Canada Pension Plan, R.S.C. 1970, c. C-5.; Old Age Security Act, R.S.C 1970, c. O-6.; Public Service Superannuation Act, R.S.C 1970, c. P-36.; Members of Parliament Retiring Allowances Act, R.S.C. 1970, c. M-10; Canadian Forces Superannuation Act, R.S.C. 1970, c. C-9; Civilian War Pensions and Allowances Act, R.S.C.1970, c. C-20; War Veterans Allowance Act, R.S.C. 1970, c. W-5; Defence Services Pension Continuation Act, R.S.C. 1970, c. D-3; Diplomatic Service (Special) Superannuation Act, R.S.C. 1970, c. D-5; R.C.M.P. Pension Continuation Act, R.S.C. 1970, c. R-10; R.C.M.P. Superannuation Act, R.S.C.1970, c. R-11; Veterans Benefit Act, R.S.C. 1970, c. V-2; Governor General's Retiring Annuity Act, R.S.C. 1970, c. G-15; Judges Act, R.S.C. 1970, c. J-1, ss. 23-33; Supplementary Retirement Benefits Act, R.S.C. 1970, c. 43(1st Supp.); Pension Act, R.S.C. 1970, c. P-7; Teachers Pension Act, R.S.N.S. 1967, c. 301; Public Service Superannuation Act, R.S.N.S 1967, c. 256; Members' Retiring Allowances Act, R.S.N.S. 1967, c. 181; Municipal Corporations Supplementary Powers Act, R.S.N.S. 1967, c. 196, ss. 16-19; An Act Respecting Pensions for Certain Officers, S.N.S. 1918, c. 22; Social Assistance Act, S.N.S. 1970, c. 16.

3. R.S.C. 1970, c. P-8

4. S.C. 1970-71-72, c. 63. The standards for registration appear in the Department of National Revenue's Information Circular 72-13R2, "Employees' Pension Plans", 19 June, 1974.

plans for the deduction from "income" of the contributions to, and the income of, pension funds. The Income Tax Act's requirements for registration of a "pension plan" are noted throughout the paper. The prerequisites for registration of a Registered Retirement Savings Plan and a Deferred Profit Sharing Plan are outlined in Appendix A.

II. Design and Costing

1. *Procedure*. Because the uninitiated employer has difficulty comprehending the infinite variety of pension schemes available he frequently consults experts at a pension consultant firm for advice. Thereupon the procedure is: (1) Design the plan. The principal criterion in the choice of design is the cost to the employer of the various alternatives. (2) Commission an actuary to cost the package. (3) If the cost meets the employer's approval, select an underwriter, appoint an administrative board, and apply for registration under the Income Tax Act.

2. *Types of Pension Benefit*. The frequency of the types of benefit in 1970 was:[5]

Type of benefit	% of plans		% of employees	
money purchase	52.5		4.9	
profit sharing	1.9		0.8	
flat benefit	4.6		15.0	
unit benefit				
final earnings		0.1		0.2
final average earnings		2.3		6.0
average best earnings		6.0		44.7
career earnings		29.5		24.1
total	37.9		75.0	
composite and other	3.1		4.3	
total	100.0		100.0	

Money purchase plans. A money purchase plan defines the contributions of the employer and the employee; the most common rate is a contribution of 5% of the employee's pay from both the employer and the employee.[6] This money is invested, and the

5. Statistics Canada, *Pension Plans in Canada*, *supra*, note 1 at 17, table D.
6. *Id*., at 42-43, table 14.

employee's benefit varies with the assets of the fund at his date of retirement. A genus of money purchase conceived by the Teachers Insurance And Annuity Association of America is the equity annuity plan; the money is invested in an equity portfolio of high grade common stock, the theory being that the portfolio, and thus the pension benefit, will appreciate with inevitable inflation.

The small employer, as the above statistics show, prefers the money purchase plan. This is because his costs are predetermined and the administration is unsophisticated. The plan finds a cool reception, however, from many unions and employees. There are two reasons for this response. First, employees see pensions as a security, not a sweepstake. They prefer a guaranteed benefit to the uncertain, though possibly higher, return of a money purchase pension tied to investment performance.[7] Second, money purchase discriminates against employees who joined the plan at an advanced age. Contributions of a 20 year old employee earn income for forty years more than do the contributions of a 60 year old. If both serve for five years, the benefit eventually paid to the 20 year old will be three times the amount of the benefit paid to the 60 year old.[8] This exacerbates the already volatile intra-union tension between young and old employees.[9]

Profit sharing plan. The employee usually makes no contributions. The employer's contributions are proportionate to the company's profits (for example "15% of gross profits exempting 20% of capital employed"). An employee accumulates "points" according to years of service and amount of earnings. Benefits from the fund are proportionate to the employee's total of "points". Because his liabilities fall with his company's fortunes, the employer has no difficulty funding a profit sharing plan. The employee, however, may be stranded in the worst of both worlds: a recession threatens both his present employment and his income after retirement.

Flat Benefit plan. The benefit is fixed in a dollar amount and does not vary with the financial performance of the fund or the Company, or with the employee's earnings. Typical formulae are "Benefit of

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7. This was the opinion of J. K. Bell, an eminent Nova Scotian trade unionist shared with Ralph Nader: R. Nader and K. Blackwell, *You and Your Pension* (New York: Grossman, 1973) at 61-62, 77.
8. See the tabulation of The Law Society of Upper Canada, *Labour Law Part II*, 1972, Part D at 6, table 1.
9. For role of the union, see *infra*, text accompanying footnotes 134 to 139.

$5 per month for each year that the employee worked over 1800 hours'' and ''$150 per month commencing at age 65, for employees with thirty years of service''. Only three percent of flat benefit plans credit the employee with a benefit of over $6 per month for each year of service.[10] Seventy-five percent of flat benefit plans are non-contributory[11] (*i.e.* the employee does not contribute). The employer's contribution is uncertain, being the difference between the employee's contribution (if any) and the monthly benefit multiplied by the number of months that the employee is expected to live after retirement. Flat benefit plans are especially popular with unions because the amount of the benefit is more comprehensible to the employee than with other designs of plan. The periodic renegotiation of collective agreements obviates the disadvantage of flat benefit plans — the decimation of the ''real'' benefit by inflation.

Unit benefit plans. Unit benefit plans cover 75% of pensioned employees. Their distinguishing feature is the variation of the benefit according to the employee's earnings. The benefit is calculated as: (i) a specified percentage: the most common is 2% or 1.5%;[12] (ii) multiplied by the number of years of service: a maximum of thirty-five years is common; (iii) multiplied by an earnings' base, which is, annual earnings of the employee at his date of retirement (''final earnings''); or average annual earnings of the employee over, for example, the five years preceding his retirement (''final average earnings''); or average annual earnings of the employee over, for example, his five most renumerative years (''average best earnings''); or average annual earnings over his career (''career earnings'').[13]

Thus, if an employee is hired at age 35, earns $10,000 annually until age 55, is promoted to $15,000 from ages 55 to 60, is demoted to $12,000 from ages 60 to 64, and then raised to $14,000 until his retirement at age 65: (i) under a 2% final earnings plan he receives 2/100 × 30 × 14,000=$8,400 annual benefit; (ii) under a 2% five year average best earnings plan he receives 2/100 × 30 × 62,000/5= $7,440 annual benefit; (iii) under a 2% five year average best earnings plan he receives 2/100 × 30 × 75,000/5= $9,000

10. Statistics Canada, *supra*, note 1 at 44-45, table 16.
11. *Id*.
12. *Id*., at 42-43, table 15.
13. Section 10 of the Dosco Plan in Appendix B has the effect of a career earnings plan.

annual benefit; (iv) under a 2% career earnings plan he receives $2/100 \times 30 \times 337{,}000/30 =$ \$6,740 annual benefit. Over 25% of unit benefit plans in 1970 were non-contributory.[14] Of the remainder the most common rate of contribution from the employee was 5% of his pay.[15] The employer contributes the uncertain deficiency of the benefit minus the employee's contribution.[16]

Because the final or best earnings of a successful employee are much greater than his average earnings, he is averse to the post-retirement reduction of income involved in a career earnings plan. As the decision-making power over pensions is often vested is such persons, there was a 1965-70 shift from career earnings to final and best earnings.[17] Under a final or best earnings plan, however, a sudden increase in wages (due, for example, to a new collective agreement) imposes an acute increase in pension liability on the employer; in the example above the employer's liability under an average best plan was \$2,260 per employee per year greater than under a career earnings plan. A local pension consultant thus stated that currently the most popular design in Nova Scotia is a career earnings plan that the employer may adjust upward *at his convenience*.

Summary. The principal difference between the plans is the variable which determines the amount of the benefit. The benefit varies: (i) under a money purchase plan, with the performance of the pension fund's investment portfolio; (ii) under a profit sharing plan, with the fortunes of the employer's company; (iii) under a flat benefit plan, there is no distinguishing variable; (iv) under a unit benefit plan, with the annual earnings of the employee.

3. *Eligibility*. To avoid needless bookkeeping for transient employees and the consequent costs of surrender charges from the underwriter of the fund, plans frequently require a minimum age or years of service before the employee may "participate" (*i.e.* before he may contribute or accumulate pension credits).[18] The age requirement is frequently the age of majority, to avoid complications with infants' legal status.

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14. Statistics Canada, *supra*, note 1 at 40-41, table 13.
15. *Id.*
16. A costing model is depicted, *infra*, text accompanying footnotes 91 to 93.
17. Statistics Canada, *supra*, note 1 at 17, table D.
18. See, for example, s. 3(a)(b) of the Dosco Plan in Appendix B.

4. *Intergration With Canada Pension Plan*. Generally, in 1974, the Canada Pension Plan required both the employee and the employer to contribute 1.8%, and permitted retired employees to recover 25%, of the first $6,600 of the employee's pay. This $6,600 (the "Year's Maximum Pensionable Earnings") escalates annually with the cost of living.[19] Thus both contributions and benefits rise with inflation. In practice many "non-integrated" private plans provide lower dollar rates of contribution and benefit than would be the case if there was no Canada Pension Plan. An "integrated" plan, however, *states in its formula* the reduction of its contributions and benefits according to the rates in the Canada Pension Plan. In 1970, 74.6% of pensioned employees were in integrated plans: 58.1% of private sector employees and 94.7% of employees under public plans.[20] The frequency of integration methods in 1970 was:[21]

Method of integration	% of plans	% of pensioned employees
benefit step rate	16.2	62.1
ineligible earnings	1.9	2.0
contribution step rate	10.5	2.1
benefit offset	0.7	2.8
other	4.1	5.6
(non-integrated	66.6	25.4
totals	100.0	100.0

Benefit step rate. Benefits on a fixed maximum portion of the employee's pay (commonly the C.P.P.'s Year's Maximum Pensionable Earnings: $6,600 for 1974) are reduced but not eliminated. The most common range of formulae are benefits of 1.26%-1.49% of the Year's Maximum Pensionable Earnings, and 2% of the employee's pay in excess of the YMPE.[22] Benefit step rate is feasible only with a plan that specifies the benefit — flat benefit and unit benefit plans — and not with money purchase and profit sharing plans which specify only the contributions.

19. See the Canada Pension Plan, RSC 1970, c. C-5, and amendments.
20. Statistics Canada, *supra*, note 1, at 34-35, table 8.
21. *Id.*
22. *Id.*, at 34, table 11.

Ineligible earnings. The structure is identical to benefit step rate except that benefits, and usually contributions, are eliminated on the fixed maximum. The exempt maximum of the employee's pay is usually lower than with benefit step rate. A familiar career average plan with ineligible earnings intergration is: "For each year of service, the employee shall receive 2% of the career average of this annual earnings over $1,500".

Contribution step rate. With money purchase and profit sharing plans the contribution, rather than the benefit, is reduced on the fixed maximum portion of the employee's pay; for example, "The employer and employee shall contribute 3.2% of the employee's pay for earnings up to $6,000, and 5% for earnings above $6,000".

Benefit offset. The three previous types of integration fix in dollars the exempt portion of the employee's pay at, for example, $6,600. Thus when CPP's Year's Maximum Pensionable Earnings rises to $6,700 to recompense the employee for the cost of inflation, the employee's private pension is not reduced for the extra $100; his total retirement income escalates with the cost of living. The benefit offset integration *raises* the exempt portion of the employee's earnings under the private plan to correspond with the YMPE; a higher pension under the CPP gives the employee nothing but lowers the employer's contribution under the private plan. In fact, because the CPP requires higher contributions to defray higher benefits, employees in non-contributory private plans *lose* money with each annual increase of pensions under the Canada Pension Plan. The 80,676 Canadians (26,515 of them in Government plans)[23] who bear these injustices may query the credibility of the Hon. Marc Lalonde, Minister of National Health and Welfare, who on November 26, 1973 told the National Pension Conference: "The simple fact is that CPP benefits *will* [Lalonde's emphasis] now be adjusted annually, in line with the total increase in the cost of living. In other words, whatever the pension is worth when you begin drawing if it will retain the same purchasing power over the years."[24]

Discriminatory effect of intergration. Integration operates on the same premise as a regressive tax: assess the poor at a greater rate

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23. *Id.*, at 34, table 8.

