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Profit Sharing and Pension Plans in Canada: A Legal Profile

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Profit Sharing and Pension Plans in Canada: A Legal Profile*

by

DANIEL JAY BAUM**

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* This is the first part of Prof. Baum's article. The second part will describe the factual environment and the operation of profit sharing and pension plans and will be published in the next issue.

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1. INTRODUCTION

This article will describe the legal environment surrounding profit sharing and pension plans in Canada.¹ Central to this statement is a detailed summary of those legal restrictions affecting investment decisions, and more particularly the use of monies in equity participation.² That is, a decision having been made to establish a profit sharing or pension plan, how may the funds flowing into the scheme be invested?

Before specific legislation touching upon investment decisions can be discussed, certain primary matters must be developed. First, who has the power to decide whether and how a profit sharing or pension scheme will operate? Is management to assume an inherent right to initiate, modify, and direct the flow of monies into such schemes? In part the answers to these questions will be found in labor law, and more particularly the demands of collective bargaining.

Second, management must know to whose jurisdiction it is subject. A business, operating in several provinces, implementing a single profit sharing or pension plan, might have some difficulty if it is confronted with conflicting federal and provincial legislation. Thus, it becomes necessary to examine the jurisdictional setting and federal involvement in the control over profit sharing and pension plans.

A separate section will discuss the Income Tax Act. The tax treatment of pension funds will be contrasted with that of profit sharing plans. Apart from differences in definition, the tax alternatives for either choice will be presented.

Finally, provincial regulation is set forth. Primary emphasis is given to Ontario legislation not merely because it has served as a model for many other provinces, but also because of its industrial strength. The law of Quebec, under which a somewhat different environment has been created, also is included in this presentation.³ From a practical view, an effort is made to answer that most important question: Is there uniformity of regulation?

2. THE ROLE OF LABOR LAW

Profit sharing and pension plans possess certain common characteristics. Both generally are addressed to employees. Each, offering a form of compensation, can induce employee loyalty, tenure,

1. The term "pension funds" is meant to refer to private pension plans. Those plans pursuant to Special Acts of the Federal or Provincial Parliaments are to be distinguished.

2. The term "pension fund industry" also refers to the industry of private pension plans.

3. The Quebec Pension Plan and the Supplemental Pension Plans Act, *infra* at 48.

and, perhaps, efficiency. Yet there is no necessary assurance that all or any of these characteristics will come into being. For that matter, there is even the possibility that the characteristics might not harmonize with each other. Is it not possible to have an industry where high employee turnover is desirable and efficient? Indeed, is it not possible to have an industry where the youngest, those with the least seniority, might represent not only the cheapest labor, but also the most productive? If so, a profit sharing or pension plan geared to pass greater rewards to those possessing the most seniority from management's view, could be self-defeating.

Nevertheless, whatever management's view, whatever the goals of a profit sharing or pension plan, there is an overriding consideration: What will the law allow? Any plan, any exercise of business judgment, must comport with public policy as expressed in law. The thrust of this paper is to state clearly that policy. In doing so, it would be desirable if there were a single, well-stated law, called the public policy of profit sharing and pension plans. There is not. There is instead multiple legislation at federal and provincial levels designed to achieve diverse ends.

A beginning point could be the developed law governing labor disputes. In 1968 the Ontario Royal Commission Inquiry Into Labour Disputes, terming the strike device "a residual of the primordial struggle," called profit-sharing "theoretically, and . . . practicably, the most effective" way of achieving industrial peace. To the Royal Commission profit sharing results in:

giving the employee a sense of genuine participation in what is viewed as a life work. The employee, as part owner, feels that interest, the spur to increased efficiency and gradually increasing return. With expanding administrative consultation, these plans offer both an attitude towards and a broadened view of the employer-employee relations that exist today; and experience shows that these schemes are not incompatible with unionism, labour's security.⁴

The Ontario Royal Commission made proposals outside the ambit of labor legislation. The comment on profit sharing had little to do with the statutory scheme of industrial government. That scheme is designed not to *regulate*, but rather to allow groups of individuals to band together for the purpose of selecting a representative empowered

4. REPORT OF THE ROYAL COMMISSION INQUIRY INTO LABOUR DISPUTES (*The Raud Report*) 42-44 (Queen's Printer, 1968).

to bargain as of right with management.⁵ The law imposes, in this regard, an affirmative duty on management to bargain in good faith:

The intent of the statute is to provide a vehicle whereby labor and management can resolve their differences in an orderly, mutually protective manner to the extent that where the differences are a legitimate and honest stand on the part of each party, and all reasonable efforts to resolve them have been exhausted, then the right to strike or lockout comes into effect. The test as to reasonableness and honesty or good faith of a party is an objective one.⁶

At the extremes, good faith bargaining and objectivity can be measured, and the law can recognize and condemn those blatant attempts of refusal to bargain, coupled with employee wage bonuses, all aimed at destroying the union. This was done in *Regina v. Davidson Rubber Co., Inc.*, where the court stated:

The Company through its representatives and their take it or leave it attitude, their reluctance to meet with the Union representatives to negotiate an agreement, their dealing directly with employees with full knowledge of the certification of the Union as sole bargaining agent, all went beyond the realm of tough bargaining and were a deliberate attempt on the part of the Company to undermine and destroy the Union as a force within the plant⁷

5. CANADIAN INDUSTRIAL RELATIONS, THE REPORT OF THE TASK FORCE ON LABOUR RELATIONS 117 (Privy Council Office, 1968):

One cannot assume a correlation between the results of collective bargaining and any particular concept of equity. Collective bargaining is basically a power struggle; the outcome is more a reflection of the relative economic positions of the protagonists than of the merits of their claims and counterclaims in terms of some standard of equity.

6. *Regina v. Davidson Rubber Co., Inc.*, [1970] 1 Ont. 6, 18 (Ont. Prov. Ct.). Except for those matters related to peace, order, and good government, and those areas of the economy specifically subject to federal control (such as banking and broadcasting) the legislative power over labor relations rests with the provinces. The federal government and provinces all have used their powers to provide for collective bargaining as the key to labor public policy. See *The Alberta Labour Act*, ALTA. REV. STAT. c. 167, § 55(1) (b) (1955); *The Labour Relations Act*, B. C. REV. STAT. c. 205, §§ 2(1), 18 (1960); *The Labour Relations Act*, MAN. REV. STAT. c. 132, §§ 2(1)(e), 14(1954); *The Labour Relations Act*, NEWF. REV. STAT. c. 258, §§ 2(1)(e), 14(1954); *The Trade Union Act*, N.S. REV. STAT. c. 295, §§ 1(e), 14(1954); *The Labour Relations Act*, ONT. REV. STAT. c. 202, § 12 (1960); *The Industrial Relations Act*, STAT. PR. EDW. IS. c. 18, §§ 1 (e), 17 (1962); *The Labour Code*, QUE. REV. STAT. c. 141, § 41 (1964); *The Trade Union Act*, SASK. REV. STAT. c. 259, § 2(i)(1953); *Industrial Relations and Disputes Act*, CAN. REV. STAT. c. 152, §§ 2(1)(e), 14(1952).

7. *Id.* 23.

Still, the burden rests on the prosecution to prove bad faith, partly because of the quasi-criminal nature of an offense charged under, for example, the Ontario act. This often is an extremely difficult task. Not without reason are there few decisions covering good faith bargaining. However, it would be a mistake to assume that management is without constraint in the bargaining process. To do so would misconceive the nature of that process. The right to bargain necessarily assumes the right of the parties to resort to economic sanctions, including the right to strike and lockout. All that the law imposes is a process that is collective in nature. Under it the parties draft their own charter of industrial government. Through the collective agreement they lay down the terms and conditions of employment. The law, on the whole, says nothing to them about the substantive terms of the agreement to the extent that it has been committed to writing. Thus, for example, the Labour Relations Act of Ontario declares a collective bargaining agreement to be a contract "in writing between an employer . . . and a trade union . . . containing provisions respecting terms or conditions of employment in the rights, privileges or duties of the employer, the employer's organization, the trade union or its employees." ⁸

The legislature having spoken, the judiciary is not to interfere. No common law is to be read into the expressed terms of the union-

8. Both union and management have their own views as to how the written agreement should be interpreted.

How does management usually phrase its tacit assumptions about the nature and meaning of a collective agreement, which assumptions will grant it freedom to pursue the values it believes important? It argues that management begins with certain functions and prerogatives that preexisted collective bargaining, the purpose of union bargaining is to obtain contractual limitations on these "rights"; the eventual bargain involves an exchange that is freely agreed to by very sophisticated negotiators; and that any other approach to arbitral interpretation is in conflict with the policy of free collective bargaining.

Unions unequivocally repudiate the suggestion that the pre-existing legal position is carried over into the administration of the collective bargaining agreement, to the extent that the latter does not expressly change this position. Rather, they propose quite a different set of assumptions with which the interpretation of the agreement ought to be approached in arbitration. Each of the parties begins negotiating as an equal, with no pre-existing biases in its favour. To the extent that the explicit bargain that is reached confers rights or power on one side, it is legally permitted to enjoy them. To the extent there is no explicit mention in the contract about a certain matter, then the *status quo* at the beginning of the agreement, modified by practices that have been accepted during the administration of the agreement, should be the criterion for evaluating the legality of proposed employer action. This is true at least to the extent that the employer action will substantially infringe on the integrity of the bargaining unit and the proprietary rights in their jobs of the unit incumbents. P. WEILER, *LABOUR ARBITRATION AND INDUSTRIAL CHANGE*, TASK FORCE ON LABOUR RELATIONS, Study No. 6 at 5-6 (Privy Council Office, 1969).

management contract. The parties are bound by statute and agreement to resolve disputes of contract *interpretation* through impartial arbitration. The Supreme Court of Canada on more than one occasion has drawn a heavy line between interpretation and substantive addition to the contract. As a matter of law the Court has confined the industrial court, that is, the arbitration panel, to a sphere with severe limitations that hinder the development of a new *common law* for industry. The principle has been applied specifically to issues arising from pension fund administration. The decisions posit a judicial view not only of the arbitration process, but also of labor and management. The Court's rulings are not to be overlooked by profit sharing and pension planners.

