

**The Effectiveness and Efficiency of Pension Regulation in Ontario and in
Comparative Perspective**

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Introduction

The mandate for this study, as set out by the Expert Commission on Pensions, includes the following questions:

Is the Financial Services Commission of Ontario (FSCO) meeting the objectives of the *Pension Benefits Act* (Ontario) (PBA) in particular in relation to the issues that are listed in the Terms of Reference? Are there significant sources of delay or inefficiency? Where are they? Are they related to FSCO regulatory processes, or court and arbitration processes? How does FSCO compare to other regulators in Canada and abroad?

The need for regulating private pension plans is clear. These plans operate in markets and labour contexts characterized by asymmetric information, unequal resources, potential conflicts of interest, significant vulnerability and moral hazard. How to best regulate the pension sector, however, remains a work in progress. It also remains a question rooted in a particular legislative and market context. The focus of this study is on whether the pension regulator in Ontario is fulfilling the statutory goals of the PBA as efficiently and effectively as possible.

Regulation, generally, may be said to involve activities by a public body to steer private parties toward designated public policy goals.² Part of the difficulty in assessing the success of FSCO's activities, however, is the multifaceted nature of the PBA's goals.

² See John Braithwaite, "Rewards and Regulations" (2002) 29 *Journal of Law and Society* 12.

Significantly, the PBA itself does not contain a statement as to its purposes. This may be contrasted with analogous regulatory legislation, in which the purposes are elaborated. For example, the Ontario *Securities Act* includes the following statement of legislative purpose:

The purposes of this Act are,

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.³

In light of this legislative silence, the actual content of the PBA can be taken to imply that the Act advancing different goals in the interest of different groups. For some, it is economic regulation, intended to facilitate market activity and to interfere only in cases of clear market failure. On this view, the primary purpose of the PBA is to deal with the consequences both of termination of employment and the wind-up of an employer, and to ensure the solvency of pension plans. A secondary purpose would be to establish clear and predictable standards for pension plans to encourage economic activity where pensions are involved. For others, however, the PBA was created to clarify economic rights and to protect a social benefit. The primary purpose for this group would be to redress the imbalance of power between employers and employees and to protect vulnerable workers. Still others might see the purpose of the PBA as establishing a public interest in good governance and sound financial management, including disclosure obligations and setting out the legal duties of the various parties involved in the administration and management of pension plans.

³ 1994, c. 33, s. 2, s.1.1.

Eileen Gillese, in her 1996 study, “Pension Plans and the Law of Trusts,”⁴ observes that the enactment of the PBA reflected a shift towards protection of plan members compared with previous legislative schemes, but little else about the goals of the legislation in her view is clear. She concludes: “The legislation provides little or no guidance on the broad issues and questions which beleaguer us ... Its focus is on detail ... it does not and, as currently expressed, cannot provide a framework for resolving significant questions in the pension field.”⁵

The Supreme Court attempted to clarify the goals of the PBA in the following passage from its decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*:

The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp*, supra [*GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.)]; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is recommended that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.⁶

⁴ (1996) 75 Canadian Bar Review 221

⁵ *Ibid.* at 229.

⁶ (2003), 242 D.L.R. (4th) 193 (S.C.C.) at para. 38.

Sometimes, the search for balance in interpreting the PBA gives way to a clear emphasis by a court on protecting the rights of vulnerable employees. As the Ontario Court of Appeal asserted in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)*:

. . . [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures."⁷

The academic literature adds yet further gloss on the purposes of the PBA. In his text, *Pension Law*, Ari Kaplan asserts that the PBA is generally aimed at two objectives: (1) to secure employee pensions from discretionary revocation and to preserve the financial integrity of earned pension entitlements.⁸

FSCO describes its own mandate, flowing from the FSCO Act, in the following terms:

To protect the public interest and enhance public confidence in the regulated sectors, FSCO provides regulatory services that protect financial services consumers and pension plan beneficiaries, and support a healthy and competitive financial services industry.⁹

While acknowledging that any attempt to capture the legislative objectives of the PBA can (and likely will) be contested, I take the three most significant statutory purposes for the purposes of evaluating the regulation of pensions in this study to be:

⁷ (1998), 158 D.L.R. (4th) 497 (Ont. C.A.) at p. 503, cited in *Monsanto*, *ibid*, at para. 16.

⁸ Ari Kaplan, *Pension Law* (Toronto: Irwin, 2006), p.9.

⁹ See FSCO Statement of Priorities (June, 2007) at <http://www.fSCO.gov.on.ca/english/pubs/priorities/SOP-June07.pdf>.

- (1) protecting and safeguarding pension benefits for members of regulated pension plans;
- (2) providing clear and predictable standards for the creation, operation and dissolution of regulated pension plans; and
- (3) setting out the circumstances justifying regulatory intervention in the administration and management of pension plans.

The analysis below will examine the efficiency and the effectiveness of pension regulation in Ontario with these purposes in mind. In doing so, it will be necessary to take into the consideration the fact that the pension regulator (FSCO) also regulates other sectors (insurance, mortgage brokers, etc) and that pension plans are subject to the regulation of bodies other than FSCO (for example, the Canada Revenue Agency).

This analysis is divided into five sections. The first section explores the criteria for efficiency and effectiveness in pension regulation. The second section examines the structure of pension regulation within FSCO. The third section examines the Financial Services Tribunal (FST). The fourth section consists of a comparative analysis of pension regulation in other Canadian jurisdictions, Australia, the United Kingdom and the United States. Finally, the fifth section, in light of the analysis provided in the first four sections, canvasses opportunities to enhance the efficiency and effectiveness of pension regulation in Ontario.

1. The Criteria for Efficiency and Effectiveness in Pension Regulation

The first section of the study is intended to present a framework for analyzing efficiency and effectiveness in an economic regulator such as FSCO.

1.1 What is efficient and effective regulation?

The research mandate uses the term ‘administrative efficiency’ as defining both the goal and the guidelines of pension regulation. While valuing efficiency generally connotes the primacy of a low cost/benefit ratio, the idea of *administrative* efficiency introduces a number of qualitative considerations into what might otherwise be a strictly quantitative analysis. Consequently, determining what constitutes effective regulation, first require an identification of the qualitative considerations that must be accounted for in a regulatory scheme (including adjudication of regulatory disputes).

1.1.1 What are relevant principles?

Before turning to the considerations which will shape the evaluation of efficiency and effectiveness in the context of pension regulation, it is important to outline the principles guiding this evaluation. In 2005, the Organization for Economic Co-operation and Development (OECD) adopted “Guiding Principles for Regulatory Quality and Performance.”¹⁰ The principles relevant to pension regulation are as follows:

- 1) clear objectives and frameworks for implementation. More specifically, good regulation should:
 - a. serve clearly identified policy goals and be effective in doing so;
 - b. have a sound legal and empirical basis;

¹⁰ See <http://www.oecd.org/dataoecd/19/51/37318586.pdf>.

- c. produce benefits that justify costs, taking economic, environmental and social factors into account;
 - d. minimize costs and market distortions;
 - e. promote innovation through market incentives and goal-based approaches;
 - f. be consistent with other regulations and policies; and
 - g. be consistent with other economic goals (e.g. competition, trade and investment, etc)
- 2) assess impacts and review the effects of regulation systematically to ensure that they continue to meet their intended objectives efficiently and effectively in a changing and complex economic and social environment;
- 3) ensure that regulatory institutions, processes and regulations are transparent and non-discriminatory; and
- 4) design regulatory structures to stimulate competition and efficiency, eliminate unjustified regulatory barriers and keep only those regulatory structures which can demonstrably be shown to serve the broad public interest.

These principles have become a benchmark against which to evaluate regulatory structures in a variety of settings and appear appropriate to the Ontario setting.¹¹

¹¹ See, for example, Mamiko Yokoi-Arai's "The Regulatory Efficiency of a Single Regulator in Financial Services: Analysis of the UK and Japan" (2006) 22 Banking and Finance Law Review 23 at 25.

1.1.2 *What are relevant considerations?*

The list of considerations potentially relevant to applying these principles to the context of pension regulation in Ontario could (and perhaps should) be a long one. Rather than attempting to be exhaustive, I set out below eight considerations which I take to be most significant in an analysis of the efficiency and effectiveness of pension regulation, mindful of the purposes of the PBA and the principles identified above.

The first consideration is the importance of balancing between individual and public interest—i.e. should a regulatory body prioritize the best interests of the specific and discrete persons and entities it effects, or should such individual interests be subordinated to what is in the public’s best interest. Generally the policy to which a regulator adheres will articulate public interest goals. In the case of pension regulation, however, these public interest goals arise in the context of voluntary arrangements between private parties. Unlike the CPP or Old Age Pension schemes, where the public interest is paramount, the regulation of private, voluntary pension schemes must also accommodate the parties’ preferences, and respect the market forces which shape the pension industry.

A second consideration is the relationship between costs and benefits in pension regulation. If the regulator thoroughly inspected every pension plan every year, the likelihood of serious non-compliance and the jeopardy to pension plan members of losing benefits would be greatly reduced. The cost of such a scheme, however, would be

astronomical. While costs are relatively easy to track, benefits may be difficult to quantify, especially where benefits include a mix of statutory objectives, as outlined above.

A third consideration is the independence of FSCO (and the FST). Although regulatory bodies are often referred to as ‘independent agencies’, in reality their existence, membership and governing principles are subject to the preferences of the government. This consideration calls for an examination of whether or not a regulator/adjudicator is able to demonstrate its autonomy from government in the decisions—i.e. does it make decisions that are reasonable or correct interpretations of the relevant policy even though such decisions might be adverse to the interest of the government. A related inquiry is to what degree and depth a regulator should be able to develop its own rules, policies and priorities.

A fourth consideration is the relationship between FSCO and its stakeholders. This requires examination of whether or not stakeholders are consulted when FSCO is considering changes in policy or the adjudicatory process, as well as the approach of FSCO to education, prevention and outreach more generally. It also requires examination of whether the existing policies and processes are responsive to the needs and concerns of pension plan administrators, pension plan members, pensioners, employers and the professionals who play a key role in the sector (e.g. lawyers, accountants, actuaries, etc)

A fifth consideration is whether or not FSCO (and the FST) are optimally utilized. Does the jurisdiction of these bodies correspond with their powers and resources? Underlying this question is the idea that a regulator's internal functioning and efficiency are mitigated with regard to its greater regulatory effectiveness if it is under or over utilized.