24. Quoted in Canadian Labour Congress, *Citizenship Month; February, 1974; An adequate Pension at Age 60*, Jan. 14, 1974, at 7. The Minister was referring to Bill C-224 which received Royal assent on December 12, 1973, but which did not

than the rich. Under the 2% career earnings plan with $1,500 ineligible earnings, noted above, the private pension of a man earning $30,000 annually is reduced by 5%; the pension of a man earning $3,000 is halved. Those least able to provide for themselves suffer the most.

Policy of integration. Both pension consultants interviewed accepted intergration as a matter of course. One stated that: "They [employers] only have a certain amount of money to give for pensions. You can't milk a dry cow. Whether the money is distributed under the Canada Pension Plan or a private pension shouldn't matter". The Canada Pension Plan need not be a mere detour for moneys otherwise destined for employees. The American Securities and Exchange Commission examined the mid-century growth of private pension funds, and found that "the chief impetus to pension fund growth, however, was the establishment of the Old Age and Survivors Insurance in the middle thirties".[25] The Hon. Judy LaMarsh, Minister of National Health and Welfare at the conception of the Canada Pension Plan, stated in 1964:

> [The CPP] is not intended to provide all the retirement income which most Canadians wish to have. People who now belong to pension plans — and increasingly, one may expect and hope, almost all Canadians — will make further provision for their retirement, beyond the Canada Pension Plan. . .The proper role of government is to provide a floor. In Canada, as in other countries, this floor can be expected to help people to be more pension-minded; it will thus increase, not diminish, the popularity of private pension plans.[26]

Optimally the CPP should make citizens more "pension-minded". This has not yet occurred.

5. *Past Service Benefits*. A man who is sixty years old at the inception of a pension plan has only five years to accumulate meagre pension credits. To ensure a higher pension the employer may contribute for his employee's past service. Because past service funding is costly the employee's past service credit is usually lower than his current service credit; for example, a new plan may provide a 2% career earnings for current and future service

remedy benefit offset integration. See now Canada Pension Plan Ammendment Act, S.C. 1973-4, c. 41.

25. Securities and Exchange Commission, *Survey of Corporate Pension Funds 1951-1954* (Washington: U.S. Government Printing Office, 1956), at 1.

26. The Hon J. LaMarsh, "The Canada Pension Plan", in L. Coward, ed., *Pensions in Canada*, (Don Mills, Ontario: C.C.H. Canadian Ltd., 1964), at 18.

but only 1% for each year of employment before the inception of the plan.

The federal Pension Benefits Standards Act requires the employer to fund his past service liabilities within fifteen to sixty years, depending on the nature of the liability.[27] Section 20(1)(s) of the Income Tax Act[28] and Information Circular 72-13R2,[29] paras. 11(b), 17-26 state the prerequisites for deduction of past service contributions: first, the plan must specify the current and future service benefit, thus excluding past service contributions for money purchase and profit sharing plans;[30] second, only a limited amount of the contributions are deductible.[31]

Neither Act requires the employer to fund past service; his discretion is intact. Because of its cost past service funding is rare and, when implemented, occasionally tragic. In the early 1960's a prosperous Domco Industries Ltd. had working captial of $9,700,000. The buoyant company introduced a pension plan and promised extensive funding for past service. After a spendthrift management and the mild recession of the 1970's had dissipated the capital surplus, the Italian syndicate which controlled Domco sought to "stop the hemorrhage" caused by its unruly past service liability. Domco wound up the entire pension plan, by then registered under Quebec's Supplemental Pension Plans Act,[32] and reduced or ceased payment of pensions to thousands of employees. After discovering that in several years he would retire without a pension, one man said: "It was a blow all right. But it was either that or they would have closed down the plant. What else can you do but carry on — unless you put a pistol to your head?"[33]

6. *Retirement Date*. In 1970 76% of pensioned males had a "normal retirement age" of 65; for 10% the age was 60. For 28% of women the age was 65; for 53%, 60.[34] Because Old Age Security and the Canada Pension Plan become payable at age 65, when the private plan permits retirement before 65 it occasionally provides a

27. R.S.C. 1970, c. P-8, s. 11(a); Pension Benefit Standards Regulations, S.O.R./67-328, s. 10, *as am* by S.O.R./71-76, schedule.
28. S.C. 1970-71-72, c. 63.
29. Dept. of National Revenue, Information Circular 72-13R2, June 19, 1974.
30. *Id.*, at para. 18 (a).
31. *Id.*, at paras. 19(a), 20, 21.
32. S.Q. 1965, c. 25.
33. "How Secure is Your Firm's Pension Plan?" The Financial Post, 3 March, 1973, at 8.
34. Statistics Canada, *supra*, note 1 at 44-45, table 17.

"bridge benefit". For example, instead of $200 monthly commencing at age 65, an employee retiring at 60 would receive from the private plan $250 monthly until age 65 and $175 monthly afterward.

Early retirement has been described as "probably the most emotional issue in the pension field today. Young employees are sure they are going to retire at age 55 or 60."[35] Unions press diligently for early retirement.[36] For many employees, however, the capture of early retirement is a Pyrrhic victory. Suppose a 60 year old employee has ten years of service under a 2% final earnings plan. His current annual salary is $10,000; his anticipated salary at age 65 is $15,000. His life expectancy is 75. If he retires at age 60 his annual pension will be 2/100 × 10 × 10,000=$2,000. Before death he will accumulate $30,000. If he retires at 65 his total receipts before death will be 2/100 × 15 × 15,000 × 10=$45,000. Thus early retirement cost the employee $15,000. But few plans stop here; most submit the employee to an acturial *discount* for early retirement. Thus s. 8 of the Dosco plan[37] would reduce the employee's $30,000 by a further 30%. For employers, early retirement of the workforce can be a lucrative investment.

7. Termination of employment before retirement: Vesting; Locking-In; Portability: Death and Disability

A consecutive estimate of labour mobility is that, before their retirement, 76% of 20 year old employees will terminate their present employment, 5% will die and 4% will become disabled. Only 15% will serve until retirement with their present employer.[38] What fate awaits the pensions of the wayward 85%?

(i) "Vesting" in the law. Most pensions are either unilateral contracts or bilateral contracts subject to a condition. The unilateral consideration or the bilateral condition required of the employee is service with the employer until retirement or until an earlier *specified* date, whereupon the pension "vests".[39] Until vesting, the

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35. Ian H. Ashford, of Imperial Oil Ltd.; quoted in The Globe and Mail, 1 May, 1973.
36. Canadian Labour Congress, *supra*, note 24.
37. See Appendix B.
38. Hamilton, *The Attorney's Role in Pension and Profit-Sharing Plans: The Challenge to Learn, Innovate and Advise* (1968), 22 Southwestern L.J. 417, lat 422.
39. See, for example, s. 20 of the Dosco Plan in Appendix B.

employee probably has no contractual right even to his employer's past contributions.[40] The Income Tax Act requires vesting only for plans under a provincial or federal Pension Benefits Standards Act;[41] thus most plans in Nova Scotia are exempt. The federal Pension Benefits Standards Act requires a plan to "contractually provide" for vesting after ten years of service and attainment of forty-five years of age.[42] The "forty-five and ten" rule has been the law in Ontario for almost nine years.[43] Two years ago the Pension Commission of Ontario recommended a reduction to "forty and five" [44] Labour,[45] the Globe and Mail[46] and even The Financial Post[47] have clamoured for "full, immediate vesting". Logically, any of the employer's contributions for a pension should pay for a pension. Nova Scotia, however, has no statutory requirement of vesting.

(ii) Vesting in practice. 91.8% of employees *not* under legislation are in plans that provide for vesting before retirement. 76.4% are in plans that match or better the statutory requirement of ten years of service.[48] Thus, it appears superficially that vesting legislation is unnecessary — employees are well cared for. But these statistics are misleading because the employee's contributions are not "locked in".[49] A pension is "locked in" when an employee cannot forfeit the employer's contributions. By a quirk of human nature the vast majority of employees prefer the "bird in the hand" of their own contributions in a lump sum to a future pension composed of employee and employer contributions. The younger the employee, the more blunted are his sensitivities to pensions; the more destitute he is, the more he desires liquid capital. If the employer's contributions are locked in the pension is safe. But the apparent magnanimity ends here, and it is interesting that government is the most niggardly of employers. In 1970 2.6% of all

40. The law is discussed in detail *infra,* text accompanying footnotes 170 to 260.
41. Circular 72-13R2, *supra*, note 29, at para. 9(c); W. Mercer, *Canadian Handbook of Pension and Welfare Plans*, rev. ed., L. Coward, (4th ed. Don Mills, Ontario: C.C.H. Canadian Ltd., 1972), at 75.
42. R.S.C. 1970, c. P-8, ss. 10(1)(a).
43. The Pension Benefits Act, R.S.O. 1970, c. 342, ss. 21(1)(a), 21(3)(a).
44. The Globe and Mail, 13 October, 1973, at 6 (editorial).
45. E. Finn, *The Case for Co-Management of Employee Pension Funds* (1973), 73 The Labour Gazette 356, at 356.
46. *Supra*, note 35.
47. "More Protection Needed", 14 April, 1973, at 6.
48. Statistics Canada, *supra*, note 1, at 23, table J.
49. See also s. 20 of the Dosco Plan in Appendix B.

employees not under Pension Benefits legislation and .2% of government employees (who are exempt from Pension Benefits legislation anyway) were in plans which locked in the employer's contributions. Only 3.7% of all employees, and .5% of government employees, were in plans which included the employer's contributions as part of the lump sum payment.[50] Of the remaining 93.7% of all employees, and 99.3% of government employees, a local pension consultant estimated that 90% elect to forfeit the employer's contribution on termination of employment.[51]

The repercussions were illustrated in an incident recounted by an eminent official of Nova Scotia labour, Mr. J. K. Bell. A 58 year old Nova Scotian needed cash to buy liquor. He could not withdraw his pension contributions while employed, so he quit his job, forfeited his pension, received and squandered his cash windfall. He then developed a heart condition but, as this was pre-Medicare and he had no job, he could not afford medical attention. J. K. Bell stated that employees occasionally quit jobs three or four times to obtain refunds of their contributions, and then live in penury after retirement.

The Income Tax Act does not require locking-in for plans not under Pension Benefits legislation.[52] The Pension Benefits Standards Act forbids commutation of 75% of the pension benefits.[53] Nova Scotia has no locking-in legislation.

(iii) "Pension slavery" and liberation of the employer's contributions. Plans with long vesting requirements "were designed to keep the worker with the Company throughout his working life".[54] If he terminates employement he forfeits the employer's contributions. From his experience in Nova Scotia, one of the pension consultants interviewed described such workers as "angry", "hotbeds of dissension"; "they want to leave, but they are tied to their jobs". An American comentator states: "The older worker who must forfeit his pension if he chooses to change employers is uncomfortably close to serfdom".[55]

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50. Statistics Canada, supra, note 1, at 56-57, table 25. Dalhousie's Staff Scheme, s. 15 is one of the exceptions that includes the employer's vested contributions in the lump sum.

51. Section 21 of the Dosco Plan in Appendix B gives the employee a second chance to "self-destruct" in case he initially elects the pension under s. 20.

52. Circular 72-13R2, *supra*, note 29 at para. 9(c).

53. For example, R.S.C. 1970, C. P-8, ss. 10(1)(c,d), 10(2) (a-c).

54. The Globe and Mail, 13 October, 1973, at 6 (editorial).

55. Schulz, *Pension Aspects of the Economics of Aging: Present and Future Roles*

The employer may unilaterally deny the employee his pension by dismissing the employee before vesting. In Nova Scotia this practice has prevailed especially in the garment industry. J. K. Bell cited a poignant example: in 1957 twenty employees at Dominion Steel and Coal Co.'s coaling station at Pier 9 in Halifax were nearing their vesting dates. To avoid pension liabilities Dosco closed the station and all the employees lost their jobs. Most of the workers were over sixty years of age, but as none had met the vesting requirements[56] they also ceded their pensions. The Trade Union Act,[57] s. 51(3)(d) protects unionized employees on strike or discharged contrary to the Act. There is no other statutory safeguard of pension rights on dismissal before vesting. The notice period for dismissal without cause at common law and under the Labour Standards Code,[58] s. 68, merely antedates the employee's notice of discharge.

(iv) Disposition of the money — a synopsis. To recap, of Nova Scotian employees not under the federal Pension Benefits Standards Act, who terminate employment other than by retirement, death or disability: (i) roughly 8.2% will lose thier pensions because their plan has no vesting provision; (ii) of the 91.8% of employees in plans with vesting, anyone who terminates before vesting will lose his pension; of those who terminate after vesting, roughly 85% will voluntarily forfeit their pensions. The latest available statistics (1965)[59] show that only 3% of terminated employees under pension plans will receive pensions.

Employees who lose their pensions usually receive "the return of their contributions plus interest."[60] A local pension consultant stated that interest in Nova Scotia plans is usually about 3% and rarely above 4%. The Dosco Plan offered 2-1/2% compounded.[61] Because pensions are underwritten by a variety of carriers — trustees, insurance companies, governments — there is no data measuring investment returns of all pension funds. But J. K. Bell said that a pension manager could "walk downstairs to a co-operative insurance company and receive 7% on a NHA

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of Private Pensions (Washington: U.S. Government Printing Office, 1970), at 39.

56. See ss. 19-20 of the Dosco Plan in Appendix B.

57. S.N.S. 1972, c. 19.

58. S.N.S. 1972, c. 10.

59. Statistics Canada, *supra*, note 1, at 22. The 1970 data concerns only the provisions in plans, not the disposition of the money on termination.