On January 1, 1966, the Canada Pension Plan became effective. At that time, speaking for the Government, Miss Judy La Marsh stated:

The Canada Pension Plan . . . is designed to make available to all Canadians a satisfactory minimum standard of pensions related to incomes up to an average level. . . . It is not intended to provide all the retirement income which most Canadians wish to have. People who now belong to pension plans . . . will make further provision for their retirement, beyond the Canada Pension Plan. *How they do so, and to what extent, is properly left to individual choice or collective bargaining. The proper role of government is to provide a floor.*⁹

By statute Government had set a floor for retirement pension. The problem facing many employers was what to do with their already existing welfare schemes, of which several were voluntary and in being through *unilateral* action on the part of management. The Hudson Bay Mining & Smelting Co., Ltd. found itself in such a position. It had a plan under which employees contributed 3 percent of their earnings, and the company added whatever was necessary to provide an annual pension equal to 45 percent of the employee's total contributions. Under the Canada Pension Plan at its inception employees were to contribute 1.8 percent of their earnings. Hudson Bay notified its employees that the 1.8 percent would come from the monies put into the company pension, thereby reducing the employee contribution to the private plan by more than half to 1.2 percent. It

9. Quoted by Lawrence E. Coward, Chairman, Pension Commission of Ontario, *Pensions in Canada*, CCH Canada Ltd. 18 (1964); see also CAN. REV. STAT. c. 51(1964-65).

should also be noted that the employer contribution was necessarily lessened.¹⁰

Hudson Bay chose not to enlarge or diversify its retirement scheme, although the Canada Pension Plan provided that theoretical opportunity. Instead, the company opted for integration of benefits. The union disputed management's right to do this under the collective bargaining agreement despite the clear warnings issued by the company to its employees in a booklet:

1. The company reserved the right to administer the plan and "to decide all matters with respect thereto."
2. The company, save for those monies already contributed and therefore deemed vested in the employees, reserved the right to "change or discontinue the plan."¹¹

Management initiated the pension. Management cautioned the employees concerning company rights. How then could the union challenge what had been done? The basis for attack came from the collective bargaining agreement. It, not a welfare booklet issued by the company, was deemed the primary instrument for ascertaining rights and privileges. One article of that agreement bound the company "in accordance with the terms of the present agreements" not to discontinue its support of existing welfare programs, which included the pension plan.

The question came before an arbitration board of three, a union nominee, a company nominee, and an impartial chairman. By a two to one decision the board held that the article in the collective agreement bound management to continue its existing pension plan. On review the judiciary had to decide whether the arbitration panel interpreted or added to the substance of the collective agreement. For the Court Mr. Justice Martland upheld the board's ruling:

When the [Company] agreed to continue its support of the welfare plans in accordance with the terms of the present agreements that commitment can certainly be construed as an undertaking by it not to discontinue any of those plans, but to maintain them as they then existed. Such an interpretation of the article is, in my opinion, not only a proper one, but is probably the right one. *But whether right or wrong, in my view the Board interpreted and did not amend the agreement.*

10. *Re: International Association of Machinists & Aerospace Workers, Flin Flon Lodge 1848 et al. and Hudson Bay Mining & Smelting Co. Ltd.*, 66 D.L.R. 2d 1, 3 (S. Ct. Can. 1967).

11. *Id.*

This being so, it did not exceed its jurisdiction and its award is valid.¹²

To the Supreme Court the proper exercise of jurisdiction by an arbitration panel is *not* whether a *correct decision* is reached by the arbitrators, but whether the board interpreted or added to the substance of the agreement. *Within these boundaries* there is nothing to prevent the development of an industrial common law; of one arbitrator citing and accepting the reasoning of another arbitrator in the interpretation of language. Of course, it must be recognized that the language of collective agreements necessitates an understanding of industry custom. For Hudson Bay the process of arbitration resulted in an initially gratuitous plan being converted into something in the nature of an employee's right. The fact that it was a pension rather than a profit sharing plan made no difference. The same rationale would apply.

In another decision coming seven years before *Hudson Bay* the Supreme Court further indicated the function of arbitration and the prerogative of management. Canada Car & Foundry Co., Ltd., operating in Quebec, had unilaterally instituted a retirement plan before the first collective agreement. Under the terms of that plan, voluntary as to employee participation, compulsory retirement at 65 was ordered. To what extent may a pension or profit-sharing program contain compulsory retirement provisos and not strike at what many regard as key features of any collective agreement, namely, seniority rights, and the requirement that any discharge must be for just cause?

The Court stated:

The determination of a mandatory retirement age, applicable to all employees, is clearly a function of management. While it may well be that the age at which such compulsory retirement should become effective could be made the subject of collective agreement, the agreement under consideration here does not touch upon it. . . . In my opinion, compulsory retirement at age 65 is not a violation of the clauses in the collective agreement respecting seniority rights. . . .¹³

The Court enunciated a doctrine of residual management rights which arbitrators were to read into agreements. These were prerogatives that a company could negotiate away. Yet failing any specific agreement proviso, those residual rights of management are to

12. *Id.* 4-5 (emphasis added).

13. Canada Car & Foundry Co., Ltd. v. Dinham, [1960] S.C.R. 3, 21 D. L.R. 2d 273 (1960).

stand.¹⁴ Recognizing the industrial facts of life, what are arbitrators to do? Said one arbitration chairman in a decision which evoked separate opinions from both the company and union nominee:

To the average employee the terms of his employment are contained in the collective agreement. When a retirement plan is created unilaterally by the company, without consultation with his authorized bargaining agent, the union, and it permits him to use discretion whether or not he should participate, it is understandable he should consider that the terms of the collective agreement referring to his accrued seniority, which ostensibly assured him continued employment or work available that he is able to perform, would govern his term of employment until such time as the company finds cause for his discharge.

This underlines, in the opinion of the chairman, the necessity for the company creating a general policy of retirement, separate and apart from the contents of a plan applicable only to those who participate in it.¹⁵

The chairman in the arbitration felt compelled in the face of court rulings to permit the company to carry forward a program of compulsory retirement insofar as there was adequate notice. This was assumed for those who participated in the voluntary retirement plan; it was not for those who elected to stay outside that plan. While concurring in the chairman's result the union nominee rejected his rationale. Referring to the *Canada Car* decision of the Supreme Court the union nominee stated:

With deference, I find that the comments of the court about compulsory retirement are tantamount to an obliteration of the collective agreement. Take, for example, the seniority provisions. These provisions grant a priority of certain available work to certain people. The retirement plan then

14. *Re: Sandwich, Windsor and Amherstburg Railway Co.*, 26 D.L.R. 2d 704, 705 (Ont. Ct. App. 1960). For the Court, Aylesworth, J., said:

Spence, J., [for the lower court], accepts the principle that retirement of employees at any particular age is a function of management and that the question therefore is whether or not that function of management is in any way cut down or taken away from the employer by reason of the provisions of the collective agreement. We all, I think, are in full agreement with that statement of principle by Spence, J. I think we all certainly are also in agreement that the collective agreement does not prohibit in precise terms that which was done by the company.

15. *Re: International Chemical Workers, Local 174, & Dominion Tar & Chemical Co., Ltd.*, 10 Lab. Arb. Cas. 331, 336 (Can. 1960).

comes along and removes this priority by removing the people. The agreement says that certain employees may do X and Y. The retirement plan says that if they are of a certain age they may *not* do X and Y. To follow the *Canada Car* dictum is to support the legal mutilation of collective agreements. Therefore I would approach the grievance of Kemp free from this judicial encumbrance.

It is my view that Dominion Tar has no right to perpetuate a mandatory retirement policy in the wake of the discharge provisions of its collective agreement with local 174. In so saying I realize that I fly in the face of much Ontario arbitration authority. With respect to the eminent arbitrators; I see no distinction between forced "retirement" and "discharge" as the term "discharge" is used in collective agreements.

We must construe the word in the light of its obvious purpose. Collective agreements are designed to provide employees with *job security*. There are two ways that security may be impaired. One way is through temporary termination of employment, and the other way is through permanent termination of employment. Temporary termination is dealt with in the lay-off clauses, and in my view permanent termination is dealt with in the discharge clauses.

Some arbitrators have argued that to be discharged is to be "fired." Retirement must therefore mean something else. With respect, there is no reason to assume that the parties intended to distinguish the *methods* by which employment might be terminated. Surely they were concerned only with the *fact* of termination. Whether the employer ended the relationship with a smile or with a growl would be of little consequence. The concern of the parties was to protect against the arbitrary severance of the employment relationship. Thus I submit that any management scheme which permanently terminates employment must be governed by the discharge provisions. This obviously includes retirement plans.¹⁶

The union dissent in part, well reasoned though it may have been, flew in the face of firm judicial opinion which arbitrators were not free to disregard in the development of their own common law for

16. *Id.* 341.

industry.¹⁷ Nor, in this regard, has weight been given to American rulings, "however persuasive." Said Arbitrator Wilson in 1961:

Even if it were conceded that the right of dismissal without cause, on proper notice, had been surrendered . . . , the [court] decisions I have quoted make it clear that dismissal on account of age is dismissal for a cause which can unilaterally be established by the employer.¹⁸

By judicial decision the union's sphere of interest in profit and pension plans has been limited. Even those vital areas of seniority and discharge for cause, key to effective union representation, may be touched upon in the exercise of management prerogative related to welfare programs. The burden is placed on the union to delineate *clearly* the expressed limitations on management's administration of a pension or profit sharing program.¹⁹ That burden is not easy to carry. Consider the 1969 report of the Board of Conciliation in the dispute between the Canadian Broadcasting Corporation and the Association of Radio and Television Employees of Canada (ARTEC)²⁰ A point at issue was the unions's desire to share in the administration of the company pension plan. This was rejected in part by the company on the ground that ARTEC was only one of several unions whose

17. Of the existing law Professor Weiler wrote:

At present, both arbitral and judicial doctrine in Ontario accept, with some limited reservations, the reserved rights theory as justifying management prerogative to change, unilaterally, working conditions for business reasons. This principle was originally worked out and established in the context of subcontracting cases. Here the basic philosophical assumptions have been developed concerning the approach to arbitral reasoning and decision making. Unfortunately the lines that were drawn seemed to identify a legalistic, literal interpretation of the agreement with arbitral restraint on the subcontracting issue and opposed this combination to one of active, arbitral policy making about management initiatives together with a creative interpretation of the provisions of the agreement in the light of their collective bargaining background. It is the thesis of this paper that there is no necessary identity of position on these two issues, that it is inconsistent with the proper role of the arbitrator for him to pick and choose among the various unilateral rights left to management, but that adherence by the arbitrator to the rule of law established by the agreement is quite compatible with a creative elaboration of the structure of relations established by the parties.