A sixth consideration is whether FSCO has appropriate strategic objectives, performance standards and appropriate data and mechanisms for assessing its performance. This consideration may involve an analysis of the risk-based approach of FSCO regulation, the means it has employed to classify and respond to risk and how to measure the success of its approach. Without such benchmarks, it is difficult to evaluate whether the regulator is effective, whether the staffing and resources afforded the regulator are sufficient, and whether the goals of the PBA are being met.

A seventh consideration is whether or not FSCO (and the FST) provide value for the investment of public funds. For example, do FSCO and FST make optimal use of available technology and expertise? This could also involve looking at factors such as the average turn-around time from the activation to the end of all matters brought before the FST, the average turn-around time for each class or category of investigation brought before FSCO, etc.¹²

¹² See: Benjamin, Paul and Gruen, Carola, "The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database" (June 2006). DPRU Working Paper No. 06/110 Available at SSRN: <http://ssrn.com/abstract=943999>

An eighth and final consideration is whether or not regulated pension funds are sufficiently protected by FSCO. This consideration involves an examination of the prevention, monitoring, and enforcement strategy of FSCO, and whether its powers are sufficient (and exercised in a sufficient way) to safeguard the interests of pension plans and pension plan members.

1.1.3 Which methodologies are appropriate?

There are a wide variety of methodologies for measuring the relative effectiveness of a regulator, most of which relies on the use of counterfactuals.¹³ Five methodologies appear to be suited to the evaluation of pension regulation.

- 1) Compare observed outcomes of the existing system with estimates for the outcomes based on counterfactuals. In the context of administrative procedure or dispute resolution this requires varying one procedure at a time and comparing results.

- 2) Compare ‘treated entities’ with ‘untreated entities’. In this method particular processes or procedures are identified as key variables. The ‘treated entity’ is the control group—i.e. it is an existing regulatory system that makes use of the particular procedure—while the untreated entity is the comparator. In this method a single regulatory system is meant to implement different processes/procedures,

¹³ See C. Coglianese, "Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection" (2003), 55 Administrative Law Review 785.

- the outcomes of each are then compared with the aim of inferring the counterfactual(s) that account(s) for any differing results between them.
- 3) A longitudinal survey of a single regulatory system that has undergone reforms. In this method outcomes in certain areas before reform are compared with outcomes in those areas after reform.
 - 4) A cross sectional survey, in which the systems of different jurisdictions are compared. In this method all procedural similarities and differences are identified as variables and each is weighted as more/less/not significant in explaining the differences in outcomes brought about by each system.
 - 5) A survey of the goals of the regulator and the objective measures for evaluating whether those goals are being achieved.

While all five methodologies could be used for determining what variables or combination of variables should be used to constitute the kind of regulatory system that would best achieve the assumed goals of the PBA, limits on available data (for example, there are no unregulated pension plans to compare with the regulated ones) suggest more reliance on the latter three methodologies. In particular, because the purpose of the regulation is set by the goals of the PBA, the last methodology of evaluating whether FSCO through its regulatory activities fulfills those goals is the primary analytic question with which this study grapples. The other methodologies (e.g. looking to other

jurisdictions governed by analogous legislative schemes, or looking to previous iterations of pension regulation in Ontario) are ancillary approaches intended to shed more light on this primary question.

1.2. Frameworks of Analysis

As mentioned above, the challenge in pension regulation is not evaluating the means but defining the ends. For example, if the “end” of pension regulation was seen as promoting the creation of pension plans to cover as many employees as possible and providing the highest level of pension benefits, then the evaluation of pension regulation would be relatively straightforward. An efficient and effective regulator would be one which figured out how to stimulate the creation of pension plans and pursued such actions. These actions might include reducing regulatory burdens and transaction costs, providing support and infrastructure to assist employers, and other services seen to be valuable. Policy development would focus on identifying barriers to the creation of pension plans and overcoming them. Benchmarks for success would include the number of plans and the size of the membership of those plans.

Alternatively, if the goal of regulation was not to stimulate more plans but to protect employees currently participating in pension plans, a different set of objectives for pension regulation would be apparent. Higher entry barriers and licensing requirements, as well as strict funding requirements, enhanced monitoring, reporting, inspection, intervention, and enforcement activities, all might be paths to greater

protection for pension plan members. Of course, the reverse impulse would flow from the goal of stimulating economic activity at a lower cost to employers. The challenge in evaluating pension regulation is not that we lack for information about goals, but that the information we have, both from the PBA and policy-makers, suggests multiple and in some cases competing goals, which are intended to be achieved simultaneously.

According to Coglianese, economic analysis should be used to set optimal cost-benefit ratios, and policy options should be measured out and opted for accordingly.¹⁴ While such analyses are no doubt useful, much of the literature on measuring or comparing the effectiveness of regulatory bodies is written with regard to the question of if public or private (or a combination thereof) regulatory bodies are desirable rather than with regard to the question of what is the most desirable or effective structure for a public regulatory body.

Most of the literature on evaluating regulatory efficiency has arisen in particular historical and legislative contexts (for example, the literature arising out of former U.S. President Reagan's Executive Order 12291 that influenced the method for Regulatory Impact Analysis (RIA) or the Compliance Cost Assessment (CCA) procedure implemented by former UK Prime Minister Thatcher. These regulatory initiatives came from governments which had prioritized deregulation policies. The ideological underpinnings of such policies aside, they are useful for suggesting a framework of questions for how to determine the standard against which regulatory reform should be

¹⁴ Coglianese, *ibid.*

measured and assessed.¹⁵ The cost-benefit analysis of efficiency is a significant factor in the choice of regulatory structure but it is not the only factor.

There are three supervisory structures which govern pensions in various jurisdictions: (1) a specialized pension regulator; (2) a partially specialized regulator where the regulator will have responsibility over pensions and/or insurance and/or labour relations and/or related sectors; and (3) an integrated regulator, where a single regulator will be responsible for most or all economic sectors.¹⁶ On this breakdown, FSCO would fall somewhere between the second and third model. While FSCO is responsible for a variety of financial sectors, there are also significant financial sectors outside of its jurisdiction (for example, securities regulation) so it appears more integrated than the partially specialized model and yet less integrated than the truly integrated model. FSCO thus is an attempt to capture some of the economies of scale and logistical efficiencies of an integrated model, while retaining some of the advantages of the specialized or partially specialized model. As discussed below, this model is a product of cost/benefit analysis (e.g. economies of scale realized by regulating more than one sector) but also of political, administrative and historical factors.

As a final note on the framework for analysis, when regulation occurs in the life cycle of economic activity is also an important factor. With respect to pension plans,

¹⁵ For further discussion, see Anthony Ogus, *Regulation: legal form and economic theory*, (Oxford: Clarendon Press, 1994), pp. 162-165.

¹⁶ A recent OECD study has found these three models are all well-represented across OECD member states. See Vinicius Carvalho-Pinheiro, “Supervisory Structures for Private Pension Funds in OECD Countries,” in OECD, *Supervising Private Pensions: Institutions and Methods*, No. 6 (2004), at Table II.2.

regulators can intervene *ex ante*, upon entry into a sector, on an ongoing basis for all parties in a sector, or on an *ex post* basis when there has been a regulatory infraction.¹⁷

Ex ante pension supervision sets out the relevant entry requirements (e.g. licensing process, registration requirements, etc) which might include minimum standards for pension plan funding and pension plan governance. Ongoing regulation may involve a diverse mix of instruments, from off-site monitoring, on-site inspections, regular meetings with pension fund directors and managers, contact with pension professionals (lawyers, accountants, actuaries), and response to complaints. In a risk-based approach, such as that adopted by Ontario, the analysis is of data from pension plan disclosure and reporting. *Ex post* regulation shifts the focus to the tools and resources of the regulator to enforce compliance, impose sanctions and pursue other corrective mechanisms.

An efficient and effective regulator must strike an appropriate balance between these three types of interaction and intervention with regulated entities, and justify its prioritizing of one type of interaction and intervention over others.

2. The Operation of FSCO

The second section of the study analyzes the Financial Services Commission of Ontario in greater detail. The purpose of this section is both to describe the structure,

¹⁷ This tripartite structure is borrowed from Ambrogio Rinaldi, “Supervising Private Pensions: An Introduction,” in *ibid.* at pp.14-16.

organization, funding, activities and performance assessment of FSCO, and also to provide a basis for applying the framework of analysis developed in the first section.

2.1 FSCO's Context

FSCO was created in 1997 by the *Financial Services Commission of Ontario Act*.¹⁸ The restructuring was part of a Government of Ontario initiative designed to increase the efficiency and reduce the cost of government regulation in a number of sectors. FSCO represented the amalgamation of the former Pension Commission of Ontario, the Ontario Insurance Commission and the Deposit Institutions Division of the Ministry of Finance.

The *Financial Services Commission of Ontario Act*, 1997 assigned regulating duties based on its division of FSCO into three parts: the Commission, the FST and the Superintendent of Financial Services (the “Superintendent”). Together these bodies were given responsibility over regulating auto insurance, co-operatives, credit unions, insurance, loan and trust companies, mortgage brokers, the Motor Vehicles Accident Claims Fund and pensions in Ontario.

The purposes of FSCO as set out in the *Act* are:

- (a) to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors;

¹⁸ S.O. 1997, c.28.

(b) to make recommendations to the Minister on matters affecting the regulated sectors; and

(c) to provide the resources necessary for the proper functioning of the Tribunal.¹⁹

Prior to the creation of FSCO, pension regulation was the responsibility of the Pension Commission of Ontario (PCO). The PCO was an integrated agency, with authority over licensing, enforcement and adjudication. FSCO represented a change from the PCO:

- (1) FSCO regulates not just pensions but other sectors as well – this both creates challenges of focus and prioritization but also provides enhanced regulatory capacity and sophistication;
- (2) Pension regulation is now bifurcated, divided between FSCO and the Financial Services Tribunal (FST), which has the sole function of holding hearings in relation to decisions of the Superintendent;
- (3) Whereas the PCO appointed the Superintendent, in the current scheme, the Superintendent is a government appointee and the CEO of FSCO.
- (4) FSCO’s governing legislation sets out that both the Superintendent and the FST are required by statute to “have regard” to the Minister’s policy statements in decision-making.²⁰ While the Minister has yet to issue policy statements of this kind, this provision suggests the legislature sought to leave open a greater role for the Government in regulatory policy than was the case under the PCO.