60. See, for example, s. 19 of the Dosco Plan in Appendix B.

61. Appendix B. ss. 19, 2(s). The Dalhousie Plan, s. 15 allows 3-1/2%.

mortgage, probably 9% on a conventional mortgage''. Because pensions are long term, interest is crucial. If an employee severed after twenty years of participation receives interest 5% lower than the annual rate of return of the pension fund, he reaps 100% less than he has sown.

The settlor of a trust cannot withdraw the money at will.[62] Thus when (i) the employer's contributions are forfeited or (ii) the employee receives less than a fair interest rate, the money must stay in the fund. Under flat and unit benefit plans, however, the employer need only pay the difference between the specified amount of benefit and the assets of the fund. When the fund is enriched by money denied to an employee, the employer discounts his future contributions. The trust money might as well be in his pocket.

(v) Portability, A ''portable'' plan is one where the employer's contributions are not only vested, but may be transferred to the pension fund of the pensioner's new employer. The Pension Benefits Standards Act does not demand portability. The Income Tax Act permits[63] but does not require portability. The Superintendent of the Dalhousie fund stated that portability between most University plans is only rarely effected because of the actuarial inconvenience of transposing the figures of, for example, a career earnings plan at University of Toronto to the final average plan at Dalhousie. A local pension consultant acknowledged the problem of asymmetry but indicated that it may not be insoluble. The leading Canadian authority states:[64]

> 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.

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62. Regulations under the Pension Benefits Standards Act, SOR/67-328, s. 9(4) reinforces the common law by forbidding withdrawals from pension funds except under stated circumstances.
63. S.C. 1970-71-72, c. 63, ss. 60(j-1), 146(16).
64. Mercer, *supra*, note 41 at 43.

More ambitious is industry-wide portability within a geographical unit. It utilizes the "hour bank" system and is especially appropriate for industies with high labour mobility. Through collective bargaining each employer under the plan is assessed, for example, $.20 per hour of work per employee. Employers pay the money into a central trust, and the employee is credited with a benefit commensurate to the contributions made on his behalf.[65] The pension consultants interviewed knew of no Nova Scotian instance of industry-wide portability. Thirdly, the employer may dispose of his pension responsibilities by paying the money credited to the employee into a Registered Retirement Savings Plan. The employee then controls his own pension subject to the Income Tax Act.[66] The advantages of portability to the employee are obvious. The employer also has something to gain; for example, he need not keep records for employees who may have been dead for a decade.

(vi) Termination by death or disability. Without special provision in the plan the employer's contractual duties respecting employees severed before vesting by death or disability are identical to this duties to other terminated employees; as the condition precedent to the employer's duty is unfulfilled, he need not pay a pension. Because contributory plans in practice always return the employee's contributions, his quasi-contractual right to recover these moneys is untested. The issue, therefore, is the extent to which the employee or his survivor recovers money other than the employee's contributions.

Death. The Pension Benefits Standards Act enforces but does not require a death benefit in a pension plan.[67] The Income Tax Act permits but does not require (a) a refund of contributions with or without interest[68] (b) an appended life insurance policy[69] and (c) a survivor's pension paying a *maximum* of a "reasonable and moderate" benefit.[70] When a death benefit "is payable under the plan" the Beneficiaries Designation Act[71] subrogates for

65. *Id.*, at 179-85.
66. Registered Retirement Savings Plans are discussed, *infra,* Appendix A.
67. R.S.C. 1970, c. P-8, ss. 10(1)(c), 13.
68. Circular 72-13R2, *supra*, note 29 at para. 9(c).
69. *Id.*, at para. 36.
70. *Id.*, at para. 9(f).
71. R.S.N.S. 1967, c. 21 s. 2; adopted by the Pension Benefits Standards Act, R.S.C. 1970, c. P-8, s. 13.

beneficiary to the rights of the employee. In 1970, the provision for death benefits in private plans was:[72]

type of benefit	% of plans	% of employees
no death benefit[73]	5.4	22.5
refund of employee contributions only[74]	25.1	35.8
refund of employee contributions (if any) and vested employer contributions[75]	66.5	15.6
survivor's pension	2.6	23.5
other	0.4	2.6
total	100.	100.

The survivors of 58.3% of employees will receive none of the employer's past contributions; if the plan is non-contributory they will receive nothing. Their fate is illustrated by letters written to Ralph Nader:[76] "My husband died in 1970 while still working for the same company he had worked for for thirty-one years. The company said I would not get a nickel of his pension because my name was not on a certain papėr." . . . "I was one of those unfortunate widows who could not collect on my husband's pension plan. My husband was within two months of collecting his first pension check when he passed away." If the employer wants to pay the survivor something beyond the employee's contributions in a lump sum he should do it by way of group life insurance rather than a pension plan. Death benefits via a pension plan are taxable in the hands of the estate; through life insurance they are not taxable.[77]

Widow's pensions are invariably actuarially discounted, usually by 50%.[78] Thus an employee with ten years of service under a career earnings plan is entitled to 20% of his average earnings; if he

72. Statistics Canada, *supra*, note 1 at 56-57, table 26.
73. These were all non-contributory plans, *Id.*, at 24.
74. See, for example, the Dosco Plan, s. 15, in Appendix B. Interest is again $2\frac{1}{2}$%: s. 2(s).
75. See, for example, the Dalhousie Plan, s. 16.
76. Nader, *supra*, note 7 at 97.
77. Mercer, *supra*, note 41 at 50. Income Tax Act, S.C. 1970-71-72, c. 63, ss. 148(1)(a), 148(9)(c)(i); also ss. 6(1)(a), 6(4), 56(1)(a)(iii).
78. Statistics Canada, *supra*, note 1 at 58-59, table 28.

dies his widow would receive 10% of his average earnings, annually until her death. The Department of National Revenue's model of a "reasonable and moderate" survivor's pension has a discount of 60%, further reduced if the spouse is more than ten years younger than the deceased employee.[79] To avoid abuse of the survivorship provisions "by deathbed nuptials in favour of a third party," the plan usually requires that the widow has been married for a certain number of years before the employee's death. Remarriage of the widow is generally a condition subsequent.

Disability. The Pension Benefits Standards Act does not specifically refer to disability benefits. Thus the money is locked-in and must be taken as an annuity.[80] Pension benefits are taxable in the hands of the employee.[81] In 1972 Long Term Disability Insurance benefits also became taxable,[82] rendering pension plans a proper forum for disability annuities. The Department of National Revenue permits but does not require disability benefits in a Registered Pension Plan; the maximum allowable benefit is a "reasonable" amount.[83] The range of disability benefits in the private sector in 1970 was:[84]

type of benefit	% of plans	% of employees covered
full pension accrued at date of disability	4.2	27.7
actuarially reduced pension	19.1	16.3
flat amount per month	.7	.5
other	2.2	11.6
no disability benefit	73.8	43.9
total	100.	100.

The Dalhousie Plan is ingenious. Section 14 permits the disabled employee to continue his pension contributions while receiving

79. Circular 72-13R2, *supra*, note 29 at para. 9(f).
80. R.S.C. 1970, c. P-8, ss. 10(1)(c,d), 10(2)(a-c).
81. Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(a). See also, s. 60(a), (j), (m-n).
82. Income Tax Act, S.C. 1970-71-72, c. 63, s. 6(1)(f).
83. Circular 72-13R2, *supra*, note 29 at para. 9(d).
84. Statistics Canada, *supra*, note 1 at 49, table 20.

Long Term Disability benefits. On retirement, the Disability benefit ceases and the pension begins.

8. *Manner of Payment of the Benefits.* The Pension Benefits Standards Act does not permit a lump sum payment on retirement.[85] With stated exceptions a plan registered under the Income Tax Act must be an "annuity payable at least for life".[86] Life annuities vary: (i) A "straight life annuity" ends with the death of the employee. (ii) A "life annuity with a guaranteed period" (of, for example, five years) pays the beneficiary for three years afters the employee's death if the employee dies two years after retirement. Because of the underwriter's added liability, each instalment paid to the pensioner is lower than with a straight life annuity. (iii) A "joint and survivorship annuity" pays a benefit for the lives of the employee, his wife and the survivor of them. Because the underwriter insures two lives this form pays the lowest instalment of all. (iv) Finally, an annuity might be paid for a period guaranteeing the return of the employee's contributions. Common practice is the "optioned" pension of the Dalhousie Plan, s. 9 and the Dosco Plan, s. 14. Three months before retirement, a participant in the Dalhousie scheme is notified that he may elect a straight life annuity, a guaranteed ten year annuity with a lower monthly pension or a joint and survivorship annuity with a still lower benefit. The employee gauges his life expectancy and that of his joint annuitant, then tempts fortune with a selection.

9. *Post-Retirement Adjustment For Inflation*

In 1970 only .4% of plans covering 6.8% of employees in pension plans had escalator clauses tying the benefit to the Consumer Price Index.[87] Parliament recently removed the 2% annual ceiling on escalations under the Canada Pension Plan;[88] whether this will cause private pension managers to be more "pension-minded" remains to be seen. A second method of dodging inflation is to purchase "variable annuities", which are post-retirement extensions of the "equity annuity" principle discussed above.[89] The annuity varies with the performance of a portfolio of common stock, in the faith that the stock market rises

85. R.S.C. 1970, c. P-8, ss. 10(1)(c,d), 10(2)(b-d).
86. Circular 72-13R2, *supra*, note 29 at para. 9(b).
87. Statistics Canada, *supra*, note 1 at 25.
88. Canada Pension Plan Ammendment Act, S.C. 1973-4, c. 41.
89. *Supra*, text following note 6.

with inflation. Variable annuities are also rare, covering 2.5% of employees in pension plans in 1970.[90]

10. *Costing The Package* Suppose a 2% career earnings plan requires the employee to contribute 5% of his salary,[91] has integration of $2,000 in eligible earnings, a death benefit of return of the employee's contributions, and a retirement age of 65. Vesting is at 50 years of age plus ten years of participation. A 40 year old employee with fifteen years of participation will earn $8,000 in 1974. How much should the employer contribute to meet his liabilities to the employee for March, 1974? (1) Estimate the employee's salary for the next 25 years, and take his average annual salary for his career. Assume that the actuaries decide that his average career salary will be $12,000. (2) $12,000 minus $2,000 ineligible earnings leaves $10,000 pensionable earnings. (3) 2% of $10,000 equals $200 pension credit earned by the employee each year, for *each* year of retirement. (4) Assume that the mortality tables show that a 40 year old male will live to 75. The employee has earned 10 (years) X $200=$2,000 total pension credit. (5) Assume that the labour mobility tables show that there is a 40% chance that the employee will terminate his employment before vesting. Thus the employer may reduce his contributions by 40%,[92] 60% of $2,000=$1,200. (6) The employee's pensionable earnings in 1974 are $8,000 minus $2,000 ineligible earnings leaving $6,000, of which he contributes 5% or $300 in 1974. (7) If the interest tables show that a 5% average annual interest rate will prevail over the next thirty-five years the employee's $300, without compounding for this simple model, will become 275/100 X $300= $825 when he attains the age of seventy-five. (8) Thus $375 must enter the fund before the employee dies. (9) At 5% annual simple interest the employer's contributions will earn 175% before the employee dies. 100/275 X $375= $136.36 required for 1974, or $11.36 for March, 1974 for a straight life annuity. (10) A five year guarantee appreciates the employer's costs by 2.2%, a ten year guarantee by 8.2%, and a full and joint survivorship annuity by 45.2%.[93]

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90. Statistics Canada, *supra*, note 1 at 25-26.
91. 5% is the most common rate of employee contribution. *Id.*, at 36-37, table 9.
92. Alternatively, the employer may contribute the full $2,000.00 and discount his future contributions after the employee terminates. See *supra*, text following note 62.
93. Law Society of Upper Canada, *supra*, note 8, Part D at 15, table 5.

III. Administration of the Plan

1. *Funding Versus No Funding*

A "funded" plan has assets covering all pension credits already accumulated by retired and active employees; if the plan is wound up every employee would receive from the fund every dollar to which he has become entitled. An "unfunded" plan maintains the employer's liability but delays his payment into the fund of money credited to employees. There are two forms of "unfunded" plans: (i) *Terminal funding:* The employer discharges his total liability at the date of retirement. If the pension is $100 monthly the employer, on the employee's retirement, will purchase an annuity from an insurance company for about $15,000. (ii) *Pay as you go:* The pension is paid directly from the employer's working capital. There is no fund, no carrier, not security for the employee. The Pension Benefits Standards Act[94] requires advance funding. The Income Tax Act[95] does not.

Insolvency of the employer can shatter an unfunded plan. As the insurance company or trustee has not received money sufficient to pay the pension, the employee is left to his contractual remedy against the insolvent or bankrupt employer. Unless pensions are "pay" under the Labour Standards Code,[96] ss. 1(n), 77(6) and 84, the employee is an unsecured contractual creditor. When Nova Scotia acquired the Sydney Works of Dominion Steel and Coal Corporation in 1967-68 the Dosco Plan, according to J. K. Bell, was underfunded by thousand of dollars. Only the Government's resuscitation of the plan with lump-sum contributions avoided widespread default of pension payments. Funding also has advantages for the employer: his costs do not fluctuate with flurries of retirement in the work force.