Supra, note 8 at 6.

18. *Re: Int'l. Woodworkers, Local 1-71, & Canadian Forest Products Ltd.*, 12 Lab. Arb. Cas. 25, 28 (Can. 1961).

19. *See Re: United Automobile Workers, Local 1075 & Canadian Car & Foundry Co., Ltd.*, 6 Lab. Arb. Cas. 161, 169 (Can. 1955).

20. In the Matter of a Dispute between Canadian Broadcasting Corporation and Association of Radio and Television Employees of Canada, (Dean H.W. Arthurs, Chairman) Feb. 25, 1969 (unpublished).

members contributed to the plan. In its award the Board of Conciliation found no merit to the company position:

. . . [I]n terms of unilateral corporate control of these welfare items there is no legal or moral reason why the Corporation cannot and should not enter into a consensual arrangement with ARTEC for the financing and governance of these plans. Such consensual arrangements are the rule rather than the exception in industry. Moreover to refuse to share the administration of any of these plans with ARTEC is indefensible at a time when they are financed, almost entirely by employee contributions.

The Corporation indicated its willingness to establish a broadly based consultative committee, which would include representatives of ARTEC and of other groups covered by these welfare plans. However, in the course of exploring the possible activities of such a committee; this Board became impressed with the absolute necessity of according it much broader powers and fuller access to administration than appeared to be contemplated by the Corporation. In our view, any form of meaningful consultation on welfare is impossible so long as significant information relating to the administration of any of the plans is withheld from the committee. We mention here; by way of example; the necessity of full disclosure of the investments of the pension plan; the profit from which is obviously material to the financial stability of the plan. But we pass beyond the question of full disclosure to the issue of full participation in administration.

We recommend that the Corporation establish a consultative committee on welfare, the members of which will be designated by all of the unions with which the Corporation enjoys a collective bargaining relationship and to which the Corporation as well may name members. This committee should be given full access to all information which it requests, and it should prepare a scheme for the administration of all welfare plans covering Corporation employees, whether on a Corporation wide or group-by-group basis. To assist it in preparing such a scheme, any information requested by the committee should be made freely available to it.²¹

21. *Id.* 16-19.

Despite the award of the Board of Conciliation, as the negotiations came to a conclusion, ARTEC did not choose to follow the opportunity made available. The CBC remained in charge of the administration and direction of the welfare plans which were funded primarily by employees. Evidently, the issues of primary concern to the union were direct wages and conditions of employment; it was willing to put welfare plans in a secondary or fringe benefit category. Thus, in the formulation of retirement or ancillary benefit schemes management may, and often does, find itself in the position of defining the contours of those programs within the context of labor laws.²²

22. THE FEDERAL TASK FORCE ON LABOUR RELATIONS found collective bargaining concerned with fringe benefits because of their significance. At the same time, the report questioned the effectiveness of that process in the resolution of problems. *Supra* note 5.

Originally collective bargaining dealt only with a limited range of substantive issues. It was exceptional for unions and management to negotiate anything beyond wages and hours and a few basic working conditions. In the face of a threatened or actual test of economic strength, it was a matter of accommodating the positions of the two parties on a few relatively straightforward issues.

Over the years an increasingly complicated range of issues has found its way onto the bargaining table. The introduction of elaborate fringe benefit schemes, especially in the health, welfare and pension fields, and intricate job and income security arrangements, have forced the parties into more sophisticated relationships requiring something beyond crisis bargaining.

It is important to understand why these have become bargainable issues; as well as to appreciate the strengths and limitations that are inherent in such an approach to the problem. To a large extent, both fringe benefits and job and income security arrangements have been demanded by unions because of public policies that they believe to be inadequate. Because governments on this side of the Atlantic, unlike their counterparts in Europe, have been less inclined to develop public social security schemes, groups of North American workers were driven to demand, through their unions, their own little islands of private social security. As a result, so-called fringe benefits in many cases now add up to over 25 per cent of payroll costs. Similarly, because Canada has only recently begun to develop a comprehensive manpower training income maintenance, and relocation scheme, labour has had to strive for various forms of job and income protection through collective bargaining.

Later in this Report we appraise the results of these efforts in more detail. We conclude that while there are some advantages, especially in terms of flexibility, in attempting to deal with such issues through collective bargaining, there are also some distinct disadvantages. In the field of fringe benefits, for example, the result has been a proliferation of private plans with varying standards in terms of the levels of benefits, the degree of vesting and funding, and the availability of economies of scale. Against the adaptability characteristic of the present approach must also be recorded their uneven incidence and their relatively small and uneconomic base of operations. Collective bargaining has a role to play in this area, but not an exclusive one.

Equally questionable is the heavy onus placed on collective bargaining in relation to adjustments made necessary by technological and other change. Again, as our later appraisal shows, collective bargaining has made and

Faced with *de facto* capacity to initiate retirement and pension plans, what has management done? According to a statement of the Department of National Revenue in 1967, emphasis seems to have been placed on pension rather than profit sharing plans. Said the Department, ". . . [T]here does not appear to be a large number of Employee Profit Sharing Plans in existence in Canada, at least in comparison with the number of pension plans. However, we do not have a complete picture . . ." ²³ A Bell Canada Pension Fund Study conducted during the same year among seventeen Canadian companies found it desirable to have senior company management participate in the investment of pension funds to the extent that they establish the broad policy within which fund investments are made. In the minority of cases covered by the Canada Bell Study.

. . . there is an expressed desire for companies to divorce themselves as much as possible from the operation of the fund, either because they want no responsibility for the management of employee contributions (because they do not want to risk criticism by unions or others), or merely because they do not feel they have the necessary expertise to perform such a function. The majority of companies feel however, either that the size of their contributions to the fund does have enough of an impact on company operations that they should at least retain policymaking control over the investment management of the fund, or that they have enough investment expertise in their own organization to properly guide its course.²⁴

Although there is the close relationship among pension funding, labor ideals and goals, and presumably labor law, has primary control over pension funds been found in the "labor jurisprudence?" The fact is that such is not the case in Canada. While it might have been expected that a major aspect of the legal control over pension funds

doubtless will continue to make a major contribution to solutions to problems of change. But it has distinct shortcomings growing out of its limited coverage of the labour force, the varying incidence of technological change provisions, and the uneconomic and inequitable nature of many of these provisions. Especially where displacement is involved, the appropriateness of relying on collective bargaining to cope with the resulting social consequences must be called into question.

Id. 93-94.

23. B. Metzger, *Investment Practices, Performance and Management of Profit Sharing Trust Funds: A Study in Depth of Actual Holdings and Results With Certain Comparative Pension Data*, Profit Sharing Research Foundation 100 (1969).

24. Bell Canada Pension Fund Study 9 (1967).

comes from "labor law," there is an absence of regulation from that area. Regulation, as such, has taken a different form. Thus a discussion of that regulation, independent of the substantive labor law, is required.

3. LEGISLATIVE JURISDICTIONS

Pensions and pension funds are not the same. There is a distinction between controlling pensions, which might be an aspect of social welfare legislation, and regulating pension funds in an effort to direct them as *financial institutions*. This distinction, the line of separation between the institution and its product can be vital to a proper constitutional analysis to ascertain the proper roles for the federal and provincial governments.

The legislative authority over pension funds as an industry rests primarily in the provinces under The British North America Act.²⁵ Like "insurance," there is no specific section in the B.N.A. Act referring to pension funds, as such.²⁶ As a result, the legal interpretation given in the "insurance cases" may be helpful in projecting a constitutional position. The cases arose under the federal government's trade and commerce power:

Insurance cases were the medium for initial exposition of the federal trade and commerce power. There is a singular dearth of definition of "trade" or "commerce" in the privy council's decisions, perhaps because that tribunal assumed or came to a considered conclusion that the problem in the area lay not so much in the words used to define the power granted but rather the feasibility of local or national control of economic activities which belonged as much to the provinces under §§ 92(13, 16) of the B.N.A. Act as to the Dominion under § 91(2).²⁷

Lord Haldane in *Attorney General for Canada v. Attorney General for Alberta*, viewing sections of the Canadian Insurance Act, 1910,²⁸ stated, "It must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would

25. See The British North America Act, 30 & 31 Vict., c. 3, particularly §§ 92(13), 92(16) (1868).

26. This may be contrasted to the banking industry which was specifically mentioned in the B.N.A. Act. See § 91(15), as a federal jurisdiction.

27. B. LASKIN, *CANADIAN CONSTITUTIONAL LAW* 417 (3d ed. 1966).

28. 48 S.C.R. 260 (S. Ct. Can. 1913); Judicial Committee of Privy Council 1 A.C. 588 (1916).

otherwise be free to engage in the provinces.”²⁹ Thus, if pension funds are viewed at one level as an industry then legislative jurisdiction would reside in the provinces, for under the B.N.A. Act the industry would be a *particular* trade falling under the heading of “Property and Civil Rights.”³⁰ However, this position must be tempered against the history of pension fund legislation.³¹ There was a constitutional amendment with particular reference to pensions.³² In 1965, § 94A of the B.N.A. Act was passed by the Federal Parliament that subsequently received provincial assent. It provides: “The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matters.”³³

Briefly, this amendment was the result of continued negotiation in which nine of the provinces (excluding Quebec) delegated one aspect of their acknowledged legislative authority over pension funds to the federal government.³⁴ Behind the provincial delegation and later amendment of the B.N.A. Act were two factors: (1) The provinces generally accepted the proposition that the federal government had authority to promulgate social welfare legislation. (2) The then proposed Canada Pension Plan would require considerable funding.³⁵

The B.N.A. amendment brought a further realistic mix of jurisdiction. Primary authority over pension funds continued in the provinces under the category, “property and civil rights.” Yet, through constitutional change which in effect recognized federal activity relating to pensions and their administration, this theoretical primary control by the provinces may have realistically shifted for some purposes to Ottawa.