¹⁹ Ibid. at s.3.

²⁰ Ibid. at s.12(1).

Kaplan refers to the transition from the PCO to FSCO as an exercise in decentralization on the one hand, and greater governmental control over pension policy on the other hand.²¹ Whereas the PCO and the Minister clearly had important roles in policy development and implementation, these roles are now distributed between the Superintendent, the FST and the Minister.

For these reasons, it is difficult to conduct a true longitudinal analysis between the PCO and FSCO. The fact that neither the PCO nor FSCO engage in significant tracking also means there is a dearth of data to evaluate and compare the efficiency and effectiveness of FSCO as contrasted with the PCO. There are some indications, however, that at least with respect to regulation (as opposed to adjudication), FSCO has greater capacity and sophistication in its regulatory practices. A provincial audit in 1995, for example, uncovered significant problems with some of the PCO's regulatory activities while a similar audit of FSCO in 2005 disclosed significant improvements had occurred.²²

2.2 The Organization of FSCO

FSCO is governed through three separate structures. First, FSCO is governed by a five member Commission (consisting of the Chair, two Vice-Chairs, the Superintendent of Financial Services and Director of Arbitrations). Second, the Superintendent of

²¹ Supra note 8, at p.74.

²² Information provided by FSCO, Fall, 2007.

Financial Services serves as the Chief Executive Officer and supervises the staff (just over 500 FTEs operating out of a central office in North Toronto) and regulatory activities of FSCO. Third, the Financial Services Tribunal is an adjudicative body that conducts hearings to resolve disputes arising from the regulatory activities of the Superintendent.

FSCO is responsible for regulating three separate sectors: insurance (there are close to 400 licensed insurance companies operating in Ontario generating over \$31 billion in insurance premiums annually); deposit institutions, mortgage brokers and co-operatives; and pension plans.

The Superintendent of Financial Services, who both is responsible for FSCO's administrative and financial operation and serves as CEO of the FSCO board, is the most significant figure in the organization. The Superintendent exercises significant decision-making authority but also has policy-making functions and governance functions.

In this organizational context, it is important to highlight the functional autonomy of the Pensions Division within FSCO. The Pension Division within FSCO is managed by the Deputy Superintendent. The Deputy Superintendent, in turn, supervises four sectors of operation, each headed by a senior executive: the Director of Pension Plans, the Senior Manager of Operations, the Senior Manager of Pension Policy and the Chief Actuary. The Pension Division as a whole has a staff complement of approximately 70 Full Time Equivalents (FTEs), which represents approximately 15% of FSCO's total staff

(this does not count FSCO staff who perform Pension Division services along with services for the other regulated sectors, such as the examinations branch or legal services).²³

The Pension Division of FSCO regulates three kinds of pension plans:

- (1) Defined Benefit (DB) plans (DB plans provide a guaranteed level of retirement benefits, and constitute approximately 45% of the registered plans in Ontario);
- (2) Defined Contribution (DC) plans (DC plans require a set contribution but benefits depend on the accumulated contributions and investment income on those contributions, and constitute approximately 53% of the registered plans in Ontario); and
- (3) Multi-Employer Pension Plans (MEPP) (MEPP plans may include defined contribution and defined benefit structures – though the majority are target defined benefit plans - and are characteristic of industries where employees may move among several employers, such as the construction industry, and constitute approximately 2% of the registered plans in Ontario)

FSCO presently regulates 8086 pension plans in Ontario, covering over 2,000,000 members.²⁴ These pension plans vary significantly in size. For example, while only 2% of plans are in the MEPP plan category, over 44% of members are part of such plans.

²³ Information provided by FSCO, Fall, 2007.

All FSCO decisions of first instance come from the Superintendent.²⁵ The Superintendent's supervision of pension plans covers the entire life span of a pension plan, from granting certificates of registration at the time of a plan's inception to approving compliance during its day-to-day administration to ordering the wind-up of the plan. FSCO, in other words, is engaged in *ex ante*, ongoing and *ex post* regulation of the pension sector.

The funding structure for FSCO and the specific regulatory activities of FSCO in relation to pension plans, are discussed below.

2.3 Funding of Pensions Regulation

FSCO is funded on a cost-recovery basis; it is not, however, a self-funded agency. Self-funded regulators such as the Ontario Energy Board and the Ontario Securities Commission are funded from the fees they collect, and have the autonomy to allocate those funds to serve regulatory objectives. FSCO's revenues, by contrast, go directly to the Consolidated Revenue Fund for the province, and FSCO depends on annual transfers from the Government to fund its operations. Government sets the relevant fees and levies for the sector and by extension, determines levels of staffing and available resources for regulation.

²⁴ This figure is as of March, 2007. See FSCO Statement of Priorities (June 2007) at <http://www.fSCO.gov.on.ca/english/pubs/priorities/SOP-June07.pdf>. See also Statistics Canada review of Ontario's pension plans at <http://www40.statcan.ca/101/cst01/famil117g.htm>.

²⁵ For a review of the Superintendent's many specific statutory powers, see Kaplan, *supra* note 8, at pp.142-163.

FSCO collects approximately \$12,000,000 in fees from pension plans each year (out of total revenues of \$40,000,000 from all regulated sectors). Pension plans pay on a fee-per-member basis. Thus, the funding of FSCO relates to the size of the sector, not to FSCO's activities or the size and/or the complexity of the transactions FSCO supervises. Plans deemed or determined to be high-risk pay on the same basis as plans deemed or determined to be low-risk. FSCO is moving to an assessment based approach in 2008 but the principle of plans covering the cost of FSCO's operations in relation to the size of their membership will remain the guiding principle animating FSCO's funding. One significant difference in the new scheme will be that funding shortfalls, which previously fell to Government to make-up, now will be apportioned on a pro-rata basis for the plans to redress.

The budget of FSCO for 2006-2007 was \$12,558,812.67. This sum includes direct costs (largely salary and wages) of \$5,646,056.06, as well as indirect costs (supporting units) of \$6,912,865.61. The indirect costs include in-house legal services (\$1,638,671.16), in-house legal investigative services (\$171,448.01) and in-house plan examination services (\$271,111.46).

The fact that FSCO is an arm's length part of Government rather than a self-funded agency, also has implications for its expertise and regulatory capacity. For example, FSCO employees are public servants (and for the most part members of public service unions) classified and compensated according to the Ontario Public Service (OPS)

policies. The structure stipulates the salary and benefits available for FSCO staff and has proven to be a particular challenge in recruiting and retaining staff with the expertise needed. For example, developing actuarial expertise has been cited as an example of the difficulty of working within the public service as opposed to self-funded agency framework.

2.4 The Relationship between FSCO and the Ministry of Finance

The Government of Ontario has a legitimate interest in the operation of FSCO, and in the success of its regulatory activities. As with all statutory administrative bodies, FSCO was created as part of the fulfillment of governmental policy.

As indicated above, the Government is responsible for funding FSCO on a cost-recovery basis in each of the regulated sectors. FSCO is provided with a funding envelope each year and this forms the parameters within which FSCO's own allocation of resources takes place (as between regulated sectors, and within each sector as between regulatory activities). FSCO does not have authority to modify the fees collected from regulated sectors to meet its own strategic objectives.

FSCO operates at arm's length from the Government of Ontario generally and from the Ministry of Finance specifically. While Government does not direct the day-to-day operation of FSCO (and indeed has little, if any, influence over key decisions), the

Government has authority to set the general direction of pension policy. It may do this formally through legislative reform or through the issuance of policy statements, or informally, through its power to appoint the Superintendent and FST members, and its control over FSCO's global budget.

While the Pension Division of FSCO has a policy unit, FSCO does not have statutory authority to engage either in formal rule-making or policy development through a process of hearings or notice-and-comment. While FSCO plays an active role in pension policy, the pension policy branch of the Ministry of Finance also plays a significant role. FSCO is an arm's length regulator, but the legislative and administrative structure of FSCO would enable Government, if it wished, to exert influence over FSCO's priorities and capacities.

As alluded to above, independence is also put into question because FSCO regulates pensions (some of its largest regulated plans in terms of assets) where the employer or joint sponsor is the Government of Ontario. While there are some mechanisms in place (regulatory exemptions) to treat the pension plans of direct employees of Government differently, FSCO remains responsible for regulating the Government, at the same time that it is vulnerable in multiple ways to Government intervention.

2.5 FSCO's Activities

FSCO's activities in the pension sector are to some extent dictated by the PBA. Where a role for the Superintendent in relation to wind-ups is provided by the *Act*, for example, FSCO must establish a process for monitoring and intervention in relation to wind-ups. It is up to FSCO, however, to determine the most efficient and effective process for carrying out this statutory mandate. In the context of other activities, such as how FSCO engages in outreach and education and what services it provides plan administrators, the *Act* provides only an indirect framework for FSCO's activities.

FSCO's activities may be classified according to the main kinds of interaction it has with pension plans. The analysis of those activities below is divided into eight sections: 1) the pension plan application and reporting system; 2) wind-ups; 3) partial wind-ups; 4) transfer of assets; 5) the pension benefits guarantee fund; 6) communication, education and outreach; 7) monitoring, investigation and enforcement; and 8) evaluation and accountability.