Peculiar to Government plans is "notional funding" with "fairy money". The accounts of the pension fund are credited with the amounts needed to pay the pensions of retired employees, but the Government pays no dollars into the pension fund. Pensions are paid directly from the Consolidated Fund.[97] Notional funding

94. R.S.C. 1970, c. P-8, s. 11(a); SOR/67-328, s. 10, *as am* by SOR/71-76, Schedule.
95. Income Tax Act, S.C. 1970-71-72, c. 63, s. 20(1)(r); Circular 72-13R2, *supra*, note 29 at paras. 11(a), (c), 17(c).
96. S.N.S. 1972, c. 10. As to a pension's status as "wages", see *infra*, text accompanying footnotes 206 to 213.
97. See, for example, the Royal Canadian Mounted Police Superannuation Act,

allows the Government to trace its liability while postponing the day of reckoning. As Government solvency is secure the practice should raise no problems. But problems do arise because in dealings with governments actuaries may carelessly suspend disbelief. The U.K. Teachers' Superannuation Fund was established by statute in 1925. Current and future service credits were to be financed by 5% contributions from both teachers and local school boards. The Government promised to fund past service credits. Government contributions were notionally marked up. The Exchequer accountants believed what they saw on the Superannuation Fund's account books, assumed the money was paid, and ignored the Superannuation Fund in twenty-three consecutive annual budgets. The 1948 valuation of the Fund stumbled upon a $102 million deficit. As the Government had no such money, Parliament raised the contribution rates of teachers and school boards to meet the deficiency. As of 1962 the Government had not paid a shilling toward the past service that it promised to fund in 1925.[98]

2. *Methods of Funding* As money purchase and profit sharing plans define the employer's contribution, their funding raises no difficulty. Funding problems arise, however, with flat benefit and unit benefit plans where the employer's contributions are uncertain. There two methods of funding such plans:[99] (i) *"Single premium" or "accrued benefit":* Each month the employer pays the amount of benefit accruing to the employee in that month. In the costing model discussed above he contributes $11.36 for *this* month. (ii) *"Level premium" or "projected benefit":* The employer pays a *fixed* number of dollars per employee per month. In the costing model the employer might pay $35 per month for a straight life annuity, *each* month of the employee's participation. The amount does not rise with the increase earnings of the employee. Eventually the employer will pay identical sums of money; but in the short run the funding method chosen is a crucial determinant of the liquidity demanded by the pension plan.

A 60-year old man will more likely serve until vesting age than will a 30-year old. Contributions for the average 60-year old will

R.S.C. 1970, c. R-11. By s. 24 Government contributions are "charged" against the Consolidated Fund and "credited" to the Superannuation Account. By s. 23, payments are made from the Consolidated Fund and "charged" to the Superannuation Account.

98. G. Rhodes, Public Sector Pensions (Toronto: University of Toronto Press, 1965), at 107-115.

99. Mercer, *supra*, note 41, at 56-62.

earn income for a shorter period than will contributions for a 30-year old. Thus it has been estimated that, to provide indentical monthly pensions, the employer must contribute sixteen times as much money for a 60-year old than for a 30-year old.[100] The average age of a company's pensioned work force always rises in the generation after the institution of the plan, while the initial employees reach retirement age. Thus an employer of a new plan, and an employer of an aging workforce, who uses single premium funding may be stung by a swift rise in pension costs. To avoid sudden demands for liquid capital these employers should use level-premium funding, overfunding yound employees but underfunding older employees at the "level" rate. For an employer of a work force with a constant average age there is no need to overfund young employees; single premium is better.

3. *Choice of the Carrier or Underwriter*

The Pension Benefits Standards Act Regulations[101] and the Department of National Revenue[102] require that a pension plan be administered by a life insurance company, a corporate or individual trustee, a pension fund society[103] or the Government of Canada.

The methods of administration are:[104]

Funding instrument	% of plans	% of employees covered
life insurance company	68.6	14.1
— individual annuities		
— group annuities		
— deposit administration		
— segregated funds		
trusteed	27.2	60.4
— individual trustee		
— corporate trustee		
— pension fund society		
Canadian Government Annuities	1.6	0.1
Government Consolidated Funds	0.1	21.6
Other	2.5	3.8
Total	100	100

100. A. Pedoe, *Life Insurance, Annuities and Pensions*, (2nd ed. Toronto: University of Toronto Press, 1970), at 361.

101. SOR/67-328, s. 9(1).

102. Circular 72-13R2, *supra*, note 29, at para. 6(e).

103. The officers of a corporation may establish a corporate pension fund society, which will administer the pension fund, under the Pension Fund Societies Act, R.S.C. 1970, c. (-9.

104. Statistics Canada, *supra*, note 1 at 14, chart 4.

(i) Life Insurance Annuities: There are two types of annuities. With an "individual annuity" the employer purchases a separate annuity for each employee. The contract is held in trust for the employee until his retirement. A "group annuity" is a master contract covering all employees in the plan. Individual annuities have the advantage that, after termination of employment, the employee may adopt the contract and continue contributions. Most insured plans are group annuities, however, because their economies of scale substantially reduce the employer's premium.

Because under an annuity contract the insurance company guarantees the amount of the *pension*, the success of the fund's investment is of no concern to the employee or employer. Of course, to compensate for the insurance company's risk premiums are higher than the contributions needed to fund a trusteed plan. Annuities may have cash surrender value; thus the employer may change the plan's underwriter, after paying a surrender charge. Annuities have the disadvantage of being inflexible; the pension plan must fit into the insurance company's mold. Thus benefits on death, disability and early retirement may not be fundable through annuities.[105]

Deposit administration: Contributions are paid into a separate fund managed by the insurance company. The insurance company usually guarantees the *capital* of the fund and minimal interest, but not the amount of the pension; if the employer's contributions are insufficient to pay the pension the insurance company is not responsible. With annuities, after payment of each premium the insurance company, in its books, credits each employee with a portion of deferred annuity. With deposit administration, no money is allocated until an employee retires. Then the insurance company pays from the fund the amount directed by the employer and purchases an immediate annuity. Deposit administration is less formalized than an annuity contract and can fund all aspects of pension plans.[106]

Segregated funds: The Canadian and British Insurance Companies Act restricts an insurance company's power to invest its assets in equities,[107] but permits the company to "segregate" from

105. Mercer, *supra*, note 41 at 69-70.

106. *Id.*, at 70-71 D. Baum, *The Investment Function of Canadian Financial Institutions* (New York: Praeger, 1973) at 156-57.

107. The investment guidelines are stated in Canadian and British Insurance Companies Act, R.S.C. 1970, c. I-15, ss. 63-68.

its general assets a fund which may be totally invested in equities.[108] This is a "segregated fund". An employer of a pension plan managed by segregated funding directs what proportions of the fund will be allocated to the "bond fund", the "equities fund", the "mortgage fund", etc. The insurance company then selects the individual investments in each portfolio. In 1971 the assets of segregated funds were invested 51.5% in stocks, 25.4% in bonds, 18% in mortgages, and most of the remainder in short-term securities.[109] Segregated funds give the employer intimate control over investment policy. In return, the insurance company will invariably exact an exemption from liability for any diminution in the fund. Thus the "insurance" company manages the money but "insures" nothing. On the employee's retirement money proportionate in amount to his pension credit is paid from whatever is left of the segregated fund to purchase an annuity.

(ii) Trusteed The employer enters into a declaration of trust, and contributions are held by the trustees in either a "separate" or a "pooled" fund. A pooled fund is an accumulation of the moneys of small funds, and offers economies of scale in the management of investments for small pension plans.[110] The employer distributes the money among the corporate trustee's pooled stock fund, pooled Government bond fund, pooled corporate bond fund, pooled NHA mortgage fund, pooled conventional mortgage fund, and pooled U.S. equity fund. Individual investments are made by the trustee. A separate trust fund is subject to whatever terms the employer chooses to insert in the indenture of an *individual* trust or whatever "adhesive" exemption clauses the *corporate* trustee inevitably requires in its standard form trust indenture.

Trusteed carriage of a pension plan has the advantage of flexibility: stipulations in the indenture may give the employer fingertip control over investment, and the power to modify or terminate the pension plan at will. Benefits on death, disability or early retirement — matters sometimes too eccentric for insurance companies — are easily administered under a trust. The disadvantage of trusteed funds is that there is no guarantee. Unless

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108. Canadian and British Insurance Companies Act, R.S.C. 1970, c. I-15, ss. 48, 63, 81.
109. Statistics Canada, *Trusteed Pension Plans: Financial Statistics, 1971* (Catalogue 74-201 (Annual). Ottawa: Information Canada, 1971) at Appendix D.
110. Most pooled pension funds cover plans with under fifty employees. *Id.*, 26.

the trustee's misconduct is so gross as to be a breach of trust he is not responsible for diminution of the fund.

On the employee's retirement, the pension is paid either directly from the trust fund or from an annuity purchased by the trustee.

(iii) Canadian Government Annuities The Government Annuities Act[111] states that, pursuant to a contract between an employer and an employee, Her Majesty may sell an annuity for the life of the employee. Government Annuities guarantee the amount of the pension, but the maximum annuity is $100 per month. The history of Government Annuities typifies a government financing public welfare by floundering in private enterprise. In 1908 Parliament passed the Government Annuities Act, as the embryo of old age securily. Unfortunately, the Government computed its premiums using mortality tables three decades outdated in 1908. The curiously high expense of its annuities led the Government to modify its tables — in 1930. With modern tables, Government Annuities ceased to be competitive with the more efficiently managed annuities of insurance companies. In 1962, the Royal Commission on Government Organization noted that "the programme has been very costly to the Government"[112] and stated: "Apart from a periodic attractiveness when premiums are allowed to get out of line, some inflexible aspects of government annuity contracts make them less popular than competing forms. It is not unfair to suggest that the only circumstances in which they will be sold in volume is when they are priced below the current market; thus the cost of making good future deficiencies will be substantial indeed."[113] Acting on the Royal Commission's recommendation the Government administratively decided in 1967 to cease the sale of new annuities. Existing annuities continue to be paid.

(iv) Consolidated Revenue Funds Public pensions in many forms are paid out of public funds.[114]

IV. *Distribution of Power in the Administration of the Plan*

The initiation of a pension not in a collective agreement is the voluntary act of a generous employer. After its initiation, *noblesse oblige* should cease and legal liability should begin. There are three

111. R.S.C. 1970, c. G-6, s. 6(3).
112. Glassco Committee — *Report of the Royal Commission on Government Organization* (Ottawa: Queens Printer, 1962), vol. 3 at 288.
113. *Id.*, at 287-88.
114. See *supra*, note 2.

reasons: (1) The employer's motives are not totally immaculate; pensions offer him concrete advantages. A pension attracts good workers. Pre-vesting forfeiture on termination holds the good workers. A post-retirement income morally justifies compulsory retirement of unproductive older workers. Finally, the employer's contributions are deductible under the Income Tax Act.[115] (2) Under contributory plans the employer controls the employee's contribution for as long as forty-five years. (3) Most important, the employee *relies* on the belief that he will receive a pension. Denial of a pension to an elderly employee causes irreparable damage because he is too old to begin to save enough money for his retirement, and too unproductive competitively to offer his services on the labour market. He retires into poverty. Nonetheless, a pension not in a collective agreement is a contract of adhesion. The alternative to the employer's dictates is no pension. This part examines the disproportion between the employee's stake in a pension and his control over the pension in practice and in law.

1. *The Administrative Board* The Department of National Revenue requires that a plan have an "administrator" and permits the administrator to be the employer, the employer's delegate, or the trustee serving in a dual capacity.[116] J. K. Bell stated that, save for rare instances under collective agreements, the administrators of plans in Nova Scotia are invariably minions of the company.[117] The Administrator or the administrative board cannot contravene the terms of the pension plan. The problem is that under the plan he may approach omnipotence. Powers commonly given to administrators by pension plans are: to decide if the employee is eligible to participate in the plan;[118] to decide whether a cessation of employment is a "termination" requiring a forfeiture of pension credits;[119] to define the employee's pensionable pay;[120]to accept evidence and determine whether an employee is entitled to a pension on the basis of age, disability or early retirement;[121] to

115. S.C. 1970-71-72, c. 63, s. 20(1)(q), (s); see ss. 18(1)(j), 20(1)(y), 60(k), and 147 (8-9) for deferred profit sharing plans.
116. Circular 72-13R2, *supra*, note 29 at para. 6(g).
117. See, for example, the Dosco Plan's triumvirate in ss. 22-23, and also s. 29, in Appendix B.
118. See the Dosco Plan, s. 24(b), in Appendix B.
119. Mercer, *supra*, note 41 at 53.
120. *Id.*
121. *Id.*

compute the amount of benefits payable under the plan;[122] to compute rates of interest;[123] to authorize all payments by the trustee;[124] to redirect the pension to a third party;[125] to end the pension for acts prohibited by the plan;[126] to instruct regional committees in the operation of the plan;[127] to make rules for the administration of the plan;[128] to construe the plan finally and conclusively;[129] without limitation by the foregoing, all powers necessary to accomplish the purposes of the plan.[130] The administrators may then be exempted from personal liability[131] and need not be bonded.[132] The terms of any accompanying trust indenture will complement the terms of the pension plan. One local pension consultant stated that in Nova Scotia almighty administrators are the rule rather than the exception.