4. HISTORY OF FEDERAL LEGISLATIVE PARTICIPATION

In 1908, the federal government enacted the Government Annuities

29. *Id.* 596.

30. Note 25 *supra* § 92(13).

31. Particular reference meant to legislation passed where the primary intention is another social area, i.e. Income Tax, but incidental reference and effect to another area, i.e. Pension Funds.

32. This amendment refers only to the Federal Pension Plan as established; the amendment does not extend to constitutional authority with reference to private plans.

33. British North America Act, STAT. CAN. 1964-65, 13-14 Eliz. II, c. 73 (1964).

34. The exact details of such a scheme of delegation may be found in analysis of Mr. Justice Laskin in CANADIAN CONSTITUTIONAL LAW, *supra* note 27 at 39-41.

35. See note 73 *infra*. There is a comprehensive, compulsory contribution, federally operated pension plan independent of other possible private arrangements.

Act,³⁶ under which it sold annuities to residents of Canada to encourage thrift and provide security for the elderly.³⁷ For some time these annuities were a popular funding medium for small employee pension plans;³⁸ premiums were low, thus inhibiting competition from other financial institutions; the program was subsidized to the extent that the full cost of administration was met by appropriations from Parliament.³⁹ Perhaps reflecting shifting goals, the program implementation was first assigned to the Department of Trade and Commerce for four years; then the Post Office until 1922; and finally, the Department of Labour.⁴⁰

The initial limit on the purchase of annuities was \$600 per year.⁴¹ This was eventually raised to \$5,000 per year in 1920.⁴² While the variance is striking, for the most part the annual purchase limit has been \$1,200 per year.⁴³ In 1948, however, the conditions of purchase were modified;⁴⁴ the costs were revised to accommodate changed interest rates and mortality tables. The result was that annuities ceased to be cheaper than those provided by insurance companies.⁴⁵ This factor, and the growing disenchantment of the government with the accumulating debt of offering the program over the years, led to the recommendation in 1962 by the Royal Commission on Government Organization that government annuities be discontinued.⁴⁶ Receipts under the program simply did not meet liabilities.⁴⁷ More important, those intended to be benefited by the opportunity were not taking advantage of the program. The Commission stated:

36. STAT. CAN. 7-8 Edw. VII, c. 5 (1907-08).

37. *Id.*, preamble:

Whereas it is in the public interest that habits of thrift be promoted and that the people of Canada be encouraged and aided thereto so that provision may be made for old age; and whereas it is expedient that further facilities be afforded for the attainment of the said objects: therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

38. Understandably, the costs and ease of operation induced smaller plans to take advantage of whatever economies of scale could be provided by the federal act.

39. Note 36 *supra*, § 11.

40. *Id.* § 3; The subsequent amendments stipulated changed administration.

41. *Id.* § 8.

42. An Act to amend The Government Annuities Act, 1908, STAT. CAN. 10-11 Geo. V., c. 12, § 2 (1919-20).

43. The purchase limit of \$1200 existed for 38 years.

44. CAN. REV. STAT., c. 132, § 5 (1952).

45. Insurance Companies licensed to issue annuities under § 26 REV. STAT. ONT., c. 341 (1950).

46. Queen's Printer, Ottawa, Vol. 3, at 288 (1962).

47. *Id.* 286-7.

More annuities have been purchased by people of some means than by those in the lower income brackets for whom the scheme was designed. The original need has been modified by old age pensions, now paid on a universal basis.

In comparison with the position in 1903, when few facilities were available to provide for pensions and annuities, the field today is highly developed. Through employer-employee supported pension plans, life insurance schemes, and the sale of annuities in a variety of forms by financial institutions, ample facilities exist to provide against want in old age. Apart from a periodic attractiveness when premiums are allowed to get out of line, some inflexible aspects of government annuities 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.

The essential responsibilities of the government are many, and unnecessary activity should therefore be avoided. Moreover, the programme has been very costly to the government because:

- premiums have not² been set so as to cover administrative costs.
- the interest rates used have been fairly consistently out of line with the money market, thereby often giving the purchaser a definite advantage.
- the mortality basis used has not been promptly adjusted to reflect increasing longevity, so that premiums have been lower than appropriate.
- the provision for deferred payment with an option permitting purchasers, at negligible expense, to commit the government to very costly undertakings.

Your commissioners conclude that the programme is no longer necessary and that the continuing drain on public funds should be arrested.⁴⁸

In 1967, this government annuity program was terminated.⁴⁹ Without going into the substantive aspects of the original government plan, nor commenting upon the merits of such a policy, some observations are in order.

48. *Id.* 287-8.

49. Pursuant to recommendations as mentioned.

Pension funding is primarily a provincial matter. However, from the beginning the federal government has been concerned and *active* in the pension field. As early as 1908 the federal government provided a pension plan. In the administration of that plan for nearly sixty years the government stood as an active competitor to other financial institutions. The 1908 act was not the end, but only the beginning of federal involvement in pensions. From that starting point it became clear that the federal government intended to be a *participant* in the area notwithstanding the constitutional implications.⁵⁰

In this regard the federal government asserted jurisdiction; however, it did *not* do this by way of regulation. Instead, the government, establishing its own national business enterprise, took jurisdiction unto itself. The power of the provinces was not directly challenged, but the federal role was unambiguous.⁵¹

5. CURRENT FEDERAL LEGISLATIVE PARTICIPATION

Current federal pension participation is expressed in two legislative schemes, the Old Age Security Act and the Canada Pension Plan.⁵² However, it should be understood that this is not the full scope of federal intervention; this is merely the first "half" of federal presence.

a) *The Old Age Security Act*⁵³

From 1927 to 1952, legislation provided for federal sharing in assistance granted by provincial governments to those meeting stated age, residence, and citizenship requirements.⁵⁴ Pursuant to a "means test" federal participation was in the form of helping to provide subsistence level for the aged.⁵⁵

In 1951, this federal participation was formalized with the omission of the "means test" and the enactment of the Old Age Security Act and the Old Age Assistance Act, effective in 1952.⁵⁶ For the elderly, those aged 70 and over, the new laws brought an initial benefit of \$40 per

50. Though the B.N.A. Act seemed to provide otherwise, the first statute concerning pensions was of federal origin.

51. The current federal role is somewhat different, but its nature is the "indirect approach" as typified by the early act.

52. See notes 53, 68 *infra*; STAT. CAN. 1964-65, 13-14 Eliz. II, c. 51.

53. STAT. CAN. 1951 (2d Sess.), 15-16 Geo. VI, parts 1-11, c. 18.

54. These "tests may be found in An Act Respecting Old Age Pensions, STAT. CAN. 1926-27, 17 Geo. V, parts 1-11, c. 35, § 8.

55. The benefits were available to the "needy" over the age of 70, and by 1950, helped over 40% of such Canadians.

56. Note 53 *supra*; STAT. CAN., 1950-51, 14 & 15 Geo. VI, 15 Geo. VI, 1; c. 55. The means test was omitted pursuant to definitions of § 7 of latter Act.

month.⁵⁷ Yet, neither of the two laws was intended as a complete pension, but instead formed what might be described as a subsistence supplement. There was no direct relation to the cost of living or the amount actually needed for survival at the time the statutes were passed.⁵⁸

Today, under the Old Age Security Act, there is no "means test." All those who have lived in Canada for ten years, and are 65 years of age and older, qualify to receive payment under the statute. Regardless of other source income, qualifying individuals are entitled to a flat rate of \$75 per month.⁵⁹ This is intended to fluctuate according to the index provided in the Canada Pension Plan, so that in fact, 1970 payments are \$79.80.⁶⁰ Any payments received under this Act are independent of benefits received under any other law.⁶¹

Another important aspect of the Old Age Security Act is an amendment that was passed in 1966,⁶² which provides for a guaranteed income *supplement* administered pursuant to a "means test."⁶³ As mentioned, the recipient is entitled to \$75 per month, regardless of other source income. However, if the total of other source income and payments under the Old Age Security Act does not total \$105 per month, the recipient may apply for additional benefits to bring him to that level.⁶⁴ This supplemental provision is also adjusted under the index of the Canada Pension Plan, so that the 1970 maximum receivable is \$111.41.⁶⁵

Government assistance is paid directly from the Federal government's revenue accounts. Revenues from this general account form part of the broader Canada Assistance Plan that unifies old age assistance, assistance to disabled, and certain aspects of the unemployment compensation programs.⁶⁶ The latter aspects of the Canada Assistance Plan are in cooperation with provincial authorities.⁶⁷

57. *Id.* § 3.

58. Clearly, a flat rate of \$40 bore no relation to the cost of living at that time for one month.

59. An Act to Amend the Old Age Security Act, STAT. CAN. 1963, 12 Eliz. II, vol. 1, c. 16, § 1; *see also* Amendments to Old Age Security Act, STAT. CAN. 1964-1965, 13-14 Eliz. II, c. 51, §§ 120, 3A(1).

60. Amendments to Old Age Security Act, STAT. CAN. 1964-1965, 13-14 Eliz. II, c. 51, §§ 120, 3A(2).

61. *Id.*

62. STAT. CAN. 1966-67, 14-15 Eliz. II, c. 65, § 3.

63. *Id.* §§ 3, 7(2).

64. *Id.* §§ 3, 8.

65. *Id.* §§ 3, 9.

66. STAT. CAN. 1966-67, 14-15 Eliz. II, c. 45.

67. *Id.* § 4.