2.5.1 The Pension Plan Application and Reporting System

FSCO processes over 19,000 filings each year from pension plans. The PBA creates a range of reporting obligations on plan administrators and complying with these obligations will be the most regular contact plan administrators likely will have with FSCO. Additionally, the regulatory activities of FSCO, in large part, flow from the data

collected through these reports, and a number of enforcement activities will stem from failures to meet these obligations. The more important of these filing obligations are set out below:

(i) *Annual Information Return (“AIR”)*

Section 20 of the *Pensions Benefits Act*, R.S.O. 1990, c. P.8 (“PBA”) and section 8409 of the *Income Tax Act*, 1985 require that plan administrators file an AIR. Three months after the fiscal year end of a plan, an AIR containing pre-filled information is automatically sent to the plan administrator. They must complete the AIR, make corrections to any of the pre-printed information and submit it to the Ministry of Finance who then processes it for FSCO.²⁶

(ii) *Pension Benefits Guarantee Fund (“PBGF”) Certificates*

The PBGF filing requirement is set out in sections 83 (1) and 84 of the PBA and also in sections 34 (5) and 47 (2) of Ontario Regulation 909, R.R.O. 1990 (the “Regulation”). The purpose of this fund is to guarantee payment of certain benefits in the event a pension plan is wound up in whole or in part under certain circumstances such as insolvency. Plans exempt from the requirement to file the certificates include designated plans, multi-employer pension plans and those specified in section 47(1) of the Regulation.

²⁶ Financial Services Commission of Ontario, “Index No. 500-400: General Information Regarding Annual Information Return and Fees.” Available: <http://www.fSCO.gov.on.ca/english/pensions/policies/active/A500-400.pdf> (1 August 2007).

(iii) *Financial Statements and Investment Information Summary (“IIS”)*

Financial Statements for both pension plans and pension funds must be filed with the regulator under the guidelines established in section 76 of the Regulation at the end of each fiscal year. These statements disclose the plan’s assets, where assets have been invested and how they are performing. If the market value of the assets exceeds \$3 million at the end of the fiscal year, s. 76(2) of the Regulation requires that the financial statements are audited. In addition to the financial statements, plans must file an IIS if the plan provides a defined benefit.

(iv) *Actuarial Reports (“AR”) and Actuarial Information Summary (“AIS”)*

As part of the risk-based approach to monitoring the funding of defined benefit pension plans, plan administrators must also submit actuarial reports and the AIS.²⁷ The AIS is a standardized form that is completed by an actuary and submitted to FSCO with a funding valuation. These valuations form the basis of determinations by FSCO as to whether a plan is lower or higher in risk, and can be a catalyst for further monitoring or corrective activities.

(v) *Summary of Contributions (Form 7)*

²⁷ Financial Services Commission of Ontario, “Introduction of the Actuarial Information Summary to Administrators of Pension Plans Registered with FSCO or OSFI”. Available: http://www.fSCO.gov.on.ca/english/forms/pension/ais_16-02-2007.pdf (1 August 2007).

Section 56.1 (1) of the *PBA* provides that plan administrators must also file a Summary of Contributions form with the plan trustee.

The deadlines for these five forms depend on the type of plan that has been registered. DB plans use a formula to calculate a member’s pension benefits. One of the two most common formulas is a Final (or Best) Average Earnings Formula based on average earnings over the last (or highest paid) years of employment and the length of service.²⁸ The other is a Career Average Earnings Formula where the benefits are based on earnings over the entire period of plan membership.²⁹

DC plans are based on a set contribution to a plan account that is usually a fixed percentage of earnings. Factors such as the amount of contributions made by the employee and employer as well as the performance of the investments will determine benefits upon retirement.³⁰

The following table summarizes the filing requirements for DB and DC plans:³¹

	DB Plans	DC Plans
AIR	Required annually, 9 months after the plan year end	Required annually, 6 months after the plan year end
PBGF	Required annually, 9 months after the plan year end	n/a
FS and IIS	Required annually, 6 months after the plan year end	Required annually, 6 months after the plan year end

²⁸ Financial Services Commission of Ontario, “Your Pension Rights: A Guide for Members of Registered Pension Plans in Ontario” Available: http://www.fsco.gov.on.ca/english/pubs/consumerbrochures/your_pension_rights.pdf (1 August 2007).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Financial Services Commission of Ontario, “Filing Information for Administrators” available: http://www.fsco.gov.on.ca/english/pensions/filing_info.asp (1 August 2007).

AR and AIS	Required at least every 3 years, within 9 months of the valuation date	n/a
Summary of Contributions	Required annually, within 60 days of the beginning of each fiscal year, and within 60 days of a contribution change	Required annually, within 60 days of the beginning of each fiscal year, and within 60 days of a contribution change

2.5.2 Wind-ups

Another key activity for FSCO is triggered by the winding-up of pension plans, which often accompanies the insolvency of the employer. After an employer decides to wind up a plan or if the Superintendent orders this course of action, there are certain disclosure forms that must be submitted. The requirements outlined in sections 68 (2) and 68 (3) of the *PBA* establish that the first stage of a wind-up is for the plan administrator to give notice to the Superintendent, all affected members, all former members, any union representatives, the advisory committee and any other person entitled to a payment from the pension fund.

Pursuant to section 70 (1) of the *PBA*, the second document that must be filed is the wind-up report which includes the assets and liabilities of the plan, the benefits provided under the pension plan to members, the methods used to allocate and distribute the assets of the plan and other information such as is prescribed. Section 29 (3) of the Regulation requires that this report be filed within 6 months of the effective date of the wind up.

The FSCO staff review these documents and make a recommendation to the Superintendent as to whether it complies with the *PBA* and the Regulation. The plan administrator is then required to provide a statement to each member that describes both benefits and options (including the deemed election) and that conforms to the requirements in sections 72 of the *PBA* and 28(2) of the Regulation.

If all of these reports are filed properly, the Superintendent will approve the wind-up and the assets of the plan can be used to purchase life annuities³². If there is a surplus, the Superintendent will only approve the basic benefits until the surplus' disposition has been settled, at which point the full wind-up will be approved in accordance with s. 28(2) of the Regulation.³³ The benefits are then distributed based on the options elected by the members and the methods outlined in the wind-up report.

The processing of wind-up applications involves a number of administrative steps. Pensions Division staff review wind-up applications for compliance with the *PBA*. Issues may be referred to the Legal Services Branch and/or Actuarial Unit. Once a determination is made as to compliance, staff will send a compliance letter to the Plan outlining all areas of compliance concern or, if the application is complete and compliant, approve the transaction. A wind-up process is “closed” when all of the compliance issues have been addressed and the application is refused or approved.

³² Financial Services Commission of Ontario, “Index no. W100-102: Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan” Available: <http://www.fSCO.gov.on.ca/english/pensions/policies/active/W100-102.pdf> (1 August 2007).

³³ *Ibid.*

The time taken to process and close applications differs according to the type of plan. Winding up DB plans require more time and involve more complexity than DC plans. For DB plans, about 525 applications for full wind-ups were received in the five year period ending in 2006-2007. The median time to process these applications was 56 days, and the median time to close these applications was 175 days.³⁴ For DC plans, about 630 applications for full wind-ups were received for the same time period. The median time to process was 12 days and the median time to close was 34 days.³⁵ These closure times have been stable over the past five years with no notable trends.

2.5.3 Partial Plan Wind-ups

The procedure for partial plan wind-ups is generally the same as for full wind-ups. The main difference is that, pursuant to FSCO policy, a partial wind-up requires a valuation balance sheet for both the ongoing and wound up portions of the plan. This includes splitting assets and liabilities between both balance sheets and a confirmation that the funding requirements established in the most recent actuarial report continue to apply.³⁶

As with full-wind-up applications, the time for processing and closing these applications differ according to plan. For DB partial wind-up applications, FSCO

³⁴ Information provided by FSCO, Fall 2007. These statistics are based on FSCO's fiscal year. While these timelines for processing and closing applications are expressed as a "median," there is no appreciable difference between "median" and "average" timelines for either processing or closure. For the purpose of the breakdown, DB plans and DC plans include MEPPs. If it is DB MEPP, it is classified as a DB plan. Similarly, if it is a DC MEPP, it is classified as a DC plan. Also, if it is a single-employer "hybrid plan" (containing DB and DC components), it is classified as a DB plan.

³⁵ Ibid.

³⁶ Supra note 32.

received about 275 applications in the five year period ending in 2006-2007. The median time to process these applications was 81 days and the median time to close was 471 days. For DC partial wind-up applications, they received about 220 applications in the same period. The median time to process these applications was 14 days and the median time to close was 48 days. There has been a steady improvement in the median time for DB partial wind-up closures in the past two years (308 days in 2005-06, 471 days in 2006-07, compared to a closure timeline of 500 days in previous years). FSCO attributes this improvement as likely due to the impact of the Supreme Court's decision in *Monsanto*, which clarified partial wind up requirements.

2.5.4 Transfers of Assets

Transfer of assets are generally applications resulting from a sale of business involving two employers (for example, where an employer sells a division to another employer), whereas mergers are generally transfer of assets applications involving one employer (for example, an employer merges the salaried and hourly plans).

A 'transfer of assets' varies widely depending on whether it is between custodians when only one plan is involved or when the transfer is between two separate pension plans. A transfer within one plan is known as a "change of carriers" and can be achieved by sending the FSCO an explanatory letter and a copy of the document that instructs the transferring institution on the required course of action³⁷. The second type of transfer,

³⁷ Financial Services Commission of Ontario, "Index No. A700-152: Types of Asset Transfers." Available: <http://www.fSCO.gov.on.ca/english/pensions/policies/active/A700-152.pdf> (1 August 2007).

known simply as a “full or partial transfer of assets”, requires the Superintendent’s approval of an application pursuant to section 81 of the *PBA*.³⁸

Once again, as in the context of wind-ups and partial wind-ups, the resources required to deal with transfer of asset applications differs according to the type of plan and type of transfer. For DB transfer of assets, FSCO received about 115 applications in the five year period ending in 2006-2007. The median time to process was 77 and the median time to close was 1088. For DB mergers, FSCO received about 150 applications. The median time to process was 67 and the median time to close was 861. For DC transfer of assets, FSCO received about 75 applications. The median time to process was 26 and the median time to close was 328. For DC mergers, FSCO received about 150 applications. The median time to process was 33 and the median time to close was 211.³⁹

As in other areas, it takes considerably longer to process and close DB transfer of assets and mergers than DC transfer of assets and mergers. In the context of DB transfer of assets and mergers, the data also demonstrate that the Ontario Court of Appeal *Transamerica* decision in 2004, which had an impact on how the Superintendent reviews and approves applications, caused delays in closing these transactions. For example, prior to this, the median time to close, in 2002-03, DB transfer of assets was 502, and for a DB merger it was 602.

³⁸ Ibid.

³⁹ Information provided by FSCO, Fall 2007.