Custody and legal title to the fund are in the trustees; so the employee's pension should be physically and legally beyond the grasp of the employer's administrators. The Dalhousie fund belies this assumption. Section 17 of the Dalhousie Plan empowers the Investment Committee of the Board of Governors[133] to specify the investments to be made by the trustee of the pension fund. Until recently the Investment Committee had delegated this discretion to the trustee. The Board of Governors grew dissatisfied with the low return on the trustees' investments — notably Cape Breton bonds returning $2^1/_2$% annually — so it terminated the trust, drafted a new deed and appointed new trustees. The new trustees are members of the Board of Governors' Investment Committee.

Administrators are appointed and instructed by the employer but they manage the employees' contributions and pensions. They have absolute power but may be swathed in exemption clauses. Most administrators are conscientious but the *opportunity* for defalcation is inescapable. The inverse proposition illustrates the iniquity:

122. See s. 24(c) of the Dosco Plan in Appendix B.
123. *Id.*, at s. 25.
124. *Id.*, at ss. 23, 24(4), 35.
125. *Id.*, at s. 27.
126. *Id.*, at s. 32.
127. *Id.*, at s. 30.
128. *Id.*, at ss. 24, 30.
129. *Id.*, at s. 24(2).
130. *Id.*, at s. 24.
131. *Id.*, at s. 26-28.
132. *Id.*, at s. 28.
133. Except for one representative from each of the Senate and Faculty, the members of the Pension Committee are appointed by the University.

would it not be absurd if an executive pension plan was administered *exclusively* by a trade union?

2. *Assertion of Power by Trade Unions* Approximately 500 of the 20,000 private pension plans in Canada are subject to collective bargaining.[134] To what extent do the 500 plans safeguard the interests of employees?

There are Americans of union graft in the administration of Pension Funds. One of the most bizarre involves the $21,000,000 pension fund of the Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors' International Union. One day in 1966 a total stranger named Shaheen walked into the office of the Pension Committee. According to the Union's secretary-treasurer, Shaheen "criticized the bank's investment decisions. He was trying to say they had made only so much money, that he could have made more. He convinced the Board the bank was losing the fund money."[135] Instead of investigating Shaheen's credentials — and discovering that Shaheen had filed for bankruptcy in Chicago — the Union promptly appointed him as the fund's Supervising Pension Consultant. By 1971 Shaheen had supervised the fund into receivership, had absconded and had been indicted on various counts for mismanagement of the pension moneys; he has yet to be tried. Also indicted for taking illegal fees and kick-backs was the Union President, appropriately named Joseph de Paola.[136]

Graft is, of course, absent from pristine Nova Scotia. In fact, the Canadian problem is at the other extreme. "The main reason for the inadequacies in pension coverage in Canada can be traced to the failure or reluctance of the unions, up to now, to make pension improvements a priority bargaining issue."[137] Three reasons have been cited for union timidity.[138] First, union negotiators are overawed by the costing complexities of pensions and often accept the estimates of the employer's actuaries. Second, union leaders shun the burdensome responsibilities of co-administration of pension plans. Third, unions are politically motivated to neglect pensions: retirees are no longer in the union's voting constituency

134. E. Finn, *The Case for Co-Management of Employee Pension Funds* (1973), 73 The Labour Gazette 356, at 356.
135. Quoted in Nader, *supra*, note 7, at 66.
136. *Id.*, at 66-68. See also the fate of the Teamsters' fund and the exploits of Tony Boyle with the United Mine Workers' fund. *Id.*, at 68-71.
137. Finn, *supra*, note 134, at 362.
138. *Id.*, at 358.

but younger workers are; and young workers often see pensions as trivialities, decades distant.[139] The results of union indifference were stated by J. K. Bell: unions relinquish their pension demands at the bargaining table, or incorporate by reference the pre-existing individual plan with all its hedging clauses unaltered; when a Nova Scotia union does realize a plan in a collective agreement it is frequently a "me too" plan adopted verbatim from an Ontario settlement and not negotiated with reference to the needs of Nova Scotians.

The procedure for the negotiation of a newly-designed plan in Nova Scotia is usually to decide the amount of the benefit at the bargaining table to defer the negotiation of details to actuaries representing the employer and the union.

3. *Investments* The Department of National Revenue requires that a pension plan have a term stating that investments shall be in accordance with the Pension Benefits Standards Act.[140] The Pension Benefits Standards Act states that not over 10% of the fund may be invested in a single undertaking,[141] and generally limits investments qualitiatively to: bonds and debentures, shares of financially stable companies, and real estate up to three quarters of the value of a parcel of land; certain real estate must be used for income and not capital gain.[142] The Act also prohibits self-serving loans to a relative or employee of the employer, the administrator or the union, but there is no prohibition on investments in the employer's company.[143] The Canadian and British Insurance Companies Act[144] places general restrictions on the investment powers of insurance companies. The Trustee Act[145] regulates the investments of trustees, but ss. 2, 5-9 ensure that the statute operates only in the absence of contrary intent in the trust indenture. Neither statute prohibits self-serving investment of pension funds.

One local pension consultant stated that, especially for funds administered by trustees, the pension plan and the trust indenture

139. See, for example, the discussion of "locking-in", *supra*, accompanying footnotes 49 to 53. According to the Superintendent of the Dalhousie fund, disaffection of young employees is a serious problem with the University Plan.
140. Circular 72-13R2, *supra*, note 29, at paras. 13, 25(b).
141. SOR/67-328, s. 8, Schedule C, s. 8.
142. See generally R.S.C., 1970, c. P-8, s. 11(b); SOR/67-328, s. 8, Schedule C.
143. SOR/67-328, s. 8; Schedule C, s. 11.
144. R.S.C. 1970, c. I-15, ss. 63-68. For segregated funds see ss. 48, 63, 81, and 139; *as am* R.S.C. 1970, c. 19 (1st Supp.), ss. 14, 19, 25, 46.
145. R.S.N.S. 1967, c. 317, ss. 2-15, 74. See also the Trust Companies Act, R.S.N.S. 1967, c. 316, ss. 59-61.

commonly give the employer the power to direct investments. Section 17 of the Dalhousie Plan states: "The Pension Fund shall be invested in accordance with the direction of the Investment Committee of the Board of Governors. . ."[146]

The danger of concentration of investment power in the employer is that an investment opportune for the employer may not profit the employee. The Sears, Roebuck pension fund owns 24% of the Company's stock.[147] After the high price of Sears shares inhibited further purchases the pension fund bought substantial interests in six Sears subsidiaries.[148] With 80% of the pension fund's assets invested in Sears,[149] misfortune for the Company could pauperize thousands of pension recipeients. Moreover, there is conflict of interest. Under the Sears pension plan and trust indenture, the Company's Board of Directors dictates the investments to be made by the trustees. As the major voting shareholders of Sears, Roebuck,[150] the trustees in turn designate the composition of the Board of Directors. At the U.S. Senate Sub-Committee Hearings on the Stock Market, the Chairman of the Board of Trustees of the Pension Plan (who was also Chairman of Sears, Roebuck's Finance Committee) testified: "In thrity years during which I have been connected with the company, and twenty-six years during which I have headed the company, we [the trustees] have never had a dispute. We have never had any controversy, and we have never had any proxy fight. It has been very peaceful. There is, of course, the danger at some time the trustees might seek to perpetuate a man for their own selfish purposes."[151]

Abuses are not absent from Nova Scotia. Eastern Provincial Airlines, for example, has used its pension funds to purchase aircraft.[152] J. K. Bell complained that many abuses are not detected because pension funds classify their investment records. In 1971 the securities traded by trusted pension funds in the industrial sector suffered a new loss of over $28,000,000,[153] which suffices "to

146. See the discussion of the Dalhousie Plan, *supra*, and note 133.
147. F. Lundberg, *The Rich and the Super-rich* (New York: Bantam Books Inc., 1968), at 272.
148. P. Harbrecht, *Pension Funds and Economic Power* (New York: The Twentieth Century Fund, 1959), at 87.
149. Nader, *supra*, note 7, at 72.
150. Lundberg, *supra*, note 147, at 272.
151. Harbrecht, *supra*, note 148, at 87.
152. The source of this information preferred to remain anonymous.
153. Statistics Canada, supra, note 109, at 38-39, table 8. In terms of capital loss

show that many pension funds have been used as a handy dumping ground for the bonds of corporations''.[154]

Government is also guilty of self-serving investment. The evaluation of prospective investments generally is a comparison of expected rate of return to both risk and the need for liquidity:[155]

(i) Rate of return: Government pensions are universally invested heavily in fixed but low return Government bonds. In 1971, Government pension funds were invested 12% in stocks and 68% in bonds, most of which were Government bonds. Private plans invested 36% in stocks and 39% in bonds.[156] The Metropolitan Toronto Police Fund has been invested 80% in Toronto Municipal bonds and 20% in other Government issues.[157] The result is that bond-concentrated public pension funds earn lower returns on investments than do private plans invested in equities. Thus the Canada Pension Plan[157] fund, invested in provincial bonds pursuant to the Canada Pension Plan, [158] s. 112, earns an annual return of 4.4% while the equity-concentrated fund of the Quebec Pension Plan earns 11.27%.[159]

(ii) Risk: The risk involved in equity investment is minimal, for two reasons. First, a pension plan permits long term investment; stock purchased by the contributions of a twenty year old employee need not be liquidated for forty-five years. Thus sporadic recessions are immaterial to a pension fund manager. Only the long run is crucial, and the last century has shown a general trend of inflation. Equities usually thrive on inflation. Second, the remaining risk is erased by the Government's taxing and minting powers.

(iii) Need for liquidity: A pension becomes payable on the fixed date of the employee's retirement. Liability cannot accrue unexpectedly with, for example, a sudden stock market panic. Moreover, during the first twenty years after the initiation of a pension plan (before the original generation of contributing

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as a percentage of total expenditure, industrial pension funds fared six times worse than ''religious and charitable pension funds'' and seven times worse than ''educational pension funds''.

154. Finn, supra, note 134, at 357.

155. P. Dietz. *Pension Funds; Measuring Investment Performance* (Toronto: Collier-Macmillan Canada Ltd., 1966), at 31-43.

156. Statistics Canada, *supra*, note 109, at 18.

157. Baum, *supra*, note 106, at 152-54.

158. R.S.C. 1970, c. C-5.

159. The 4th Estate, 17 January 1974, at 12; also Canadian Labour Congress, *supra*, note 24, at 5.

employees reaches retirement) the fund's income exceeds expenditure. Thus liquidity is rarely crucial to a pension fund.[160]

For these reasons, Governments should invest pension funds in equities.[161] Instead they invest heavily in Government bonds, which provide a lower return to the pension fund. This is a "dramatic example of government financing itself at favorable interest rates through the use of government-operated pension funds".[162]

Self-serving investments may be very costly. Even apart from compounded interest, each $100 contribution of a twenty-five year old employee will return $100 more by age 65 if it is invested at $7^1/_2\%$ than if it is invested at 5%.

With many unit benefit plans, however, the return on investment is immaterial to the employee, because all income to the fund defrays the employer's contributions. J. K. Bell stated that under the local Eaton's plan, the Company and the employees initially contributed equal amounts; but the mounting return on investments has reduced the Company's contributions to one ninth of the employees' contributions. As the employer has promised to pay only the difference between the amount of the benefit and the assets of the fund[163] his position is contractually unimpeachable. To an employee unseasoned in the construction may appear deceitful. The former Chairman of the Natinal 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 fund 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 thus is able to conceal its mistakes, hindering corrective action.[164]

4. *Disclosure* The Pension Benefits Standards Act[165] requires the employer to give to each employee a written explanation of the plan. The Income Tax Act requires no disclosure to the employee.

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160. In 1971, employer contributions alone more than offset the total expenditures of trusteed pension plans. Statistics Canada, *supra*, note 109, at 30, table 2.
161. See also Mercer, *supra*, note 41, at 83-91.
162. Baum, *supra*, note 106, at 152.
163. See, for example, s. 12 of the Dosco plan in Appendix B.
164. Finn, *supra*, note 134, at 357, quoting Douglas Fullerton.
165. R.S.C. 1970, c. P-8, s. 11(c).

A survey of the New York State Insurance Department found that of the 188 surveyed plans which did not guarantee the payment of pensions, 70 plans provided employees with booklets stating or implying that benefits were promised without restriction, 34 plans were silent and only 84 plans informed the employees of the truth.[166] Dalhousie's plan is eleven pages long, yet its terms are summarized for employees in two pages of the "Staff Handbook". According to the Superintendent of the Dalhousie Plan, the trust indenture of the fund is not open to inspection by employees or their representatives. Section 9 of the indenture states that the trustees' records (respecting investment performance, etc.) may be viewed only by persons designated by the University.[167] J. K. Bell stated that Hawker Siddeley Canada Ltd. recently replaced the underwriter of its pension plan without notification to either the employees or their union. In Nova Scotia most employees are ignorant of the details of their pension plan and its administration.

One person who was interviewed stated that non-disclosure is justified to avoid confusing the simple-minded employees with the complicated financial and administrative details of pension plans. The argument is unsound. Throughout his career the employee naturally assumes that the contributions made for his pension will eventually purchase a pension. Thus he does not stockpile personal savings. J. K. Bell stated that employees are usually first informed of their rights and duties under the pension plan several months before their retirement. The 64 year old employee who discovers that his anticipated pension is not forthcoming because of a break in continuous service, insufficient funding or failure to follow the application procedure suffers irremediable loss; he has not time to hoard savings for a decent retirement income.[168] To prevent feelings of false security among employees, the Nova Scotia Federation of Labour has petitioned the provincial Cabinet for "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."[169]

166. Harbrecht, *supra*, note 148, at 59.
167. The Acadia University Faculty, on the other hand, has insisted upon and obtained disclosure of the facts pertinent to the administration of the Acadia pension plan.
168. See the examples of the inequities of non-disclosure in Nader, *supra*, note 7, at 7-8, 30-40, 89.
169. Presentation of Nova Scotia Federation of Labour to the Government of Nova Scotia, 10 January, 1973, at 33.