The actual mechanics for the receipt of old age security benefits are not of direct concern at this time. However, it is again important to note the nature of the federal government's role in this matter. Historically, the government was in fact a competitor with pension supplying institutions in the sale of annuities. However, participation under the Old Age Security Act is of a different nature. The government is the supplier of a subsistence type of pension without formal contribution under these acts, thereby setting a somewhat different base for the operation of pension institutions.

b) *Canada Pension Plan*⁶⁸

The federal government enacted the Canada Pension Plan in 1965 in part under the authority of the then new constitutional amendment to the B.N.A. Act, Section 94A. After discussion and negotiation nine provinces delegated certain aspects of their jurisdiction so that the plan could be passed.⁶⁹ The Quebec exception will be discussed more completely under the later heading "Other Provincial Regulation"; the Canada Pension Plan for the other provinces has been in force since January 1, 1966.⁷⁰

The Canada Pension Plan can be briefly described as an extension of the social insurance program of the Old Age Security Act. Currently, it applies to approximately 92% of the Canadian labor force, but its coverage extends to self-employed persons as well as employees.⁷¹ The plan is considerably more comprehensive than merely providing pension benefits to the defined contributors; it extends to relief for the disabled and their dependents, benefits for survivors, disabled survivors, and orphans of defined contributors.⁷²

Premier Robarts of Ontario discussed the significance of the Plan and his province's position:

Since the right to do this [enact pension fund legislation] clearly extends to each province of Canada, Ontario must choose between two options. It must either operate its own "comparable" plan, or it must participate in the Canada Pension Plan.

Some broad and important changes have been made in the various versions of the Plan put forward by the Federal government over the period of the last year and a half. . . .

68. STAT. CAN. 1964-65, 13-14 Eliz. II, c. 51.

69. Note 34 *supra*.

70. *Id.* § 125.

71. *Id.* § 10.

72. *Id.* § 43.

In this context, I have come to the conclusion that bearing in mind the safeguards which have been put in the legislation, it would be in the best interests of the people of Ontario and in the best interests of Canada that we in Ontario accept the Canada Pension Plan in principle and lend every effort to make this plan truly national in scope for the benefit of all the citizens of Canada. . . .

As a result, we shall achieve uniformity of contributions and benefits, and portability from coast to coast which has been our aim since the beginning of our study in the field of pensions.⁷³

As a result, Ontario made extensive changes to its own proposed legislation in the pension field.⁷⁴ The provinces generally, bowed to the uniform nature and comprehensive aspects of the broad federal plan.⁷⁵

Benefits under the plan are related to earnings, and contributions. There is a provision to escalate benefits similar to that as discussed under the Old Age Security Act.⁷⁶ Contributions are payable directly from the employee's earnings at the rate of 1.8% of gross income beginning at \$600, not to exceed deductions for income over \$5,300.⁷⁷ Contributions are taken from the employees' earnings by the employer; they are exempt from income tax and are forwarded directly to the federal government.⁷⁸ Self-employed persons earning over \$800 a year pay 3.6% of earnings over \$600 to a maximum of \$5,300. These sums, too, are forwarded directly to the federal government.⁷⁹ Pensions, as of 1970, are payable at age 65.⁸⁰ The retirement pension is 25% of a contributor's average pensionable earnings,⁸¹ which include the \$600 exempt from contributions to the maximum of \$5,300, and are calculated from age 18 or from the commencement of the program, whichever had been first.⁸² There is no averaging over a period of less than 120 months, with the result that for the first ten years of the program, only partial pensions will be payable.⁸³ The total result will be that from 1976, full pensions should be payable.⁸⁴

73. Legislature of Ontario Debates No. 2, Jan. 21, 1965, at 23-25 (The Queen's Printer, Toronto 1965).

74. § 6(a) of this study. "The Pension Benefits Act," *infra* at 34.

75. § 8 of this study, "Other Provincial Regulation," *infra* at 47.

76. Note 68 *supra*, § 20.

77. *Id.* §§ 14-17.

78. *Id.* § 22.

79. *Id.* § 34.

80. *Id.* § 44.

81. *Id.* § 46.

82. *Id.* § 49.

83. *Id.* § 47.

84. Note 34 *supra*, using the "effective date" of Jan. 1, 1966.

As previously stated, disability pensions are provided, as well as for those of survivors of contributors. For our purpose it is enough to state that such provisions are available under the act.⁸⁵ They might be described as the insurance element to the plan, the lump sum payments available and the disability aspect are not entirely related to pensions by definition.⁸⁶

The full impact of the Canada Pension Plan, and more particularly of the Plan coupled with the other federal assistance previously mentioned, is difficult to gauge. There is not yet enough experience under the Plan. However, this much does seem clear: The federal government has changed its historical intention concerning pensions. It is no longer a seller of annuities. There is no longer a voluntary aspect to the federal government assistance; the "contributor" has no choice but to participate in the Plan. The government has undertaken to provide a subsistence level in its plans through the combination of the Old Age Security Act and the Canada Pension Plan. A floor has been set. Every aged or disabled citizen has a base level of income, without direct reference to means and amounts channeled to the voluntary purchase of annuities.

One real impact of this legislation is the role that the federal government has created for other pension supplying institutions. A "private" pension need no longer concern itself with the direct problem of subsistence for its beneficiaries. In effect, private pension plans have been relegated to a position of supplying supplemental pension incomes. The result of such a role has not been control or regulation by the federal government over private pension plans, although none could dispute the substantive effects on the private sector of public welfare law.

In terms of the private pension "trustees" roles, this has a marked effect as well. Subsistence is no longer an issue. This severely alters the nature of the trust or indenture that a pension fund management group must undertake. The performance of the private pension "trustee" can be gauged by different standards: A pension fund trustee need not be solely concerned with security and preservation of assets as he might be were he under the understanding that his beneficiary had no other source of income.

Similarly, the contributor to a private pension plan may have speculative objectives, for he need not be as concerned with his daily needs of shelter, subsistence, and care. Government action, in sum, may have freed the private sector to become performance oriented. By

85. Note 68 *supra*, §§ 54-58.

86. Pensions at retirement age will be measured in relation to contributions as against individual circumstances of "tragedy."

implication, therefore, the private sector can concern itself more fully with responding to inflation, or more optimistically, a measure of wealth in old age. Yet at this time, whatever federal law should allow, there are warnings to be sounded. Provincial law did not automatically free private pension funds to the winds of the market.

Provincial laws enacted at about the same time as the Canada Pension Plan made definite provision that private pension plans could not retroactively adjust their levels to take advantage of the Canada Pension Plan benefits.⁸⁷ As an illustration, Ontario declared: "No amendment of a pension plan consequent upon the coming into force of the Canada Pension Plan shall adversely affect the pension benefit credits of any member in respect of remuneration and service or membership in the plan prior to the first day of January, 1966."⁸⁸

The Ontario amendment, however, might only have been a step in a transition. The former Chairman of the Pension Commission of Ontario stated:

Following the introduction of the Canada Pension Plan and the extension of Old Age Security, the popular idea of an "appropriate" pension level has changed drastically. I suggest that an appropriate pension should be distinguished from a subsistence pension and from a pension that maintains the same standard of living. An appropriate pension is basically what society believes its senior members should get. . . . Generally, this involves a double deck plan with one level of benefits and contributions on earnings up to the Canada Pension Plan ceiling and a higher level of benefits and contributions over the ceiling.⁸⁹

6. PROVINCIAL REGULATION

The primary authority for the control of pension funds resides in the Provinces. Federal participation is directed toward supplying a base level of subsistence for the elderly. The following is a summary of provincial regulation of "private" pension plans.⁹⁰ The initial focus will be on Ontario. The legislation of other provinces will be compared in Section 7, *infra*. The analysis will concentrate on controls over equity participation.

87. Note 88 *infra*.

88. Note 92, § 22 *infra*.

89. See The National Underwriter 38 (Oct. 8, 1966) (Paper presented to American Pension Conference).

90. Again, excluded are those pension plans created pursuant to Special Act of either Parliament.

a) *The Pension Benefits Act*⁹¹

The Pension Benefits Act of 1965 is the basis for existing Ontario regulation over pension plans.⁹² However, during the period 1960-1965 studies were made and other legislation was attempted. It may be useful to set forth the provincial attitude concerning pension funds during this period.⁹³

In 1960, the Ontario Committee on Portable Pensions was established.⁹⁴ Its inquiry was comprehensive, but its particular concern was the portability of pension credits on a change in employment. The Committee made two reports to the Ontario Government, and proposed a draft bill.⁹⁵

The first report of the Committee dealt with *voluntary* plans, present or future. It rejected any compulsory state-operated pension program.⁹⁶ The Committee recommended:

- a) The establishment of a vesting standard
- b) restrictions on cash withdrawals of contributions
- c) compulsory membership for new employees where there is an initial plan established.⁹⁷

In making these recommendations, the Committee thrust was portability of benefits and locking in of contributions made. The recommendations were not nearly as comprehensive as the second report which stated:

An arrangement for transferring pension accumulations from one fund to another, or for consolidating a number of separate pensions at the time of retirement, serves merely to assemble what has already been acquired and cannot, of itself, increase it. Indirectly, however, the result may be more substantial since the convenience of transfer and consolidation may serve to induce more retention of pension savings, and where membership is voluntary, may encourage non-members to join. Further, the aggregating of small pension accumulations, by whatever method, should give the

91. This general expression refers to an Act to Provide for the Extension Improvement and Solvency of Pension Plans and for the Portability of Pension Benefits, STAT. ONT. 1962-63, 11-12 Eliz. II, c. 103.

92. REV. STAT. ONT. 1965, 13-14 Eliz. II, c. 96.

93. Note 73 *supra*.

94. It consists of D. MacGregor and G.E. Gathercole, joint chairmen, R.M. Clark, C. E. Hendry, R.E.G. Davis, and J.A. Tuck.