2.5.5 Pension Benefits Guarantee Fund

FSCO administers the Pension Benefits Guarantee Fund (PBGF), which provides a minimum level of retirement benefits to members of a pension plan that has been the subject of a wind-up or partial wind-up, where the remaining assets are insufficient to meet the obligations under the plan. The reporting requirements for PBGF certificates are mentioned above. In 2004, there were 15 claims against the fund, totaling approximately \$135,000,000.⁴⁰

2.5.6 Communication, Education and Outreach

Regulation consists of more than ensuring compliance.⁴¹ As noted above, regulation involves a relationship between a public body and private parties aimed at advancing specified public interest goals. From a standpoint of effectiveness and efficiency, moreover, it is clear that on-going education, outreach and communication can achieve far more by way of preventing enforcement at far less cost than *ex-post* enforcement and corrective activities.

Both the Pension Division within FSCO and the FST have informal, advisory bodies drawn from professionals and others with pension regulatory or legal expertise. These bodies are used as sounding boards for particular initiatives; they do not appear to be used as a source of communication between the regulator and stakeholders.

⁴⁰ FSCO Annual Report, 2004, p.17.

⁴¹ See, for example, Colin Scott, “Accountability in the Regulatory State” (2000) 27 Journal of Law and Society.

FSCO has undertaken initiatives relating to communication in the pension context, including a focus on improving its website (and moving its “pension bulletin” on-line). However, FSCO does not appear to engage in any significant data gathering or evaluation of its activities in relation to education, outreach and communication (apart from the tracking of direct inquiries, discussed below).

2.5.7 Monitoring, Inquiries and Enforcement

FSCO adopts a risk-based approach to its enforcement activities. This approach is discussed in greater detail in a related research study for the Commission.⁴² In short, the approach involves analyzing which kinds of pension plans are at greatest risk either to be unsustainable or to jeopardize the members’ benefits, and to focus enforcement activities on those plans, rather than apply the same enforcement activities to all plans. For example, defined benefit plans are generally recognized as higher risk than defined contribution plans. Multi-employer plans tend to give rise to greater governance complexities than either defined benefit or defined contribution plans. Additionally, within a category of plan, particular funding arrangements and investment strategies have been identified as higher risk based on empirical modeling and computer analysis.

Apart from its own proactive, risk-based approach to monitoring activities, FSCO also receives and responds to inquiries of various kinds directly from plan members, including complaints that trigger monitoring and enforcement activities.

⁴² See paper prepared by Mary Condon.

(i) *Inquiries*

FSCO considers all written communication from plan members to be “inquiries,” including simple requests for information, confusion over processes, concerns with plan administration and complaints against both plan administrators and FSCO itself.⁴³ FSCO does not track particular kinds of inquiries (complaints, for example, as opposed to requests for information). For all of these inquiries, however, a similar process is followed. First, the member will be requested to contact the plan administrator directly to see if the inquiry can be addressed by the administrator.⁴⁴ Approximately 80% of all inquiries are resolved at this stage. For the approximately 20% of inquiries that cannot be resolved, FSCO may take a number of steps, involving first obtaining the necessary information about the matter and second, providing a decision-letter to the administrator in relation to the inquiry. A decision-letter could simply confirm that the administrator has complied with its responsibilities under the *Act* or could lead to a notice of proposal, indicating an ongoing concern, which triggers a set of procedural rights for the plan administrator and further steps for FSCO, discussed below.

The number of inquiries coming to FSCO is on the rise. The following figures show the number of inquiries closed by FSCO annually since 2002:⁴⁵

⁴³ FSCO receives but does not track oral communications. Where the oral communication relates to a concern, complaint or requires follow-up activities, FSCO staff will request that the communication be put in writing.

⁴⁴ Where the inquiry concerns a complaint against an administrator, FSCO will contact the administrator and convey the complaint on an anonymous basis.

⁴⁵ Information provided by FSCO, Fall, 2007. “Closed” files indicate files where the matter was concluded either because no follow-up was needed or the necessary follow-up was concluded.

Year	Files Closed
- 2002	654
- 2003	842
- 2004	825
- 2005	845
- 2006	984
- 2007	1053

The dramatic increase apparent in the volume of inquiries begs a central question as to whether inquiries are a sign of regulatory success or regulatory failure. FSCO seeks neither to encourage nor to discourage inquiries. Arguably, however, some inquiries are more desirable than others. For example, presumably FSCO would want members to know their rights under the PBA and to bring concerns to the attention of FSCO where possible breaches to their rights might be occurring. An increase in inquiries, however, is not necessarily desirable. If inquiries are largely requests for information or confusion about benefits, this may signal that plan administrators are ineffective in communicating with plan members. Alternatively, an increase in inquiries could be due to exogenous factors, such as a rise in insolvencies in the economy more generally.

FSCO does not have any clear objectives in relation to inquiries other than to respond to them in a timely and effective manner. In this respect, it has demonstrated marked success. The median time to close an inquiry in 2002 was 94 days.⁴⁶ By 2007, the median response time has been reduced to 14 days, notwithstanding the increase in volume. FSCO credits this improvement to the fact that service response has been a

⁴⁶ Information provided by FSCO Fall, 2007. 2002 may have been an anomalous year as the closure timeline was also affected by significant staff vacancies and inquiry backlogs. In 2003, the median response time was 92 days, for 2004 it was 45 days, for 2005 it was 33 days and for 2006 it was 14 days.

significant priority and the systems employed by FSCO have been reorganized and modernized.

(ii) *Examinations*

Either in response to a complaint arising from an inquiry, or in relation to a concern arising from risk-based monitoring, FSCO will conduct a small number of examinations each year. Examinations represent the high end of ongoing regulatory investigation and are resource intensive (the examination unit is a shared service of FSCO's regulated sectors but pension examinations are also supported by Pension Division staff).

To illustrate the examination process I will use the case of the Canadian Commercial Workers Industry Pension Plan (CCWIPP).⁴⁷ In 2002, anonymous allegations were made to FSCO that the CCWIPP was contravening the PBA, including allegations of irregularities in the investment of pension fund assets in real estate ventures managed by the Board of Trustees, related party transactions between the plan and the Board and conflict of interest situations. In its Pension Examination Report in May of 2005, FSCO set out the steps it had taken in the investigation. These steps include:

- An initial written request for information to the administrator and the review of the information collected (in the case of CCWIPP, over 150 boxes of documents were provided to FSCO);

⁴⁷ CCWIPP provides benefits to 310,000 current and former members of the United Food and Commercial Workers Canada (UFCW Canada) union who work for 328 participating employers across Canada. In 2005, the Plan paid out \$111 million in benefits, with approximately 17,000 members receiving pensions. See <http://www.ccwipp.org/about/index.html>.

- If concerns remain, an on-site examination is then undertaken, involving a review of all relevant files related to the allegations (in the case of CCWIPP, this took place in 2004);
- A meeting is then held with the administrator to present the findings of the review and obtain additional input (this also took place in 2004 in the CCWIPP case);
- A draft report is prepared and issued to the administrator for comment (the draft report in the case of CCWIPP was issued in December 2004); and then the report is finalized (the CCWIPP report was finalized in May of 2005).

Following the Report in the CCWIPP matter, concerns were raised by CCWIPP's Board in September of 2005 alleging "factual errors" in the report and a further "Addendum" to the Pension Examination Report was issued in January 2006 to respond to those concerns. In June of 2006, FSCO initiated a prosecution of CCWIPP for breaches of the PBA.

The CCWIPP was not indicative of a typical complaint handled by FSCO, but the duration of 3-4 years from the start of an examination to the determination of a regulatory breach demonstrates how a single complainant may, in effect, divert such significant resources from FSCO to the investigation of her or his allegations. Given the competing demands for scarce resources, such examples raise concerns regarding the efficiency and effectiveness of FSCO's examinations activities.

(iii) *Enforcement*

In addition to examinations, FSCO engages in a range of monitoring and enforcement activities relating to pensions. Major enforcement activities, as described by FSCO, include:

- Letter of Caution, advising that stronger regulatory action will be taken in the event of another violation;
- Minutes of Settlement, whereby the Superintendent and a person reach an agreement about the appropriate resolution of the non-compliance;
- A formal hearing before the Financial Services Tribunal (FST) which may result in an order to restrict, suspend or revoke a license or registration;
- A Notice of Proposal, issued by the Superintendent, whereby a person is required to stop specific activities or is ordered to perform acts that are necessary to remedy the situation;
- Prosecutions under the *Provincial Offences Act (POA)*⁴⁸

FSCO provides a review of its pension enforcement activities, divided into orders (primarily involving winding-up orders, approximately 25 per year), consents (approximately 4-5 per year), declarations (primarily involving declarations that the pension benefits guarantee fund applies to a pension plan, approximately 16 per year) and notices of proposal (primarily to notices to make orders, declarations, or to refuse to approve a winding-up or other scheme, approximately 100 per year).⁴⁹

The Superintendent also may conduct investigations and prosecutions of anyone who contravenes the PBA. As a provincial offence, a person found guilty of an infraction is subject to a fine of up to \$200,000.

FSCO's enforcement challenges tend to flow both from limits on its statutory powers and limits on its institutional capacity (e.g. staffing and budget).

⁴⁸ See http://www.fSCO.gov.on.ca/english/pubs/bulletins/mebulletins/2007/g-08_07.asp.

⁴⁹ See <http://www.fSCO.gov.on.ca/english/pubs/bulletins/pensionbulletins/september.2007.asp>.

With respect to statutory powers, one example of these limitations is the “notice of proposal” requirement. The Superintendent is obliged to provide a “notice of proposal” before taking certain action. Section 89 of the PBA provides that,

89.(1)Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.⁵⁰

Similar notice requirements are provided for the other significant order-making powers of the Superintendent. The effect of the notice requirements is that regulatory intervention often is time-consuming and expensive. Further, as discussed below, it may prevent FSCO from managing time-sensitive regulatory intervention.

With respect to institutional capacity, FSCO has identified a number of challenges. These include:

- 1) Staff turnover creates gaps in institutional knowledge and continuity. In 2002, the vacancy rate among FSCO staff was approximately 20% leading to stress and overwork for remaining staff and a significant back-log in regulatory activities. Staff turnover also relates to the strictures of OPS salary and benefit structures. As a result, FSCO moved to a model focusing on entry-level recruitment and becoming a “learning organization” in which staff might move through several positions early in their career (moving, for example, from the position of pension

⁵⁰ PBA, R.S.O. 1990, c.P.8.