5. The Recourses of the Employee in Law

There is a paucity of Canadian case law interpreting private pensions. British cases concern primarily statutory superannuation. Only the United States has a fully-developed body of private pension case law. Because of the questionable authority in Nova Scotia of American law, much of the following discussion is speculative.

(i) An early dictum: "Is it not lawful for me to do what I will with mine own?" [The Master quoting the employer in the Parable of Labourers, Holy Bible, King James Version, St. Mathew, c. 20, v. 15]

(ii) The collective agreement

Relationship with the individual pension: The Supreme Court of Canada has held that a collective agreement wherein the employer promised "to continue his support of" an existing individual pension plan incorporated the individual plan into the collective agreement and permitted its enforcement through arbitration.[170] The status of a pre-existing individual pension which is not incorporated into the collective agreement is uncertain. The Supreme Court of Canada has held that after execution of a collective agreement "there is no room left" for terms of individual employment contracts.[171] An arbitrator in *Re CUPE Local 1000 and Hydro-Electric Power Commission of Ontario*[172] held that an individual pension plan is valid insofar as it does no conflict with the collective agreement. Because arbitrators have no jurisdiction to interpret individual pension plans,[173] *Hydro-Electric* has questionable weight. The Ontario Labour Relations Board has held, however, that an individual plan may be concurrent with a collective agreement, and that an employer commits anti-union discrimination when he discontinues an individual plan for employees in a *unit* who are covered by a separate pension plan in a collective agreement.[174]

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170. *Re International Association of Machinists and Aerospace Workers, Flin Flon Lodge 1848 et al and Hudson's Bay Mining and Smelting Co. Ltd.*, [1968] S.C.R. 113; 66 D.L.R. (2d) 1.

171. *Le Syndicat Catholique des Employés de Magasins de Québec Inc. v. La Compagnie Paquet Ltée.*, [1959] S.C.R. 206 at 212; 18 D.L.R. (2d) 346, at 353-54.

172. (1966), 17 L.A.C. 244 (Thomas).

173. *Re Sudbury Mine, Mill and Smelter Workers Union and Falconbridge Nickel Mines Ltd.* (1958), 9 L.A.C. 105. (Little).

174. *IBEW Local 1966* v. *Johnson Controls Ltd.* (1971), 71 C.L.L.C. 16,041.

General phrases in collective agreements: A collective agreement will often state no more than that an employer must purchase a group annuity from an insurance company, at a specified premium or amount of benefit. If the collective agreement binds the employer to provide a benefit, *but does not specify the underwriter*, then the employer must provide the benefit even in circumstances excluded by the insurance contract that he later executes.[175] The employer is also bound when the insurance contract does not contain a term required by the collective agreement.[176] When the collective agreement states that the pension shall be provided by an insurance company and the policy contains the terms required by the collective agreement, the employer is not bound when the employee is denied a benefit by a "loophole" term in the insurance policy.[177]

Sexual discrimination: The Trade Union Act,[178] s. 24 (7) nullifies a collective agreement that discriminates sexually. One pension consultant interviewed stated that, since the recent amendment to the Human Rights Act[179] barring sexual discrimination, many plans have "equalized" their terms by, for example, adding "widower's benefits" to existing "widow's benefits". These and other unionized plans had ignored the pre-existing s. 24 (7) of the Trade Union Act. As pension plans abound in sexual discrimination respecting retirement age, benefit rates, disability benefits and survivor's beneftis,[180] one may speculate on the number of legally deceased collective agreements with pension plans now governing the industrial relations of Nova Scotia.

There may be also be discrimination against men. The mortality tables show that women outlive men. If their rates of contribution and benefit are equal, a woman will before her death receive more per dollar of contribution than will a man. It is therefore agruable that equal rates of contribution and benefit discriminate against men and nullify the collective agreement. The argument would probably

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175. *Re International Association of Machinists Lodge 171 and Fleet Manufacturing Ltd.* (1967), 18 L.A.C. 311 (O'Shea)

176. *Re Corporation of the City of London and CUPE Local 107* (1972), 2 L.A.C. (2d) 325 (Hinnegan), at 328.

177. *Re Canadian Ohio Brass Co. and International Chemical Workers Local 345* (1973), 3 L.A.C. (2d) 27 (Weatherill); *RE Bendix Automotive of Canada Ltd. and UAW Local 195* (1973), 3 L.A.C. (2d) 21 (Weatherill); *Re Lufkin Rule Co. of Canada and USW Local 6709* (1973), 3 L.A.C. (2d) 295 (Brown).

178. S.N.S. 1972, c. 19.

179. S.N.S. 1969, c. 11, *as am*, S.N.S. 1972, c. 65.

180. Statistics Canada, *supra*, note 1, at 44-49.

fail in Nova Scotia; one usually reliable source stated that the Nova Scotia Labour Relations Board would "look long and hard" at a collective agreement that differentiated the benefit rates of the sexes before allowing it to survive s. 24(7).

Duration of the employer's liability: When a collective agreement ends, the employer's liability to pay the pension ceases.[181] An arbitrator appointed under a new collective agreement has no jurisdiction to hear a dispute respecting a breach of the pension plan in the previous agreement.[182]

The status of an employee under a collective agreement negotiated after his retirement is suspect. In *Allied Chemical and Alkali Workers Local 1* v. *Pittsburgh Plate Glass Co., Chemical Division*[183] the U.S. Supreme Court held that a retired employee is not an "employee" and not in the "unit", and that pensions for retired employees are not subjects of mandatory bargaining. In *Howe Sound Co.* v. *International Union of Mine Mill and Smelter Workers Local 663*[184] the B.C. Supreme Court examined the equivalents of ss. 1(1)(e), 1(1)(x), 22(2), 39, and 40 of the Nova Scotia Trade Union Act, stated that a union may negotiate a collective agreement only for "actual employees", and held that persons not actively employed by the employer are "in no way bound by, affected by, or entitled to" the pensions conferred by the collective agreement.[185] In two footnotes *Pittsburgh Plate Glass* stated that pensions were subjects of "permissive" bargaining under the National Labour Relations Act.[186] It is therefore conceivable that, notwithstanding *Howe Sound*, a union-negotiated pension may be enforced *personally* by the union on the employee's behalf. If the retiree is not an "employee" or in the "unit" then the union derives no legal capacity from the Trade Union Act, s. 25(a)

181. *Re Coulter Manufacturing Ltd. and UAW Local 222* (1972), 1 L.A.C. 426 (Weatherill), at 430. As a strike is not conterminous with the termination of the collective agreement, it appears that the Trade Union Act, s. 51 (3)(d)(i) does not rivivify the employer's pension liability.

182. *Re UAW and Acme Screw and Gear Ltd.* (1964), 15 L.A.C. 351 (Little), at 362-63.

183. 92 S. Ct. 383 (1971).

184. (1961), 27 D.L.R. (2d) 453; 61 C.L.L.C. 15,338, *rev'd* on the issue of *certiorari*, [1962]S.C.R. 318, *aff'g* (1961-62), 36 W.W.R. 181 (C.A.). Neither appellate court discussed the enforceability of pensions.

185. (1961), 27 D.L.R. (2d) 453, at 456; 61 C.L.L.C. 15, 338, at 197.

186. 92 S. Ct. 383 (1971), at 393, n.11; at 398-99, n.20. See also *Re Coulter Manufacturing Ltd. and UAW Local 222* (1972), 1 L.A.C. 426 (Weatherill), at 429.

to bargain on his behalf; the union must rely upon its common law capacity to contract under *International Brotherhood of Teamsters Local 213* v. *Therien*[187] and *O'Laughin* v. *The Halifax Longshoremen's Association.*[188]

Duty of fair representation: In practice a retired employee has nothing to offer his employer; he has no bargaining power and needs the union. Yet if he is not an "employee" or in the "unit" then he is unaffected by ss. 25(a) and 39 of the Trade Union Act, and is legally free to bargain. Thus the theoretical base for the duty of fair representation — "exclusivity" — is undercut. For the retired employee, the already-uncertain status of the duty of fair representation in Nova Scotia is further jeopardized.

(iii) Individual contract A pension plan which explicitly states that it is a contract is, of course, a contract, assuming that there is offer and acceptance, consideration and intent to create legal relations. If the employee's consideration is a promise than it is a bilateral contract. Pension plans rarely state that they are contracts or require a promise from the employee; almost all pensions not in collective agreements have been voluntarily instituted by the employer. What is their contractual status?

Gift or gratuity: Several American cases have held that noncontributory pensions are gratuities with "none of the essential elements of a contract".[189] Under this theory the pension is enforceable only as a "gift" and the employer may revoke his promise before "delivery" of the pension.

Unilateral contract: The bulk of American authority holds that pensions are unilateral contracts, the consideration from the employee being mere service with the employer until vesting.[190]

187. [1960]S.C.R. 265; 22 D.L.R. (2d) 1.
188. (1972), 3 N.S.R. (2d) 766 (App. Div.); 28 D.L.R. (3d) 315.
189. *Neuffer v. Bakery and Confectionery Works International Union,* 193 F. Supp. 699 (D.D.C. 1961), at 700; *Schneider* v. *McKesson*, 32 L.C. 94,422 (D.N.Y. 1957); *Kravitz* v. *Twentieth Century Fox Film Corp.*, 31 L.C. 93,290 (N.Y. S.C. 1957); *Hughes* v. *Encyclopedia Britannica,* 117 N.E. 2d 880 (Ill. App. Ct. 1954); *Umshler* v. *Umshler*, 76 N.E. 2d 231 (Ill. App. Ct. 1947); *Dolan* v. *Heller Bros.*, 104 A 2d 860 (N.J. Super. Ct. 1954).
190. *Wilson* v. *Rudolph Wurlitzer Co.* 194 N.E. 441 (Ohio C.A. 1934); *Gilbert* v. *Norfolk & W. Railway Co.*, 171 S.E. 814 (W. Va. S.C. 1933); *Lowndes Cooperative Association* v. *Lipsey*, 126 So. 2d 276 (Miss. S.C. 1911); *Hobbs* v. *Lewis*, 159 F. Supp. 282 (D.D.C. 1958); *Hurd* v. *Illinois Bell Telephone Co.*, 234 F. 2d 942 (7th Cir. 1956); *Hundle* v. *Morrison Steel Co.*, 223 A. 2d 193 (N.J. Super. Ct. 1966); *Hunter* v. *Sparling*, 197 P. 2d 807 (D.C.A. Cal. 1948), at 814-15.

Even non-contributory pensions have been held to be unilateral contracts.[191] If Lord Denning's subsidiary contract of *Errington* v. *Errington*[192] has ensconced itself in Nova Scotia then the employer may not revoke his promise to pay a pension before vesting. The American courts, however, have permitted the employer to deny a pension to an employee discharged before vesting.[193] In *Gorr* v. *Consolidated Foods Co.* the employer separated 87% of his workforce before vesting. The court held that the employees forfeited the employer's contributions, but emphasized that, as the money had been deposited for the "exclusive benefit of the employees", Consolidated Foods could not withdraw the forfeited money from the fund.[194] So the money remained in the fund, and defrayed Consolidated Foods' future contributions for the leftover employees.[195]

Nullification of contract clauses: If the offeror may revoke his obligations at will there is no promise and therefore no contract.[196] Pension plans not in collective agreements invariably permit the employer to "modify or terminate" the plan at will.[197] The contractual status of a pension therefore depends on the effect given to the "modify or terminate" clause. When a plan permits the employer to modify *vested* benefits: if the plan states the formula for modification, a modification according to the formula, and the pension plan generally, are upheld contractually;[198] if the plan specifies no formula, then the employer's unfettered discretion nullifies the contract for lack of a promise from the employer.[199] A plan that does not state that the employer may modify vested rights

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191. *Lloyd* v. *Heywood-Wakefield Co.*, 42 L.C. 24,639 (D. Mass. 1961); *Siegel* v. *First Pennsylvania Banking and Trust Co.*, 44 L.C. 26,299 (D. Pa. 1961).
192. [1952] 1 K.B. 290 (C.A.).
193. *Weber* v. *Bell Telephone Co. of Pennsylvania*, 47 L.C. 28, 825 (Pa. C.P. 1965); *Schneider* v. *McKesson*, 254 F. 2d 827 (2d. Cir. 1958); *Local Lodge 2040 Of International Association of Machinists* v. *Servel Inc.*, 268 F. 2d 692 (7th Cir. 1959) *certiorari* denied 361 U.S. 884 (1959); *Karcz* v. *Luther Manufacturing Co.*, 155 N.E. 2d 441 (Mass. S,J.C. 1959); *Bailey* v. *Rockwell Spring and Axle Co.*, 175 N.Y.S. 2d 104 (S.C. 1958).
194. 91 N.W. 2d 772 (Minn. S.C. 1958).
195. M. Bernstein, *Employee Pension Rights When Plants Shut Down; Problems and Some Proposals*, (1963), 76 Harv. L. Rev. 952, at 955, n.12.
196. *Randall* v. *Morgan* (1805), 12 Ves. Jun. 67; 33 E.R. 26 (Ch.).
197. See the Dosco Plan, ss. 36, 39 in Appendix B.
198. *Hurd* v. *Illinois Bell Telephone Co.*, 136 F. Supp. 125 (D. Ill. 1955), *aff'd* 234 F. 2d 942 (7th Cir. 1956).
199. *Umshler* v. *Umshler*, 76 N.E. 2d 231 (Ill. App. Ct. 1947)

will be interpreted to permit modification of only non-vested promises; the vested rights are contractually intact.[200] Many plans specify that the pension "shall not be deemed to constitute a contract". The Dosco Plan limits the employer's liability at least five times.[201] "No contract" clauses have been upheld.[202] The better view, however, is that the "no contract" clause conflicts with the plan's "vesting" clause; nothing can "vest" if there is no contract. The next step is to uphold the "vesting" clause and ignore the "no contract" clause.[203] Nullification clauses have no place under the Pension Benefits Standards Act, which requires "contractual" obligations.[204]