95. Bill No. 125.

96. A Summary Report of the Ontario Committee on Portable Pensions, 1961, at 5.

97. *Id.* 6-15.

owner a more accurate idea of their value and perhaps a greater sense of their importance.⁹⁸

In this second report, the Committee reconsidered earlier recommendations and focused on some additional areas of concern. It reaffirmed the vesting proposals and the locking in of employee contributions, but, in addition, urged that all employers with fifteen or more employees be required to introduce pension plans without, however, stating a period within which compliance would be required.⁹⁹

The Committee summarized several of the obstacles involved: How were contributions to be valued on transfer?¹⁰⁰ What was to be done if the transfer brought changed benefits?¹⁰¹ Or changed security?¹⁰² How were administrative costs to be measured?¹⁰³ How was uniform government supervision to be achieved?¹⁰⁴ Was there not the inherent difficulty of blended jurisdiction?¹⁰⁵ Finally, were there not very significant actuarial problems?¹⁰⁶

The Committee submitted a draft bill in 1961 and proposed regulations that carried forward the concern of the bill with solvency and control over investments.¹⁰⁷ These reports and the draft bill were examined and discussed at the Interprovincial Conference of Premiers in Charlottetown that year.¹⁰⁸ However, as the Committee worked on revisions of its drafts later that year, the federal government announced its intention to seek a constitutional amendment for the establishment of a nationwide contributory pension plan.¹⁰⁹ While no details were announced, it was understood that the federal government would direct attention to the solvency and portability of existing private pension plans.¹¹⁰

Notwithstanding this statement of intention, the Committee's proposal was introduced as Bill 165 in the Ontario legislature on April 6, 1962. Speaking of the Bill Premier Robarts stated:

98. The Second Report of the Ontario Committee on Portable Pensions, August 1961, at 56.

99. *Id.* ch. 2.

100. *Id.* ch. 6.

101. *Id.*

102. *Id.* ch. 8.

103. *Id.* ch. 3.

104. *Id.* ch. 10.

105. *Id.* 92.

106. *Id.* ch. 11.

107. *Globe & Mail*, Aug. 17, 1961, (on microfilm—Retirement Pension No. 2, Frame No. 16).

108. *Globe & Mail*, Aug. 19, 1961.

109. *Globe & Mail*, Dec. 7, 1961.

110. *Globe & Mail*, March 20, 1962.

The Bill represents the Committee's agreed proposals for improving the portability of pension benefits, for extending coverage of pension plans, and for raising levels of solvency where these are inadequate. Of necessity the Bill refers only to measures which could be undertaken by a provincial government, although the Committee hopes that the improvement of pension plans can be achieved on an inter-provincial basis with the cooperation of the federal government, in view of the importance of interprovincial business. . . . I wish to emphasize that the Bill is intended at this time only for study and discussion. . . .¹¹¹

The Premier added:

The announcement by the federal government is couched in such broad terms that it will leave a great deal of room for negotiation and discussion. If the required constitutional approval is not obtained by the federal government, it is, nevertheless, possible that an act similar to the *Pension Benefits Act* could be put into effect by a number of the larger provinces. If, on the other hand, the federal government does establish a nationwide wage related pension plan, with approval of the provinces, *there will still be a need for regulating the portability, solvency, and other provisions of the private pension plans that remain.* Moreover, if a federal government plan is enacted along the lines of the government plan existing in Great Britain, legislation similar to the *Pension Benefits Act* might serve as the standard under which private pension plans would be allowed to "contract out" of the government plan.¹¹²

The *Pension Benefits Act* in substantially the form as recommended, was enacted in 1963.¹¹³ To implement the legislation, the Act established the Pension Commission of Ontario as a supervisory body.¹¹⁴ Most of the provisions in the Act were to be effective January 1, 1965, with the Commission, however, to begin its information gathering and planning 1963.

In the spring of 1964 a federal-provincial conference of Premiers and Prime Ministers was held in Quebec City followed by a series of discussions regarding the introduction of the federal plan. The result for Ontario was a basic amendment of Part I of the *Pension Benefits*

111. Legislature of Ontario Debates, Vol. 2, April 6, 1962 at 2020, 2021 (The Queen's Printer, Toronto 1962).

112. *Id.* 2023 [emphasis added].

113. Note 91 *supra*.

114. *Id.* § 2.

Act.¹¹⁵ The amendment focused on the repeal of Section 17, requiring every employer with fifteen or more employees to establish a pension plan by 1965. The original vesting requirements were also altered somewhat, making such standards less stringent.¹¹⁶

The original Act, the amendment of 1964, and a draft Uniform Pension Act were incorporated into the *Pension Benefits Act* in 1965.¹¹⁷ The previous proposals, and a measure of co-operation with other provincial regulation, is a primary objective of the Act. The *Pension Benefits Act* of 1965 concentrated on vesting, funding, and the quality and diversification of investments.¹¹⁸ There is no requirement for the compulsory establishment of a plan. It is not retroactive, nor does it require changes of benefits and contributions related to service before January 1, 1965.¹¹⁹ The Act was slightly broadened and tightened by amendments in 1967, 1968, and 1969.¹²⁰

For the purpose of this article answers to the following questions are needed:

- a) What plans are encompassed by the Act?
- b) What are the specific controls affecting equity investments?

For purposes of the Act, a pension plan is "a superannuation or pension fund or plan organized and administered to provide a pension benefit for employees."¹²¹ Included, by section 1(h) of the Act are deferred profit sharing plans (other than those defined in sections 52 and 53 (a) of the Corporations Tax Act), thereby making the Act applicable to deferred plans by way of pension, rather than merely "cash" deferred profit sharing plans.¹²² The Act understandably applies only to employees in Ontario,¹²³ not to those of the Federal government or to individuals under its jurisdiction.¹²⁴ The Act excludes "employee pay-all plans" and union or fraternal programs controlled by the relevant outside group,¹²⁵ although it does apply to pension plans of employees of labor organizations which make

115. REV. STAT. ONT. 1964, 12-13 Eliz. II, c. 88.

116. *Id.*

117. STAT. ONT. 1965, 13-14 Eliz. II, c. 96.

118. *Id.*

119. *Id.* §§ 21, 22.

120. STAT. ONT. 1967, 15-16 Eliz. II, c. 72; STAT. ONT. 1968, 17 Eliz. II, c. 93; STAT. ONT. 1968-69, 17-18 Eliz. II, c. 92.

121. Note 89 *supra* § 1(1) (h).

122. *Id.* § 1(1) (h) (iv).

123. *Id.* § 1(1) (i).

124. *Id.* § 1(2).

125. *Id.* § 1.

contributions as an employer.¹²⁶ The Act, in sum, is concerned with the usual pension in which the employer is a contributor.

The Act seeks to make pensions secure through vesting, portability, and solvency requirements. Tied to solvency are the regulations of the Act on permissible investments for a registered pension fund. The statute itself through Section 25 does not lay down the allowable classes of investments. Instead, it authorizes the implementing administrative body through regulation to prescribe sanctioned investments.¹²⁷

Those regulations have been promulgated. First, it is made clear that the rules override any proviso in the plan. No agreement between parties can mitigate the effect of the regulations defined in Section 14. The quality of investments is keyed to those permitted under the Canadian and British Insurance Companies Act. This incorporation by reference in general places pension funds in the posture of security of assets investment orientation. More particularly, however, it must be emphasized that subject to minor quality restraints there is nothing that would prevent a fund from investing all of its assets in common stock. The funds are freed of the quantity restraints of the insurance act; they are burdened only with the quality standards, which, in turn, have only limited meaning. They require that a corporation have an earnings record over a brief period capable of paying a low dividend.

Other provisos give pension funds an even greater degree of mobility in their investment program. Thus, if a pension fund held securities which are "altered" by a reorganization, liquidation, or amalgamation with another corporation so that the new "securities" would not qualify as investments for a life insurance company it will not bar the pension fund from holding the new instrument. The basic aim of this section would appear to appreciate several of the realities of corporate existence. Should a company be reorganized or taken over, the pension fund is relieved from reclassifying its investments. Presumably, if the initial investment passed the "test" of the regulation, a reorganization or reclassification is not necessary.

Where, however, a pension fund chooses to invest in real estate or mortgages it may find itself subject to somewhat tighter restraint than life insurance companies which have a long history of real estate involvement. For pension funds a "basket" clause also appears in the regulations. A pension plan may invest or loan funds in areas not otherwise allowed in real estate or leaseholds. However, such investments must meet the following "tests:" a) they must be made in Canada; b) they must be only for the production of income; and,

126. *Id.*

127. ONTARIO REGULATIONS 188/65.

c) they must not exceed 1% of the book value of the total assets of the fund. This is a rather interesting type of exclusion. That it can only be made in Canada shows a decided policy preference for Canadian investment; this is not a qualitative restriction as much as one with nationalistic aims. Secondly, the exclusion applies only for the production of income. Thus, an investment cannot be made with speculative motives, nor with a view to providing capital rather than income. Finally, the basket clause is related to fund assets. No controls are exercised over actual dollar expenditures in any single project. Hence, the restriction goes to undue concentration of fund *assets*. However, it must be asked whether anything other than diversity of investment is achieved through the qualification.¹²⁸

Another proviso of the pension fund regulations qualifies the real estate restriction. It denies any interpretation that would amplify the authority conferred by the Canadian and British Insurance Companies Act (Canada) regarding investments in mortgages and real estate.¹²⁹ That Act permits a life company to place seven percent of its total assets in random investment¹³⁰ with no single real estate investment exceeding one percent of total assets.¹³¹ What pension funds are denied is the right to establish or control real estate development companies.¹³² However, for the pension plan seeking an allowed real estate investment the restrictions imposed are not severe. The legislation purports to set down criteria for real estate investment, but they cannot realistically be termed "stringent."¹³² They are not unlike those governing stock investments. Qualitatively they require only that the investments be Canadian and income producing. Nothing is laid down concerning rate of return. Further, should the fund accept a loan instrument it may obtain additional security, such as stock or warrants, as a condition to the loan or its repayment.

The pension regulations also deal with certain prohibited practices. Section 14(5) strikes at conflicts of interest. It forbids loans to certain classes of people and corporations in which the fund may operate. The section appears to recognize the "trustee" nature of the funds.¹³³ If the legislation generally is to preserve assets and protect contributors, it is not surprising that an aspect of the control to bring such a state of

128. Considering the apparent fascination with urban real estate in Canada, the amount spent within the one percent range can vary greatly during cyclical upswings in the real estate market as seen in the past decade.