- analyst focused on lower-risk plans to pension officer focused on higher-risk plans);
- 2) The need for highly specialized staff (especially in the actuarial field) which are, once again, difficult to recruit and retain within a public service framework of salary and benefits; and
 - 3) Access to examination officers is through the examination unit of FSCO which is shared among the regulated sectors according to the FSCO's overall strategic priorities. As a result, if FSCO determines that there is a need in the mortgage broker sector for additional examinations, then fewer examinations will be available in the pension sector.
 - 4) Access to legal services generally is through the Attorney General's office and FSCO's access to outside counsel is limited. Some of the larger pension plans, for example, may bring five lawyers to a meeting where FSCO has one.

To conclude, FSCO's approach to monitoring, inquiries and enforcement is a mixture of risk-based activities and responsive activities to inquiries (including specific complaints). The Pension Division has demonstrated success in many areas within its control (response times to inquiries), but its regulatory performance has been affected (sometimes adversely) by a host of factors outside of its control (for example, FSCO's overall priorities which may divert resources from the Pension Division, disputes between plan members and administrators resulting in complaints, etc). In other contexts, FSCO's own decisions and processes have affected its performance – for example, the

manner in which it manages complaint-based examinations or its litigation strategy in cases such as *Monsanto*.

2.5.8 Evaluation and Accountability

A key aspect of ensuring both efficiency and effectiveness is ongoing evaluation of whether or not activities and priorities are successful in light of the goals of the PBA. Evaluation depends, in turn, on gathering appropriate data on regulatory activities and outcomes and measuring those against specified benchmarks. While not compelled to gather specific kinds of data to measure performance, the Superintendent does have a specific mandate to conduct surveys and research programs and to compile statistical information related to pensions and pension plans.⁵¹

The FSCO Act requires that FSCO deliver to the Minister of Finance and publish in the Ontario Gazette (by June 30th each year) the following:

- (a) a statement setting out the proposed priorities of the Commission for the fiscal year in connection with the administration of this Act and all other Acts that confer powers on or assign duties to the Commission or the Superintendent; and
- (b) a summary of the reasons for the adoption of the priorities described in clause (a).⁵²

In the *Statement of Priorities* published in June of 2007,⁵³ FSCO reiterates its four strategic priorities: 1) promote a coordinate national approach to regulatory issues; 2)

⁵¹ PBA, s.97.

⁵² Supra note 18, at s.11.

⁵³ <http://www.fSCO.gov.on.ca/english/pubs/priorities/SOP-June07.pdf>.

enhance the risk based approach to regulation; 3) review and recommend amendments to the regulatory framework to keep pace with changes in the marketplace; and 4) improve delivery of services.

Included in the FSCO *Statement of Priorities* is a “report-back” on accomplishments toward the strategic priorities in the past year. Of those achievements related to pension regulation (as opposed to the other sectors FSCO regulates), the achievements identified include, for example, with respect to the first priority, working within the Canadian Association of Pension Supervisory Authorities (CAPSA) to finalize non-contentious principles of a model pension law, and developing a framework to replace the 1968 Reciprocal agreement dealing with multi-jurisdictional pension plans. Strategic initiatives for the coming year include furthering these two initiatives. No benchmarks are set out, nor time-frames, nor any assessment of performance.

The single activity achievement noted with respect to the category of enhancing risk-based regulation in the pension field was to explore the feasibility of integrating the annual financial statements and investment information summary for defined benefit pension plans into a single report to facilitate monitoring for compliance.

Of the thirteen separate achievements noted with respect to keeping up with the changes in the marketplace, only two relate to pension regulation (the review of partial wind-ups as part of the ongoing consequences of the 2003 *Monsanto* Supreme Court decision and evaluating the delinquent filing process as it relates to pension plans).

Under the fourth strategic priority, the “report-back” indicates that FSCO reviewed dispute-resolution mechanisms and will undertake modifications to make the system more efficient and “user-friendly.” Again, no benchmarks are set out, nor time frames, nor any assessment of performance. This is not to suggest that FSCO generally and the Pension Division more specifically do not have performance objectives or benchmarks, but rather that they are not made public. Thus, whatever performance assessment does occur is internal and confidential. This kind of assessment may result in improved efficiency and effectiveness (or it may not) – all that can be said with certainty is that this approach is unlikely to enhance public confidence or the confidence of the regulated sector in FSCO’s performance.

The absence of transparency in performance assessment also suggests a lack of critical self-reflection as an organization. The “report-back” contains no discussion of, or concerns with, the performance of FSCO, nor any justification for the priorities set out. This may be contrasted to the approach of other regulators. The Competition Bureau, for example, tracks the number of days different actions related to service delivery take, and measure that against established benchmarks (classified according to the complexity of the activity), so that its success or lack of success on those measures is clear.⁵⁴ The Federal Office of the Superintendent of Financial Institutions uses a mix of survey, consultations and data collection to evaluate performance, assigning to each of its key priorities an assessment as to whether the performance of OSFI had improved, declined

⁵⁴ Competition Bureau Annual Report, 2006, p.48.

or remained the same.⁵⁵ The Pension Regulator in the United Kingdom, as discussed below, engages in sophisticated perception tracking to ascertain whether its education and outreach are responsive to industry needs and successful overall.

3. The Operation of the FST

The third section of the paper analyzes the Financial Services Tribunal. The FST is an autonomous, adjudicative body. Its membership ranges between 9-15 part-time members (including the Chair and two Vice-Chairs).⁵⁶ The *FSCO Act* provides that,

The Tribunal has exclusive jurisdiction to,

- (a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
- (b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).⁵⁷

The FST adjudicates challenges to the Superintendent's decisions across the regulated sectors. Pension adjudication, however, represents the majority of hearings (approximately three-quarters). Between its inception in 1998 and 2007, the FST has received a total of 114 cases relating to pension matters. Of these, 33 have been heard and decided on their merits. Twenty-four cases were settled (14 of those with a settlement conference as part of the FST's procedures). Five cases were dismissed. Thirty-one cases were withdrawn and the remaining cases are ongoing.

⁵⁵ See OSFI Performance Report (2003) at http://www.tbs-sct.gc.ca/rma/dpr/02-03/OSFI-BSIF/OSFI-BSIF03D01_e.asp#Toc51139994.

⁵⁶ As of the summer of 2007, there were 14 members. Members are appointed for three year terms.

⁵⁷ *Ibid.* at s.20.

The PBA provides a full right of appeal from FST decisions to the Divisional Court.⁵⁸ Courts have held that the FST, as a part-time and multi-disciplinary body with a full statutory right of appeal, is not entitled to significant deference (except where the FST is exercising a statutory discretion).⁵⁹ In *Monsanto*, the Supreme Court found a standard of correctness applied to the Tribunal's interpretation of s.70(6) of the *Act* (dealing with partial wind-ups). Deschamps J., writing for the Court, observed:

On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, s. 20 ("FSCOA"), to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sectors" (FSCOA, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (FSCOA, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see FSCOA, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449, involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (FSCOA, ss. 6(4), 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of six to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (FSCOA, s. 6(3)).

Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.⁶⁰

⁵⁸ See s.91(1) of the PBA.

⁵⁹ See DCA Employees Pension Committee, 2006, at para. 9.

⁶⁰ *Monsanto*, supra note 6, at paras. 11-12.

In decisions since *Monsanto*, lower courts have elaborated on the circumstances in which deference will be shown to the FST. On questions of mixed fact and law, for example, a standard of reasonableness has been found to apply to determinations of the FST.⁶¹

Decisions relating to pension issues have constituted the vast majority of all matters before the FST. Excluding the 21 ongoing cases, there have been 93 pension cases before the FST since its formation on July 1st, 1998.⁶² Of these 93 cases, only 33 required decisions on merits while the other 60 were settled either through pre-hearing conference, settlement conference or direct negotiation between the parties.⁶³

Of the 33 cases that required decisions on merit, 11 were appealed to the Divisional Court.⁶⁴ Since decisions are pending in 2 of those 11 cases, there is a sample of 9 cases that can be used to calculate failure rate. By the end of the appeals process in all of the cases, the FST decisions were either wholly or substantially upheld by either the Divisional Court or the Court of Appeal in 7 of the 9 cases⁶⁵. However, the record in the Divisional Court alone is not as favourable as only 5 of the 9 FST rulings were upheld.⁶⁶ Of the 4 Divisional Court cases that ruled against FST, 2 were reinstated in the Ontario Court of Appeal.⁶⁷ In the remaining two cases, the Divisional Court's rejection of the

⁶¹ See, for example, *Kerry Canada v. Superintendent* (2007) 282 D.L.R. (4th) 625 (C.A.); see also *Crosbie v. Ontario (Superintendent of Financial Services)* [2006] O.J. 4298 (Div. Ct.) at para. 7.

⁶² John Solursh (Chair of the FST). "Memorandum to Cynthia Chrysler" (19 July 2007).