Termination of employment does not terminate the employee's right to a pension.[205]

The "deferred wages" theory: Pensions have been characterized as "wages" almost everywhere but in court. In days of old, pensions remunerated the *current* services of, for example, spies, "the first dukes of the kingdom" and ladies "of a less dignified character".[206] More recently, unions[207] and employees[208] have asserted that pensions are deferred wages *earned* by the employee during his years of service. It has been held that pensions are "wages" for the purpose of mandatory bargaining under the National Labour Relations Act.[209] If pensions are "wages" it theoretically follows that the consideration from the employee is his current service, and that employment until vesting is unnecessary to cement the contract; yet, only one court in a *dictum* has adopted this

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200. See generally *Little and Siefert* v. *Kent McClain of Canada Ltd.* (1972), C.C.H. Employment Benefits and Pension Guide, para. 1360 (Ont. H.C.); *Cantor* v. *Berkshire Life Insurance Co.*, 171 N.E. 2d 518 (Ohio S.C. 1960); *Adelaide Weesner* v. *Electric Power Board of Chatanooga* 41 L.C. 23, 739 (Tenn. C.A. 1961).

201. See Appendix B, ss. 36, 37. See also ss. 28, 33.

202. *Hughes* v. *Encyclopedia Britannica*, 117 N.E. 2d 880 (Ill. App Ct. 1954).

203. *California-Western States Life Insurance Co.* v. *Gibbons*, 29 L.C. 90, 831 (Cal. Super Ct. 1955); *Siegel* v. *First Pennsylvania Banking and Trust Co.*, 44 L.C. 26,299 (D. Pa. 1961).

204. R.S.C. 1970, c. P-8, ss. 10, 11.

205. *Taylor* v. *McQuilken* (1968), 2 D.L.R. (3d) 463 (Man Q.B.), at 466.

206. Sir Lewis Namier, *The Structure of British Politics at the Accession of George III* (2d ed., London: MacMillan, 1957), at 185-87.

207. G. Milling, "Labour's Interest in Pension Planning", in Coward, *supra*, note 27, at 186.

208. Nader, *supra*, note 3, at 12.

209. *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (7th Cir 1948); *Richfield Oil Corp.* v. *NLRB*, 231 F. 2d 717 (D.C. C.A. 1956), at 724.

reasoning.[210] Other cases speak of pensions as "deferred wages" but nullify the concept by holding that the employer's liability crystallizes only on the vesting date.[211] Of particular importance to a Nova Scotian employee is the status of a pension owed by an insolvent employer, as "pay" under the Labour Standards Code,[212] ss. 1(n), 77 and 84. The United States Supreme Court has stated that the purpose of giving wages priority in bankruptcy proceedings is to ensure that the employee has sufficient funds to survive the period of unemployment that follows his discharge by the bankrupt employer; as pensions are not payable until retirement, pension are beyond the purpose of bankruptcy statues giving priority to "wages".[213]

In parlance pensions are "deffered wages". In law the employee depends upon unilateral contract.

(iv) The "modify or terminate" clause; for example, the Dosco Plan, ss. 36, 39

"Modification"; special problems under collective agreements: Collective agreements frequently state that the employer is "bound to continue existing welfare plans". If the pre-existing pension plan permitted the employer to modify his obligations at will, a question arises as to whether the employer may unilaterally amend the plan which has become part of the collective agreement. The general principle is that when the collective agreement binds the employer in general terms to "abide by the pension plan" the employer may unilaterally amend the pension plan; only terms of the pension plan that are *specified* in the collective agreement are exempt from the employer's power of modiciation.[214] The employer's power to amend an individual contract has been discussed above.

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210. *Lucas* v. *Seagrave Corp.* 277 F. Supp. 338 (D. Minn. 1967), at 345.
211. See the *Hurd* case, *supra*, note 198, at 134; *Ledwith* v. *Bankers Life Insurance Co.*, 54 N.W. 2d 409 (Neb. S.C. 1952), at 417-18.
212. S.N.S. 1972, c. 10.
213. *Joint Industry Board of Electrical Industry* v. *U.S.*, 88 S. Ct. 1491 (1968).
214. *Re USW Local 4906 and Timken Roller Bearing Co.* (1966), 17 L.A.C. 157 (Reville); *Re Hamilton Type Preparation Workers Local 669 and Hamilton Spectator*, 1966, 17 L.A.C. 323. (Little); *Re UAW Local 199 and Columbus McKinnon Ltd.* (1966), 17 L.A.C. 213 (Lang). These three cases permitted modification. The following cases denied the employer a right to modify: *Re Int'l Ass'n of Firefighters Local 1137 and Township of Etobicoke* (1966), 17 L.A.C. 199 (Lane); *Re UAW Local 27 and Tecumseh Products of Canada Ltd.* (1966) 17 L.A.C. 144 (Lang); *Re International Ass's of Machinists and Aerospace Workers Flin Flon Lodge 1848 and Hudson Bay Mining and Smelting Co. Ltd.*, [1968] S.C.R. 113; 66 D.L.R. (2d) 1.

"Termination" of a pension plan by the employer The Pension Benefits Standards Act[215] states that, upon termination: cessation of the employer's contributions is deemed to terminate a pension plan;[216] the employer must defray his unfunded liability, to vested and non-vested employees;[217] the fund moneys are used to pay all the pensions to which the employees are entitled;[218] no money is refunded to the employer until the pensions are paid;[219] an amendment to a plan made for the purpose of avoiding obligations under the Act is void.[220] For continued registration under the Income Act, the assets of a terminated pension plan must be transferred to the fund of a new pension plan.[221] Pension plans invariably state the priorities for the distribution of assets upon "termination".[222] A question thus arises as to whether a mass layoff is a "termination" of the plan, permitting the severed employees to share the assets, or a continuation of the plan where the non-vested employees receive nothing. In *Gorr* v. *Consolidated Foods Co.*[223] and in *George* v. *Habe*[224] the employers laid off 87% and 95% of their work forces respectively. The courts held that neither mass severance constituted a "termination" of the pension plan.

When an employee whose pension is not vested is laid off immediately before the termination of the plan, he may not share in the distribution of the assets.[225] After paying the pensions due to the employees, the employer may recover the surplus of a group annuity fund.[226] The collocation of these two factors permits the employer to recapture much of the assets of the pension fund. In 1954 Studebaker-Packard Co. employed 10,250 employees at the Packard plant. The Company wished to discontinue its Packard plant, so it laid off thousands of employees *before* terminating its pension plan. At the plan's termination only 625 employees

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215. R.S.C.1970, c. P-8.
216. S.O.R./67-328, s. 11(1).
217. R.S.C. 1970, c. P-8, s. 12(b).
218. R.S.C. 1970, c. p-8, s. 12(a).
219. S.O.R./67-328, ss. 9(4), 11(2).
220. R.S.C. 1970, c. P-8, s. 19.
221. Circular 72-13R2, *supra*, note 29, at para. 16.
222. See for example ss. 39-41 of the Dosco Plan in Appendix B.
223. 91 N.W. 3d 772 (Minn. S.C. 1958).
224. 72 N.W. 2d 121 (Mich. S.C. 1955).
225. *Finnell* v. *Cramet Inc.* 289 F. 2d 409 (6th Cir. 1961).
226. *Hudson* v. *John Hancock Mutual Life Insurance Co.*, 46 L.C. 28,610, (8th Cir. 1963).

remained to receive pensions. The forfeited pensions reverted to the Company. International Harvester Co. in 1962 and the Saturday Evening Post in 1969 used the same tactic.[227]

(v) Quasi-contract It is arguable that the employer or the trust fund is unjustly enriched when an employee discharged before vesting forfeits the employer's contributions.[228] *Borngesser* v. *United Dairy Workers Pension Fund Commmittee*[229] stated that there was no unjust enrichment when the employer defrayed his future contributions by the amount of a discharged employee's forfeited pension. *Lucas* v. *Seagrave Corp.*[230] intimated, however, that the windfall accruing to an employer from a mass layoff might constitute unjust enrichment.

(vi) The employee's right to recover his contributions In *Pennie* v. *Reis*[231] the U.S. Supreme Court held that an employee who was denied a pension could not receive his contributions. The reason was that he had never possessed the money, which had been deducted from his wages. One would think that a modern court would assert the employee's quasi-contractual right to recover his contributions, but the result of the complicated facts of *Genevese* v. *Martin-Mariette Co.*[232] was judicial ruling that the employer could take the entire benefit of the employee's contributions. The question of an employee's quasi-contractual right to recover his contributions would rarely arise in Nova Scotia because pension plans always expressly permit a refund of contributions when the employee forfeits the pension. An expressly authorized refund is, of course, enforced.[233]

(vii) Post-retirement forfeiture of the pension Many plans prohibit the retired employee from resuming employment with a competitor of his first employer, the wages of sin being forfeiture of his pension. American courts have generally upheld the restrictive convenants.[234] The New York Supreme Court in *Kristt* v.

227. Nader, *supra*, note 3, at 51-53.
228. Bernstein, *supra*, note 195, at 962-68.
229. 135 N.W. 2d 381 (Mich. S.C. 1965); See also *Knoll* v. *Phoenix Steel Co.*, 69 L.C. 25, 287 (3rd Cir. 1972).
230. 277 F. Supp. 338 (D. Minn. 1967), at 346.
231. 132 U.S. 464 (1889).
232. 63 L.C. 19,664 (D. Pa 1969).
233. *Jamieson* v. *Dominion Steel and Coal Co.* (1971), 2 N.S.R. (2d) 517 (App. Div.); 19 D.L.R. (3d) 203.
234. *Garner* v. *Girard Trust Bank*, 65 L.C. 20,909 (Pa. C.P. 1971); *Kumm* v. *Allen*, 46 L.C. 28,326 (N.Y. S.C. 1962); cf. *Calfornia-Western States Life Insurance Co.* v. *Gibbons*, 29 L.C. 90,831 (Cal. Super. Ct. 1955).

Whelan[235] found the covenant justifiable because it allowed the employee unfettered freedom of choice: he could choose a pension without re-employment or re-employment without a pension. In Canada[236] and in England[237] restrictive covenants in pension plans have been declared void as being in restraint of trade.

(viii) Review of "final" decisions of the administrative board Many plans state that the administrative board's interpretation of the plan is "final and conclusive".[238] An American court will not, in the wake of such a clause, reverse the decision of an administrative board unless the board acted in bad faith.[239] *Russell* v. *Princeton Laboratories*[240] provides an example of reversal because of bad faith: the pension plan stated that the employee would forfeit his pension if, in the "final" opinion of the board, he had "voluntarily" terminated his employment; the employee terminated because his poor health could not tolerate the unsanitary conditions of the plant; the court reversed the board's finding of "voluntary" termination and its decision to deny the pension. The only American departure from the general position is a decision that a court may reverse a decision of an administrative board in the absence of bad faith if the decision concerns a major matter affecting all the employees (for example, integration with a public pension plan).[241] The only Canadian court to meet such a clause in a pension plan simply ignored it, without tedious rationalization.[242]

(ix) Tort An employee who selects among optional forms of pension benefits in reliance upon the misleading information of the

235. 32 L.C. 94,493 (N.Y. S.C. 1957).
236. *Taylor* v. *McQuilkin* (1968), 2 D.L.R. (3d) 463 (Man. Q.B).
237. *Bull* v. *Pitney-Bowes*, [1967] 1 W.L.R. 273 (Q.B.D.).
238. See, for example, s. 24(a) of the Dosco Plan in Appendix B.
239. *Magnolia Petroleum* v. *Butler*, 86 S.W. 2d 258 (Tex. Civ. App. 1935), at 262; *Dowling* v. *Texas and N.O.R. Co.*, 80 S.W. 2d 456 (Tex. Civ. App. 1935), at 458-59; *Webster* v. *Southwestern Bell Telephone Co.* 153 S.W. 2d 498 (Tex. Civ. App. 1941); *Menke* v. *Thompson*, 140 F. 2d 786 (8th Cir. 1944), at 791; *Western Union Telegraph Co.* v. *Robertson*, 225 S.W. 649 (Ark. S.C. 1920), at 652; *Aston* v. *Magnolium Petroleum Co.*, 241 S.W. 2d 306 (Tex. Civ. App. 1951), at 308; *Spiner* v. *Western Union Telegraph Co.*, 73 S.W. 2d 566 (Tex. Civ App. 1934), at 568-69; *Park* v. *Board of Trustees of Pension Trust Fund for Operating Engineers*, 67 L.C. 23,224 (Cal. C.A. 1971); *Norman* v. *Southern Bell Telephone and Telegraph Co.*, 322 S.W. 2d 95 (KY. C.A, 1959).
240. 56 L.C. 19,866 (N.J. S.C. 1967). See also *Moore* v. *Postal Telegraph-Cable Co.*, 24 S.R. 2d 361 (S. Car. S.C. 1943), at 364; *Forrish* v. *Kennedy*, 105 A. 2d 67 (1954); *Siegel* v. *First Pennsylvania Banking and Trust Co.*, 44 L.C. 26,229 (D. Pa. 1961).
241. The *Hurd*, case, *supra*, note 198, at 154-55.
242. The *Taylor* case, *supra*, note 236, at 468.

employer, may have an action for negligent misstatement and may recover damages for his loss caused by making an impolitic choice.[243]

(x) The employee's recourse against the insurance company "Life insurance" is defined in the Insurance Act[244] as "insurance whereby an insurer undertakes to pay insurance money. . .at a fixed determinable future time; or for a term dependent on human life". If a group annuity is "life insurance" then an employee may take advantage of third party beneficiary status under Part VIII of the Insurance Act. The Supreme Court of Canada has stated, however, that a pension annuity is not "life insurance" within the similar definition in the Ontario Insurance Act.[245] Unless the employee has privity of contract with the insurance company he has no direct remedy. Several American cases have found the required privity by depicting the annuity policy as a tripartite contract between the employer, the employee and the insurance company.[246] No Canadian case has shown similar inclinations. As only the employer and the insurance company sign the group annuity policy, it is probable that a Canadian employee is not a party to the contract and must rely upon his employer's willingness to sue the insurance company.