129. Ontario Regulation 103/66, §§ 14(2), (4), (6).

130. Stat. Can. 1964-65, 13-14 Eliz. II, c. 40 § 5(8).

131. *Id.*

132. *Id.* Compare § 64 of the Canadian and British Insurance Companies Act with the pension Fund Regulations.

133. The term "trustee" is used strictly in adjectival terms.

affairs to reality, would be the prevention of investments that may be influenced by related personalities or corporations. Similarly, it is provided that all investments be made in the name of the fund, and not its managers.

Subsection 6 of section 14 is a prohibition against a type of "undue" concentration. No more than 10 percent of the book value of the *fund* may be invested in any single venture or stock. *No* prohibition exists against a fund using the 10 percent allowable in acquiring all of a given issue. Unlike the rules governing, for example, the members of the Canadian Mutual Funds Association,¹³⁴ pension funds are not limited in the amount of any issue to be acquired. They are only constrained by an assets test. So it is that a pension fund could be in a position to obtain a control over a portfolio enterprise. The major obstacle in doing this would be the need to buy only for income.¹³⁵

In making its investments the fund may either create its own management company or contract for advice. The regulations accordingly allow a fund to invest in:

- a) a pooled, segregated mutual fund; or
- b) the shares of a corporation
 - (1) whose assets are at least 98% cash, investments and loans,
 - (2) that does not issue debt obligations, and
 - (3) that obtains at least 98% of its income from investments and loans.

The regulations provide, of course, that such controlled groups must also be limited in investment powers to the same extent as pension funds. Appropriate permission is granted to make these indirect investments, exempt from the 10% of assets test. Briefly, should a pension fund decide that it is served better by an outside "investing" institution, the "turning over" of such funds is not restricted.¹³⁶

Several conclusions may be drawn from the provincial regulations. Like insurance companies, the regulations purport to effect the quality and diversification of investment portfolios. The incorporation by reference of the quality provisions in the insurance act and the 10% requirement would seem to summarize the government's concern with investments.

However, there is one important exception that should be compared to insurance regulation and repeated: There are no limits on the proportion of the fund that may be invested in any form of equity,

134. Canadian Mutual Funds Association, Code of Ethics and Regulations.

135. By way of contrast, *see* The Bank Act of 1967, particularly § 76.

136. Envisaged is the service provided by a Trust Company, for example. It is difficult to imagine too many companies with 98% of its assets in "cash, investments and loans," etc.

including common stock.¹³⁷ Clearly, diversification is assured by the fact that no one investment may take up more than 10% of the pension fund's assets. But this would not prevent a pension fund from investing 100% of its assets in common stocks that meet the test of the "insurance act" so long as each investment is within 10% of the fund portfolio. The real question for consideration becomes, not whether there should be such regulations, but why is there that which appears to be a planned omission of further limits regarding such investment?¹³⁸

There is room for speculation. Admittedly, a pension fund has a low requirement for liquidity; presumably, most liabilities can be covered by current contributions. Perhaps also there is an underlying reality. The law may by omission recognize a need for a pension fund to concern itself with a hedge against inflation provided by equity investments. After all, the federal programs, including the Canada Pension Plan, meet basic or subsistence standards. Why not invest for the future? Why not preserve the value of the dollar? There is, however, a quite different possibility. There may be trust in the existing solvency requirements. Should pension funds be invested in a way that would jeopardize their solvency, the Pension Commission by statute has the power to amend and tighten its regulations. As matters now stand pension managers must be deemed to have discretion to judge for themselves what is reasonable in terms of equity investments.¹³⁹

This collar of regulation may fit lightly, but it is there. Pension plans do not exist of right. They are the object of interprovincial registration.¹⁴⁰ There is provision for annual information returns.¹⁴¹ And, finally, where a pension plan is terminated, the *employer* is liable to pay all amounts that would otherwise have been required to be paid to meet the test for solvency prescribed by the regulations up to the date of such termination. These amounts are payable to the insurer, administrator, or trustee of the plan. In effect, the employer becomes a guarantor of the benefits, prescribed by the provincial act, and also to the extent that evasion might be attempted because of the Canada

137. For purposes of this paper, equity ownership in a broad sense is the scope of this inquiry; there is no particular emphasis on "common stock" as the sole class of equity investment to be discussed.

138. Why are pension funds receiving different treatment than Banks, Life Insurance and Trust Companies?

139. With the exception of the "Canadian" requirement, there does not appear to be a preference for any particular class of investment. There is a distinct difference between these prohibitions and those of the Chartered Banks where investment restrictions were related to a preference for liquid investments.

140. Note 91 *supra*, § 10(2).

141. *Id.* § 13(1).

Pension Plan provisions. Behind these duties is the danger of criminal sanctions for contravention of the Act which is administered by the Pension Commission of Ontario.¹⁴²

b) *The Pension Benefits Standards Act*¹⁴³

To complete the pattern of pension regulation the federal government has intervened in the enactment of the Pension Benefits Standards Act of 1967. Its purpose is to cover those plans not encompassed by provincial regulation, and falling under federal authority. Examples of such industries are numerous. They include broadcasting, banking, shipping and navigation, and railways.¹⁴⁴

Federal law extends provincial protection to those groups outside provincial control.¹⁴⁵ The standards are generally consistent with those prescribed in the Ontario legislation; their rationale can be traced to federal government representation at the hearings conducted by the Ontario Committee on Portable Pensions.

The Act is administered by the Superintendent of Insurance at Ottawa and is under the central direction of the Minister of Finance.¹⁴⁶ In summary form the Act provides:

- a) a definition of those falling under federal jurisdiction.¹⁴⁷
- b) recognition that companies can be under both federal and provincial authority.¹⁴⁸
- c) cooperation as to agreement, registration, and inspection with provincial authorities.¹⁴⁹
- d) audit, inspection, registration, solvency, comparable to provincial legislation.¹⁵⁰
- e) criminal sanctions somewhat more stringent than those of the province.¹⁵¹

The legislation mirrors that of the provinces as to the practical control of pension funds. For present purposes, it may be noted that investment restrictions are identical and subject to the same

142. *Id.* § 10.

143. STAT. CAN. 1966-67, 14-15-16 Eliz. II, c. 92.

144. Individual Pension Plans for such employers may be found in particular Acts of Parliament, *i.e.* RCMP plan, or they may be private plans set up by "federal" companies.

145. Note 143 *supra*.

146. Note 144 *supra*, where Provincial Acts could not constitutionally control such plans.

147. Note 143 *supra*.

148. *Id.* § 3.

149. *Id.* § 5.

150. *Id.* § 13.

151. *Id.* §§ 16, 20.

incorporation by reference to the Canadian and British Insurance Companies Act. In fact, the major difference between the Ontario Act and the Federal Act is the nature of the supervision to date. The federal government has been intent in causing registered pension plans to conform to the standards set in 1967.¹⁵²

7. THE INCOME TAX ACT¹⁵³

Indirectly, but significantly, the federal government has influenced the structure and behavior of pension and profit sharing plans through welfare legislation such as The Canada Pension Plan and the Old Age Security Act, and especially the Income Tax Act.¹⁵⁴ That Act allows for the deduction of contributions to retirement plans for both the employer and the employee. The effect on retirement schemes cannot be overstated.

a) *Pension Plans*

Exclusion from income for tax purposes is the primary control imposed by the revenue act. Contributions to a pension plan by an employer are deductible from his income.¹⁵⁵ During the contribution period, the employee is not taxed on any payments made on his behalf to qualifying pension funds by the employer.¹⁵⁶ Contributions by an employee are deductible from the employee's income.¹⁵⁷ Once these amounts have reached the pension fund, and the monies are invested so that no more than 10 percent of its income is derived from sources outside Canada the fund itself pays no tax if it is registered.¹⁵⁸ In effect, the Act stimulates a measure of thrift on the part of the employee; it proposes a deduction similar to charitable deductions for the employer; and tax otherwise payable on these contributions is deferred until it is received as a retirement benefit. Then it is taxed in the hands of the employee.

Historically, the tax legislation has therefore been a direct control over pension funds generally, and their structure in particular. Previous to provincial control over vesting, categorization, termination, funding, and investment, primary control over pension

152. See generally Reports of Superintendent of Insurance *re: Pension Plans*, available annually from Queen's Printer, Ottawa.

153. REV. STAT. CAN. (1952) c. 148.

154. *Id.* § 11(1) (X), (i).

155. *Id.* § 11(1) (g), (h); Regulations, part XXVII.

156. *Id.* § (1)(a).

157. *Id.* §§ 11(1) (i), (8), (12).

158. *Id.* § 62(1)(q), and Departmental Rules *re: Pension Plan Registration*, Oct. 1, 1968, Rule 6.

funds was by way of registration and approval under the Income Tax Act.

From the beginning, the Department of National Revenue sought to use its tax power for broad control of pension plans. With the corporation tax payable during and shortly after World War II, business was able to pay substantial amounts to pension plans; these monies would be more favorably treated than raising wages and salaries, and, within such limits, the contributions were a matter of indifference to the shareholders.¹⁵⁹ Once corporate tax rates settled, the department shifted its interest to many of the social, legal and actuarial problems of pension plans.¹⁶⁰ The ultimate position appeared to be that the department was promoting legislation that was more and more remotely connected to the collection of tax revenues. In fact, the 1959 bulletin with reference to pension plans was admittedly a considerable infringement on areas that had been acknowledged as provincial jurisdiction.¹⁶¹ Spurred by criticism, growing provincial interest in the general control of pension funds, and increased problems with the policing of its bulletin, the department shifted its emphasis from 1960.¹⁶² As a result, the thrust of tax legislation appeared to shift from problems of vesting and funding, to the problem of preventing illusory and tax avoidance pension schemes.

Current administrative policy appears to have been stabilized in the departmental rules with regard to the "acceptance" of pension plans of October 1st, 1968.¹⁶³ The Federal taxing authority fully recognizes and broadens provincial control. Indeed, aid is extended in enforcing provincial law. A new or amended pension plan must now receive provincial registration before it can receive registration for federal tax purposes. However, the mere provincial acceptance of a plan does not assure tax acceptance unless additional criteria are met.