⁶³ *Ibid.*

⁶⁴ Financial Services Commission of Ontario, "Pension Decisions" Available: <http://www.fstontario.ca/english/decisions/pension/default.asp> (1 August 2007).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

FST ruling was upheld in the Court of Appeal and also the Supreme Court of Canada in the *Monsanto* case.⁶⁸

The number of judgments that upheld FST decisions and the description of each case are presented in the two tables below:

Summary of Judgments by Court Level

Court	FST Decision Upheld	FST Decision Overturned	Failure Rate
Divisional Court	5	4	4/9
Ontario Court of Appeal	2	2	2/4
Supreme Court of Canada	0	1	1/1
Final Holding	7	2	2/9

*Summary of Non-Pending Cases*⁶⁹

Decision Name	FST Decision	Subsequent Events
<u><i>Barbara Lewis (Donohue Forest Products Inc.)</i></u>	01/09/2004	Appeal to Divisional Court: Appeal Dismissed, costs ordered against Appellant, November 10, 2004 Motion for Leave to Appeal to Court of Appeal: Denied March 18, 2005
<u><i>Baxter, et al (National Steel Car Limited)</i></u>	05/31/2002	Appeal to Divisional Court: Appeal Dismissed, costs ordered against Appellant, November 10, 2004 Motion for Leave to Appeal to Court of Appeal: Denied March 18, 2005
<u><i>BICC Cables Canada Inc.</i></u>	11/16/2000	Appeal to Divisional Court: Dismissed, April 30, 2001.
<u><i>Dustbane Enterprises Limited</i></u>	02/15/2001	Appeal to Divisional Court: Dismissed, February 15, 2001.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

<u>Kerry (Canada) Inc.</u>	03/04/2004	<p>Appeal to Divisional Court: Appeal allowed in part; Order of Tribunal set aside, New order made, March 15, 2006</p> <p>Appeal to Court of Appeal: Appeal allowed; decision of the Tribunal reinstated; cross-appeal dismissed, June 5, 2007</p>
<u>Kerry (Canada) Inc.</u>	04/28/2004	<p>Appeal to Divisional Court: Divisional Court Order as to Costs: dated May 31, 2006; Costs awarded to Appellants; Fixed costs to be paid by Respondents, Kerry (Canada) Inc. and difference between fixed costs and solicitor/client costs to be paid out of the trust fund.</p> <p>Appeal to Court of Appeal: The Divisional Court Order as to Costs was set aside, June 5, 2007</p>
<u>Marshall Steel Limited</u>	11/29/2002	<p>Appeal to Divisional Court: Notice of Abandonment filed with Divisional Court, October 21, 2004</p>
<u>Monsanto Canada Inc.</u>	04/14/2000	<p>Appeal to Divisional Court: Appeal Allowed. Decision Dated March 19, 2001</p> <p>Appeal to Court of Appeal: Decision of Divisional Court Upheld, November 22, 2002</p> <p>Appeal to Supreme Court of Canada: Decision of Court of Appeal and Divisional Court Upheld, July 29, 2004</p>
<u>Ontario Teachers' Pension Plan Board (Anne Stairs)</u>	05/31/2000	<p>Appeal to Divisional Court: Appeal allowed, Superintendent's order affirmed, June 18 and December 5, 2002</p> <p>Appeal to Court of Appeal: Appeal dismissed, Cross-Appeal allowed in part, February 10, 2004</p>

While the overall failure rate for FST decisions that have been appealed is 2/9, it is 4/9 in the Divisional Court, 2/4 in the Ontario Court of Appeal and 1/1 in the Supreme

Court of Canada. By contrast, the former PCO rarely had any of its decisions overturned in the period 1988-1998.⁷⁰

The failure rate and decisions such as *Monsanto* do not, in and of themselves, suggest that the FST is ineffective or inefficient. These factors, however, appear to be symptomatic of a broader set of concerns. These concerns include:⁷¹

- 1) The expertise of FST members, while improving, remains uneven. Those members with significant pension experience will often have conflicts-of-interest due to connections with either the lawyers or parties involved in pension adjudication and be unavailable to sit.
- 2) Because members are part-time and hearings are infrequent, the FST lacks the institutional capacity and sophistication of larger tribunals.
- 3) The fact that a substantial proportion of parties bringing challenges to the FST are self-represented leads to hearings which are inefficient, and to a tendency to favour such parties in decision-making.
- 4) In significant cases, where it is clear that the matter will reach Court, and in light of the Court's approach to standard of review, the FST appears to add cost and delay to litigation, and yet to have little bearing on the outcome.

⁷⁰ See Kaplan, *supra* note 8 , at p.74.

⁷¹ These concerns arise primarily from interviews with members of the pension Bar.

- 5) The FST is not sufficiently independent of FSCO. The Chair of the FST sits on the Board of FSCO and the FST budget is a line item on the budget of FSCO.

To the extent these concerns are recognized by the FST (which has an advisory body which includes members of the pension Bar), there is little indication that significant reforms are being contemplated. The FST has adopted procedures and rules in accordance with the Statutory Powers Procedure Act (SPPA),⁷² and adopts an approach geared to be accessible and flexible. The FSCO Statement of Priorities discussed above, includes a brief mention of the FST, whose only achievement in the “report-back” section for 2006 was the publication of brochures intended to assist self-represented litigants.⁷³

4. Comparative Analysis

The fourth section of the study presents a comparative analysis of efficiency and effectiveness in pension regulation. It is important not to examine Ontario’s pension regulation scheme in isolation. As discussed above, the current model is the culmination of a particular historical trajectory and particular economic and political factors. Evaluating Ontario’s pension regulation is enhanced by viewing it from comparative contexts. This section will present two such contexts: (1) the experience of Ontario in relation to other Canadian jurisdictions; and (2) the experience of Ontario in relation to peer jurisdictions abroad.

⁷² R.S.O. 1990, c.S.22.

⁷³ Supra note 53, at p.15.

4.1 The Framework of Comparative Analysis

The comparative analysis below is divided into two parts. First, I provide a brief review of pension regulation in other Canadian jurisdictions. Second, I provide a more detailed review of pension regulation in three peer jurisdictions: Australia, the United Kingdom and the United States, each of which has witnessed recent and significant pension related reforms. It should be noted, however, that each of these jurisdictions feature a national pension adjudicator, in contrast to Canada where pension regulation is fragmented across the provincial, territorial and federal spheres.

Comparative study of any form of economic regulation is daunting and a comparison of regulatory structures for supervising pensions is even more perilous. The volume and kind of pension plans differs across jurisdictions. Distinctive pension laws and administrative rules, social and economic conditions as well as political and legal culture, all pose risks to drawing firm conclusions from a comparative analysis of pension regulation. The purpose of the comparative analysis below is to shed light on the criteria for effectiveness and efficiency in the context of pension regulation, and to illustrate some specific structures, powers and activities which have been identified as important to fulfilling the objectives of pension regulation in peer jurisdictions.

The problems confronting the regulator of pension plans in the peer jurisdictions examined below are often similar. Across these settings, for example, pension regulators

must operate with scarce resources to fulfill a broad statutory mandate to protect those vulnerable to loss of pension benefits.

The most sophisticated attempt yet to engage in comparative analysis of pension regulation was undertaken by the OECD Working Party on Private Pensions, whose study was initiated in 2002 and published in 2004.⁷⁴ This analysis of pension regulation across a range of different countries was undertaken jointly by the OECD and the International Network of Pension Regulators and Supervisors, and forms a significant basis for the comparative analysis below.

The OECD study identifies six common elements which are said to be characteristics in virtually all systems of pension regulation:

- 1) Licensing
- 2) Monitoring
- 3) Communication with pension funds (disclosure, outreach and education, training, etc)
- 4) Analysis
- 5) Intervention
- 6) Correction (whether punitive, remedial or compensatory)

The OECD study also identifies a number of “descriptive scales” to facilitate comparative analysis. These are:

Restrictive – Open (referring to whether there are high entry barriers or minimal entry barriers)

⁷⁴ The OECD consists of 30 member states and was established in 1961 to “bring together the governments of countries committed to democracy and the market economy to establish a network of voluntary initiatives around gathering, monitoring and analyzing economic and social data. See www.oecd.org for a description of the OECD and its program of activities and initiatives.

Proactive – Reactive (referring to whether the regulator intervenes regularly to preemptively address violations or whether the intervention is selective and only in response to certain limited criteria)

Intensive – Exception (referring to whether there is high frequency or low frequency of contact between the regulator and the pension funds)

Directive – Negotiated (referring to whether the regulator has and exercises the authority to require action from pension funds or whether to achieve desired outcomes the regulator engages in a process of negotiation with the funds)

Corrective – Deterrent (referring to whether the remedial power of the regulator is aimed at preventing or correcting problems on a comprehensive basis on the one hand, or establishing a credible deterrent power through selective enforcement on the other hand)

In light of the discussion above, it would be appropriate to characterize FSCO as a relatively restrictive, mostly reactive, deterrent-oriented regulator with a low level of contact with regulated pension funds and that employs both negotiation and directives to achieve desired outcomes. The question remains whether this orientation is conducive to efficient and effective pension regulation.

The following analysis of pension regulation in other Canadian jurisdictions, as well as in Australia, the United Kingdom and the United States, is intended to shed light on this question.

4.2 Canadian Jurisdictions

Pension regulation is an issue for all Canadian jurisdictions. The size of Ontario's pension industry, however, suggests that comparisons in regulatory challenges may be

difficult. As noted above, FSCO now regulates over 8,000 pension plans. Quebec and British Columbia, the provinces with the next largest number, each regulates approximately 1500 plans.⁷⁵ Indeed, Ontario regulates more pension plans than the other nine provinces combined.⁷⁶

Pension regulation in Canada reflects a significant diversity of organizational and supervisory structures. Ontario, Quebec and the federal Office of the Superintendent of Financial Institutions appear to operate with the most functional autonomy. A detailed comparison of the various statutory powers of Canadian jurisdictions in relation to pension regulation is set out elsewhere.⁷⁷ A brief survey of the structures of pension regulation in Canada shows a broad similarity in structure, with some important differences in the extent to which pension regulation is combined with other financial regulation, and the extent to which it is undertaken within a government department or at arm's length from government.

A. Single Broad Financial Regulator

1. Alberta Finance

Alberta Finance is responsible for all the financial operations of the Alberta government with departments that cover each sector such as tax and insurance. The Superintendent of Pensions is responsible for regulating all private and public pensions in Alberta based on statutes passed by the provincial legislature.

⁷⁵ See <http://www40.statcan.ca/101/cst01/famil117f.htm> and <http://www40.statcan.ca/101/cst01/famil117k.htm>.

⁷⁶ The other figures are: Nfld & Lab. (186), P.E.I. (67), N.S. (495), N.B. (355), Manitoba (419), Sask. (424), and Alta. (1385). There are 1,128 plans regulated by the Federal Office of the Superintendent of Financial Institutions. All figures are as of January 1, 2006, from Statistics Canada.

⁷⁷ See the mapping survey of pension laws in different Canadian jurisdictions prepared for the Expert Commission by the OBA Pensions Section (“OBA Study”), Fall 2007.