A segregated funds policy eradicates every remaining recourse of the employee. A standard form segregated funds policy states that the insurance company has custody of the funds and "in its sole discretion will determine the nature of the investments". Yet nowhere does the Canadian and British Insurance Companies Act[247] or the policy constitute the insurance company as a trustee; the employee has no equitable rights. Subject to the tenuous argument of tripartite contract, the employee has no direct contractual rights. As the insurance company does not guarantee even the captial of the fund, the employer is also bereft of contractual rights. The insurance company manages the money but is virtually immune from liability.

(xi) The employee's recourse against the trustee The Department of National Revenue requires that if a fund is held by

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243. *Gediman* v. *Anheuser-Busch Inc.*, 44 L.C. 26,037 (2d. Cir 1962).
244. R.S.N.S. 1967, c 148, s. 2(n).
245. *Gray* v. *Kerslake,* [1957] S.C.R. 516; 11 D.L.R. (2d) 225.
246. *Gallo* v. *Howard Stores Corp.*, 145 F. Supp. 909 (D. PA. 1956), at 911; *Hudson* v. *John Hancock Mutual Life Insurance Co.*, 314 F. 2d 16 (8th Cir. 1963), at 20. The *Gorr* case *supra*, note 194, at 777.
247. R.S.C. 1970, c. 1-15.

individual trustees, three of the trustees must reside in Canada, and one must be unaffiliated with the employer.[248] The Trustee Act, s. 65[249] states that the common law rules relating to perpetuities and accumulations do not apply to trusteed pension plans.

When the trust deed conflicts with the terms of the pension plan, the trust deed "stands alone" in determining the equitable rights of the employees.[250] The Trustee Act[251] and the Variation of Trusts Act[252] state the circumstances when a court may depart from the terms of a trust indenture. At common law a court will enforce the terms of the indenture except in cases of "emergency".[253] Thus, at common law, when the indenture states that investments will be directed by the settlor, the trustee is bound to invest according to the settlor's instructions[254] and an unauthorized investment may be a breach of trust.[255]Even the investment standards in the Trustee Act apply only insofar as there is no conflict with the trust indenture.[256] Unless the indenture is statutorily varied, an employer in Nova Scotia may lawfully direct the use of the trust moneys by inserting the appropriate clauses in the indenture. As the indenture is usually the employer's creation, the retention of supervisory power is quite common. The pension consultants interviewed stated that most individual trustees in Nova Scotia may invest only as instructed. The Dalhousie plan's trust deed permits the trustees to pay money from the fund " on the order of the University" (s.2), and allows the University unilaterally to select, remove and replace the trustees (s. 6).

The standard form indentures of corporate trustees often attempt to exempt the trustee from liability or an accounting to beneficiaries. Although there is authority for upholding the

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248. Circular 72-13R2, *supra*, note 29, at para 6(e)(ii)(B)

249. R.S.N.S. 1967, c. 317.

250. *International Brotherhood of Boilermakers v. Yarrow Ltd.* (1963), 39 D.L.R. (2d) 470 (B.C.S.C.), at 471, 473.

251. R.S.N.S. 1967, c. 317, s. 50.

252. R.S.N.S. 1967, c. 323.

253. *Re New,* [1910] 2 Ch. 534 (C.A.), at 544; *Chapman* v. *Chapman,* [1954] A.C. 429 (H.L.); *International Brotherhood of Boilermakers, supra*, note 250, at 474.

254. *Beauclerk* v. *Ashburnham* (1845), 8 Beav. 322; 50 E.R. 126 (Rolls Ct.); *Cadogan* v. *Essex* (1854), 2 Drew 227; 61 E.R. 706 (V.Ch. Ct.); *Re Hurst* (1890), 63 L.T. 665 (Ch.D.); G. Keeton, *The Law of Trusts* (9th ed. Bath: Pitman, 1968), at 256-59 and cases cited; P. Pettit, *Equity and the Law of Trusts* (2nd ed. London: Butterworth's, 1970), at 246-48 and cases cited.

255. *Re Salmon* (1889), 42 Ch. D. 351.

256. R.S.N.S. 1967, c. 317, ss. 2, 5-9.

exemption clauses,[257] most courts rule that clauses which limit a pensioner's recourse against the trustee are void.[258]

When the deed permits the trustees to draft rules for carrying out the purposes of the plan, the trustees, in New Jersey at least, have an affirmative duty to make "full disclosure of all facts which are material for beneficiaries to know for the protection of their interests".[259] The court held that an employee who failed to meet an eligibility requirement of which he had no notice was entitled to a declaration of his right to receive a pension.

6. *Conclusion.* Timid unions have failed to assert the employee's right to control the administration of his pension. The common law is a whirl of judicial diffidence and exemptions from liability. Registration under the Income Tax Act is voluntary at the employer's discretion, and lower taxes from the employer require higher levies on other taxpayers; so the value of the Act's bought virtue is questionable. The result is that the employer may legally dictate the terms of the plan. 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.[260]

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257. *Wilkins* v. *Hogg* (1861), 3 Giff. 116; 66 E.R. 346 (Ch.); *Brown* v. *Brown,* [1931] O.R. 759 (Ont. S.C.); 4 D.L.R. 420, at 425 *(dicta)*; Parke and A. Mellows, *The Modern Law of Trusts* (2d ed. London: Sweet and Maxwell, 1970), at 415.

258. *Jones* v. *Shipping Federation of British Columbia* (1963), 41 W.W.R. 636 (B.C.S.C.); 37 D.L.R. (2d) 273; the *Taylor* case, *supra*, note 236, at 468; *Kent* v. *Universal Film Mfg. Co.*, 193 N.Y. Supp. 838 (App. Div. 1922); *United Garment Workers of America Local No. 140* v. *Jacob Reid's Sons*, 83 F. Supp. 49 (D. Pa. 1949), at 52.

259. *Branch* v. *White*, L.C. 21, 064 (N.J. App. Div. 1968) at 21,068.

260. Between the writing and publication of this paper Bill 29 (1975) was introduced in the Nova Scotia Legislature. It is virtually indentical to the Ontario Pension Benefits Act and greatly resembles the federal Pension Benefits Standards Act discussed throughout this paper.

The salient provisions of Bill 29, with their equivalents in the federal Pension Benefits Standards Act are:

1. For the purpose of the Act, a person is "employed" in the province where he reports to work or, if he does not report to work, in the province which is the source of his remuneration: Bill 29, s. 3.
2. The Superintendent of Pensions may inspect documents and require the filing of information respecting the pension plan. Employees must be informed of the provisions of the plan: Bill 29, ss. 7(2), 15, 18(1)(b); PBSA, ss. 4, 7, 11(c), 16.
3. Pensions must vest at a minimum of forty-five years of age and ten years of continuous service; Bill 29, s. 17(1)(a); PBSA, s. 10(1)(a).

4. Except for voluntary payments, the employee's contributions are "locked in": Bill 29, ss. 17(2), 17(3)(b), 17(4); PBSA, ss. 10(1)(b-d), 10(2)(b,c).
5. When permitted by the plan the employee may elect a joint and survivorship benefit or a benefit for a guaranteed period: Bill 29, s. 17(5); PBSA, s. 10(2)(d).
6. Integration is permitted for benefits earned after 1966: Bill 29, ss. 7(6), 18(3); PBSA, s. 10(2)(e).
7. Investments will be governed by regulations: Bill 29, s. 18(1)(c); PBSA, s. 11(b).
8. When the plan is wound up or when the employer is convicted of a contravention of the Act, he must pay into the fund all money that he wrongfully withheld: Bill 29, ss. 17(7), 18(2), 25(2); PBSA. s. 12.
9. When an employer stops or is about to stop all or part of his business operations, the Superintendent may declare that the employer's pension plan is wound up: Bill 29, s. 19.
10. Funding must comply with the regulations and must be adequate to pay all benefits promised by the plan: Bill 29, ss. 18(1)(a), 25(2); PBSA, s. 11(a).
11. The manner of calculating contributions and benefits shall not be in the discretion of the employer: Bill 29, s. 20(b).

Appendix A

Income Tax Act
S.C. 1970-71-72, c. 63

Generally, the contributions of both the employer and the employee and the earnings of the fund are deductible from income. Benefits paid to employees after retirement are taxable. There are two advantages to the employee:

1. No tax is paid on the income of the pension fund. This is partially offset because the earnings of the fund are eventually paid to the employee as "income", which is all taxable, instead of as capital gain, only 50% of which is taxable.
2. The employee will probably be in a lower tax bracket after retirement than during his career. Thus he pays a lower rate of tax on his pension than on money not contributed to a pension plan.

Deferred Profit Sharing Plan

1. Defined: ss. 248(1), 147(1).
2. The plan must be registered to gain tax advantages. The prerequisites for registration are stated in s. 147(2-5). Generally, the plan must provide:
   (i) that a trustee shall hold the money;
   (ii) that no investment may be made in the employer's company;
   (iii) that the employee's interest is not assignable or surrenderable;
   (iv) that the employee has vested rights after five years of employment;
   (v) that employees will be informed of their rights;
   (vi) for death benefits should the employee die before his retirement;
   (vii) that capital gains and losses be allocated to employees at market value.
3. If the plan is registered:
   (i) the employer's deductions are the lesser of $2,500. per employee per year and 20% of the employee's salary: ss. 18(1)(j), 20(1)(y). 60(k), 147(8,9);

(ii) the income of the trust is exempt from tax: ss. 147(7), 149 (1)(s); except there is a 1% tax penalty on foreign property holdings which exceed 10% of all holdings: ss. 205-07; investment in "non-qualified investments" is taxed: ss. 198-204;
(iii) benefits paid to employees are "income": ss. 56(1)(i); 60(a), (m), (n), (1); 61(1); 61(2)(a)(iv); 147(10-12); Income Tax Application Rules, s. 40 for lump sum payments.

Registered Retirement Savings Plan.

1. Defined: ss. 146(1)(i)(J); 248(1). Generally, it is any contract for the sale of a life annuity to an individual. The annuitant's employer need not be involved. To be accepted for registration the plan must provide that benefits are not assignable or surrenderable.
2. If it is registered:
   (i) the annuitant's contributions are deductible up to $4,000. or 20% of income: ss. 60(i,1), 146(5);
   (ii) no tax is paid by a trust on its RRSP fund: ss. 146(1) (e,g), 146(4), 146(10), 205-07;
   (iii) benefits paid are taxable: ss. 56(1)(h); 60(a), (1), (m), (n); 61(2)(d); 146(8).

Employees' Profit Sharing Plan

1. The plan must qualify under the definition in ss. 144(1), 248(1).
2. Contributions are deductible: s. 20 (1)(w); 144(5).
3. The amounts allocated to the employees each year are taxable: ss. 6(1)(d); 81(1)(k), 144(3-4). If the employee forfeits the pension before vesting the tax is refundable: s. 144(9).
4. The earnings of the fund are not taxable: ss. 144(2), 149(1)(p).
5. The benefits paid to employees generally are not taxable: ss. 61(1), 61(2)(a)(iii), 144(6-7); Income Tax Application Rules, s. 40 for lump sum payments.

Pension Plan

1. Prerequisites for registration: s. 248(1) — definition of "registered pension fund or plan"; see *passim* throughout this paper for the standards required by the Department of National Revenue in Circular 72-13R2.
2. If it is registered:
   (i) The employer's contributions are deductible up to $2,500. per year per employee: ss. 20(1)(q-s); 6(1)(a).
   (ii) The employee's contributions are deductible up to $2,500. per year: ss, 8(1)(m), 8(6-8).
   (iii) The income and capital gains of the fund are not taxable: ss. 149(1)(o), 205-07.
   (iv) Benefits paid are taxable: ss. 56(1)(a); 60(a), (j), (m-n). See Income Tax Application Rules, s. 40 for lump sum payments.