Aside from policing provisions, there are several non-investment provisions that merit special attention. Employee contributions are deductible up to a maximum of \$1,500 in any single year.¹⁶⁴ An employee may deduct up to \$1,500 in any year as to past service if

159. Since deductions for pensions never "reach" the shareholder, it can be argued that this is the same as higher taxes for the corporation, that also never "reach" the shareholder.

160. See *generally* the emphasis with post-war departmental bulletins regarding pension plans.

161. Extensions were attempted into problems of solvency, vesting, etc., which were unrelated as such to tax.

162. The 1960 position, as refined, is the basis for current tax control.

163. "Departmental Rules in Regard to Acceptance of Employee Pension Plans for Registration Pursuant to § 139 (ahh) of the Income Tax Act."

164. Note 153 *supra*, § 11(1)(i).

during that period he was not a contributor to the plan.¹⁶⁵ Also, employees may deduct additional amounts for such services when they were contributors so long as the maximum for any given past year is \$1,500.¹⁶⁶ Contributions by an employer are quite similar and are governed by section 11(1) (g) of the Income Tax Act.¹⁶⁷ Contributions by an employer for past service are governed by section 76.¹⁶⁸ However, an employer is limited to the extent that current and past payments must be "reasonable in the circumstances" as stated in section 12(2) of the Act.¹⁶⁹ The objective standards are defined in departmental guidelines.¹⁷⁰

Calculation under the above rules makes the maximum pension payable \$40,000 per year.¹⁷¹ However, this need not account for any dividends that might have permitted the purchase of additional pension benefits.¹⁷²

For equity investment purposes, the major control through the Income Tax Act is the requirement that the income from the pension fund investments must be primarily Canadian.¹⁷³ The fact that 90% of income must be from Canadian sources to maintain registration has a direct effect on the investment policy of a pension fund manager.¹⁷⁴ Presumably, registration under the Act is a prerequisite for the existence of a plan. In terms of deductibility by both the employer and employee, neither would likely contribute to a pension fund were he required to pay tax on such contributions.

While not directly concerned with investments, the Act indirectly affects investments in another important way. The Act makes specific allowance for retirement savings plans and profit sharing plans as well as direct reference to pension plans.¹⁷⁵ While registered

165. *Id.* § 11(1)(i)(ii)A.

166. *Id.* § 11(1)(i)(i).

167. Employer may deduct such amount paid by him to or under a registered pension fund or plan in respect of services rendered by employees in the taxation year (subject to two express exceptions).

168. An employer, who has made a special payment on account of an employee's pension plan and has made the payment so that it is irrevocably vested in the fund, may deduct such special payment in computing his income.

169. Note 153 *supra*, § 12(2): "In computing income, no deduction shall be made in respect of an outlay or expense otherwise deductible except to the extent that the outlay or expense was reasonable in the circumstances."

170. Departmental Rules, *re* Pension Plan Registration, Oct. 1, 1968, note 163 *supra*.

171. *Id.* As set out in "The [Amended] Departmental Rules in regard to approvals under Section 76 of the Income Tax Act, dated May 1, 1968."

172. *Id.* 6(1) taxes such income when actually received by taxpayer.

173. Note 158 *supra*.

174. Any foreign investment would be of a low yield, greater growth variety so that "income" restrictions are not infringed.

175. Note 153 *supra*, § 79B(1).

retirement savings plans are not a direct alternative to pension plans, a profit sharing scheme might be.

b) *Profit Sharing Plans*

The Income Tax Act allows preferential treatment for monies contributed to registered pension funds under the Income Tax Act. However, the same favoritism is not necessarily afforded if the employer creates certain types of profit sharing plans. There are basically three varieties of profit sharing plans in Canada:

1. Profit Sharing Plans
2. Employees Profit Sharing Plans
3. Deferred Profit Sharing Plans

All involve the creation of trust funds.¹⁷⁶ The discussion to follow will briefly trace the treatment of these plans, excluding, of course, cash profit sharing arrangements which constitute current income.¹⁷⁷

Profit sharing pension plans as such are covered by the Pension Benefits Standards Act, and can be registered with the Department of National Revenue for tax purposes.¹⁷⁸ These plans are like "standardized" pension plans in which a fixed percentage of employee and employer income is contributed. In the profit sharing scheme, the employer's contribution is related to profits rather than a fixed average paid, but such a plan must include a minimum commitment by the employer even in adverse years. For full benefit under the Act, employees would take their distributions in the form of pension benefits.

Under this scheme employee contributions are tax deductible just as pension contributions under normal circumstances. However, there are limits on the tax deductibility of employer contributions for current services.¹⁷⁹

Employees' profit sharing plans in Canada are often treated as a vehicle for *thrift* and *savings*.¹⁸⁰ Under such plans, the employee contributes a percentage of his earnings to a trust fund, but the employer makes a contribution either related to the employee's contribution or related to his profits, or a combination of both. The employer's contribution is generally fixed as to its ultimate use; however, the employee has the right to direct the investment of his own monies.

Employee contributions are not tax deductible, but those of the

176. *Id.* § 79C(1).

177. *Id.*

178. *Id.* § 79C(2).

179. *Id.* § 79C(1).

180. *Id.*

employer, being a fixed investment, are tax deductible without limit. The employee, of course, has the option of directing his contribution to a registered retirement savings plan thereby making it deductible. However, this necessitates seeking a separate head of tax deductibility. Furthermore, while payments out of a trust fund, payable in any form, are not taxable in the hands of the employee, he is required to pay tax each year on all amounts of his employer's contribution allocated to his account, as well as any income that it receives.¹⁸¹ Thus, a thrift and savings plan is difficult for the employee; it has not been provided meaningful incentives under the Income Tax Act.¹⁸²

A third type of profit sharing plan found in Canada is of the deferred kind.¹⁸³ It is non-contributory. It is entirely related to the employer's profit. Under it employee contributions are similarly not tax deductible unless directed to a registered retirement savings plan. The amount of the employer's contribution, to be tax deductible, is limited to \$1,500 per employee each year with excesses payable to employees as additional remuneration. The important element is that the employer's contribution is in no way related to that of the employees', if any.

Tax is not payable by employees until payment is actually received from the fund. Similarly, investment income from the fund is not taxable so long as it passes the "90% test" of income source.

To summarize, profit sharing plans under the Income Tax Act are not treated with the same favor as pension plans. Indeed, deductibility varies with how closely the profit sharing plan resembles a "classical" pension fund. In any event, additional obstacles must be overcome for deductibility to attach.¹⁸⁴ It has been thought that, at times, a profit sharing scheme, unlike a pension plan, can be used for tax avoidance. This, in part, may account for some of the added strictures.¹⁸⁵ So it is that the majority of retirement programs in Canada are in fact "classical" pensions as opposed to profit sharing plans.¹⁸⁶

8. OTHER PROVINCIAL REGULATION

The discussion to this point has centered on the federal control of pension funds (both direct and indirect) and the provincial regulation

181. *Id.*

182. Presumably, few bargaining agents for an employee would agree to such an immediate imposition of tax on "savings."

183. *Id.* § 79C(1)(a).

184. *Id.*

185. See STRIKEMAN, CANADA TAX SERVICE, 79-714.

186. CANADIAN DEP'T OF FINANCE, PROPOSALS FOR TAX REFORM, THE WHITE PAPER (Ottawa 1969).

in Ontario. The following will be a very brief summary of the control of pension funds in the remaining nine provinces.

a) *Quebec*

It was noted earlier that the Canada Pension Plan, so vitally affecting the structure of national pension plans, was only applicable to nine provinces and excluded Quebec. A comparable comprehensive statute for the province of Quebec was passed and entitled the Quebec Pension Plan.¹⁸⁷ The result is that Quebec has a "miniature" Canada Pension Plan requiring no constitutional amendment, and preserving complete provincial jurisdiction with reference to Quebec contributors. There is provision for tie-in with the Canada Pension Plan. If contributors move outside the province, contributions are collected by the federal government and returned to the Quebec Pension management group. This legislation does not affect the Old Age Security Act, which provides additional subsistence benefits.¹⁸⁸

By way of further comparison to Ontario, the Pension Benefits Standards Act of Ontario is paralleled almost entirely by the Quebec Supplemental Pension Plans Act.¹⁸⁹ Regulation and control is highly similar to that in Ontario, and bears the same tie-in pursuant to the uniform standards provision in each of the provinces.¹⁹⁰

The result is a similar control over pension funds with the additional provincial jurisdiction applied to subsistence benefits. The federal legislation affects subsistence with the Old Age Security Act; there is a measure of control through the deductibility provision under the Income Tax Act; the provincial Pension Benefits Standards Act is paralleled by a Quebec Act, the only difference being a provincial pension plan in substitution for the federal one.

b) *Uniformity of Regulation*

It should be noted that each province has enacted its own form of the Pension Benefits Act of Ontario. For the most part, the provinces have uniformity of pension regulation, since the Ontario study was used by all the provinces as a rationale for their own Acts.¹⁹¹ Portability and investment control provisions exist in all the provincial acts. Finally, there are provisions for mutual registration. There is, in sum, inter-provincial cooperation.

187. STAT. QUE. 1965, vol. 1, 13-14 Eliz. II, c. 24.

188. *Id.* part 1.

189. *Id.*

190. *Id.* § 10.

191. *See* Comments on Interprovincial Conference of Premiers.

9. CONCLUSION

Control over pension funds in Canada can therefore be summarized as follows:

a) the establishment and administration of a profit sharing plan, although theoretically affected by collective bargaining, is left generally to the initiative of management;

b) subsistence levels are maintained by the federal government, pursuant to its Canada Pension Plan and Old Age Security Act;

c) the desirability and structuring of pension plans in Canada is vitally affected by provisions of the Income Tax Act;

d) the province of Quebec has taken a measure of the subsistence levels unto itself pursuant to the Quebec Pension Plan Act;

e) all provinces have a comprehensive provincial statute controlling the practical administration and investment requirements of pension funds in Canada.