Appeals from orders of the Superintendent may be brought to the Court of Queen’s Bench.⁷⁸

2. British Columbia Financial Institution Commission

The BC Financial Institution Commission has regulatory responsibility for trusts, credit unions, insurance, mortgage brokers, real estate and pensions in the province. It regulates pensions plans registered in British Columbia in the *Pension Benefits Standards Act*.

Appeals from the Commission may be brought to the B.C. Financial Services Tribunal.⁷⁹

3. Saskatchewan Financial Services Commission

The Financial Services Commission regulates financial institutions, securities and pensions within the province. The Pensions Division is responsible for regulating pension plans and funding.

Appeals from the Superintendent are taken directly to the Saskatchewan Court of Queen’s Bench.⁸⁰

4. The Office of the Superintendent of Financial Institutions (Canada)

The Office supervises and regulates all federally incorporated or registered deposit-taking institutions (e.g. banks), life insurance companies, property and casualty companies, and federally regulated pension plans. OSFI operates at arm’s length from Government.

Appeals from OSFI are taken to the Federal Court.⁸¹

B. Single Agency within a Department

1. Manitoba Pension Commission

The Manitoba Pension Commission is a division of the Ministry of Labour and Immigration. It registers pension plans and ensures that existing plans meet provincial standards.

Appeals from the Commission are taken directly to the Manitoba Court of Appeal.⁸²

⁷⁸ See *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s.25.

⁷⁹ *Pension Benefits Standards Act* [RSBC 1996] Chapter 352, s.21.

⁸⁰ *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001.

⁸¹ *Pension Benefits Standards Act*, 1985 (1985, c. 32 (2nd Supp.), s.33.

2. New Brunswick Office of the Superintendent of Pensions

The Office of the Superintendent of Pensions is within New Brunswick's Department of Justice and Consumer Affairs.

Appeals may be taken to the Labour and Employment Board.⁸³

3. Newfoundland and Labrador Pensions Administration Division

This division is part of the Newfoundland Department of Finance, but regulation is done solely by this division. It is responsible for the Defined Benefit Pension Plans under the Newfoundland Pooled Pension Fund.

Appeals may be taken to the Supreme Court of Newfoundland and Labrador.⁸⁴

4. Nova Scotia Environment and Labour, Financial Institutions Division

The Nova Scotia Pension Agency is within the Financial Institutions Division of the Department of the Environment and Labour and is responsible for the administration of provincial pension plans.

Appeals may be taken to the Nova Scotia Supreme Court.⁸⁵

5. Quebec Regie des Rentes

This agency regulates all pensions within *An Act Respecting the Quebec Pension Plan and Supplemental Pensions Plans Act*. It is governed by a Board of Directors and operates at arm's length from the Government.

Appeals may be taken to the Administrative Tribunal of Quebec.⁸⁶

4.2.1 Summary

There is no single "Canadian" approach to pension regulation that Ontario either exemplifies or from which Ontario departs. Some provincial regulators are specialized pension commissions, some partially specialized, and some which appear closer to an

⁸² *Pension Benefits Act*, C.C.S.M. c. P32.

⁸³ *Pension Benefits Act*, S.N.B. 1987, c. P-5.1.

⁸⁴ *Pension Benefits Act*, 1997 S.N.L. 1996.

⁸⁵ *Pension Benefits Act*, R.S.N.S. 1989, c. 340.

⁸⁶ *Supplemental Pension Plans Act* (R.S.Q., c. R-15.1).

integrated model. Ontario, Quebec and the Federal regulator operate at arm's length from government while other regulators, to varying degrees, are more closely integrated with the provincial government's regulatory operations. Some of the concerns raised with respect to the powers of FSCO are shared in other Canadian jurisdictions but there are notable exceptions. Quebec's Regie des Rentes, for example, appears to have greater authority to intervene in an expedited fashion where circumstances warrant without the procedural constraints discussed above in the context of FSCO.⁸⁷

While their structure, powers and volume differ, Canadian pension regulators all may be characterized for the most part by reactive regulation. Pension regulators rely on the self-reporting of fund administrators and most jurisdictions appear to have moved primarily to risk-based regulatory approaches.

In describing why most developed countries have adopted reactive regulation (and why most developing countries opt for proactive regulation), Edgardo Demaestri and Gustavo Ferro note,

In developed countries, there are a greater number of funds, less intrusive practices in occupational pension systems, a higher level of development in both capital markets and legal systems, asset administration through other financial intermediaries that are already highly regulated (banks, insurance companies, securities firms) and well developed practices of independent auditing.⁸⁸

This characterization seems well-suited to Canadian jurisdictions. A distinctive feature of Canadian pension regulation is the challenge of harmonizing regulatory

⁸⁷ See the OBA Study, at p.96.

⁸⁸ Edgardo Demaestri and Gustavo Ferro, "Integrated Financial Supervision and Private Pension Funds" in OECD study, supra at p.127.

standards and practices in so many jurisdictions and dealing with the many instances where pension plans have members living in multiple jurisdictions.

4.2.2 Reciprocal Agreement

The fact that pension laws and pension regulation diverge across various Canadian jurisdictions led to the creation of the inter-jurisdictional Memorandum of Reciprocal Agreement (“Reciprocal Agreement”), signed in 1968 and still in effect. The Reciprocal Agreement recognizes as a majority “administrator” the regulatory authority of the province in which the majority of the employees participating in a supplemental pension plan work. The Reciprocal Agreement entrusts the oversight of the plan and decisions on the management and wind up of the plan to this regulatory authority.

The Supreme Court considered the nature and effects of the Reciprocal Agreement in *Bouchard v. Stelco Inc.*⁸⁹ Lebel J., writing for the Court, observed:

When analysing the issues raised by the appellants’ action, we must bear in mind the importance of the agreement entered into by most of the provinces regarding the administration of supplemental pension plans. The proceeding in the instant case relates to an important aspect of Canadian federalism, namely the intergovernmental agreements designed to ensure that the provinces cooperate with each other in exercising their legislative powers so as to permit people to move and trade to flow freely within the Canadian political space (see J. Poirier, “Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit”, in J.-F. Gaudreault-DesBiens and F. Gélinas, eds., *The States and Moods of Federalism* (2005), 441). The framework agreement on pension plans is one such agreement. Recognizing that the same companies maintain a presence in multiple provinces, this agreement organizes the exercise of provincial powers in this area by endorsing reciprocal delegations of administrative functions. The appellants’ action thus tends toward reducing the

⁸⁹ 2005 SCC 64.

effectiveness of these administrative mechanisms and compromising their application. Under this framework agreement, the competent authorities in Ontario were given responsibility for overseeing the administration of Stelco's pension plan. When confronted with the problem of partially winding up this plan, they made decisions that included a determination and calculation of plan members' benefits. In conducting a legal analysis of the situation, these decisions cannot simply be disregarded.⁹⁰

In the end, the Court in *Bouchard* held that since the Ontario Superintendent's decision was not contested in its home jurisdiction (Ontario), it remains final and could not be subjected to a collateral attack through the Courts of Quebec.

The fact of multiple pension laws, rules and regulatory frameworks coupled with the existence of plan members in multiple provinces creates a number of potential hazards for an efficient and effective system of pension regulation. As Bouchard demonstrates, the lack of certainty in such scenarios can lead to costly litigation or additional transaction costs. Significantly, FSCO has included in its statement of priorities working to harmonize the various provincial pension schemes and to replace the Reciprocal Agreement with a unified set of regulatory principles and procedures. The main vehicle for achieving this goal is FSCO's participation in the Canadian Association of Pension Supervisory Authorities (CAPSA).

The CAPSA model law was developed in 2004 as a platform for moving beyond the Reciprocal Agreement.⁹¹ It includes a number of significant proposals. With respect to the powers of the regulatory authority, the model law sets out the following list of powers which would be afforded the "model" regulator:

⁹⁰ Ibid. at para. 20.

⁹¹ See <http://www.capsa-acor.org>.

- remove an administrator;
- appoint and rescind the appointment of an administrator;
- make rules;
- make policies;
- require the administrator to hold a meeting as specified by the regulatory authority;
- require payment of fees in relation to any matter under the Act;
- assess all regulated persons with respect to expenditures incurred by the regulatory authority; and
- exercise inspection powers, including the power to obtain a judicial warrant for searches.⁹²

It is worth noting that these proposals would provide powers to the regulator beyond the powers presently afforded FSCO in Ontario (which, for example, lacks statutory rule-making and policy-making jurisdiction). While the quest for a single national regulator has attracted headlines in the field of securities law, it has failed to attract much profile in the field of pensions, notwithstanding the presence of national regulators in many peer jurisdictions, such as those in Australia, the United Kingdom and the United States discussed below.

4.3 Pension Regulation in Australia

⁹² Ibid. at ss.35-36.

While Australia is characterized by a federal structure, unlike Canada, its most significant activities in relation to the regulation of pensions have taken place in the national sphere. Pensions in Australia are referred to as ‘superannuation’ and governed by both the *Superannuation Industry (Supervision) Act, 1993* and the *Superannuation (Resolution of Complaints) Act, 1993*.⁹³

In Australia, retirement income flows from three major sources:

- 1) The Age Pension (federal, means tested pension for retired citizens);
- 2) The Superannuation Guarantee (compulsory employer contribution scheme in place since 1992, and since 2002, the minimum contribution level is 9% of an employee’s earnings base; and
- 3) Voluntary Superannuation Contributions (members of superannuation funds may contribute over and above the compulsory amounts or where a compulsory contribution does not apply)

The latter two sources, The Superannuation Guarantee and the Voluntary Superannuation Contributions constitute the regulated private pension system.

Australia’s Pension System⁹⁴

Assets/Share	Fund Accounts/Share	Number/Share
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⁹³ Generally, see Greg Burner, “Private Pensions Supervisory Methods in Australia” OECD, 2004; and Julia Black “Managing regulatory risks and defining the parameters of blame: a focus on the Australian Prudential Regulation Authority” (2006) 28 Law & Pol 1.

⁹⁴ These figures are drawn from 2002 – for a statistical review of the superannuation sector in Australia 1996-2006, see <http://www.apra.gov.au/Insight/upload/Industry-overview.pdf>.

Corporate	2 045	.80%	65	12.55%	1.4	5.58%
Industry	109	.04%	52	10.04%	7.6	30.28%
Public Sector	78	.03%	102	19.69%	2.9	11.55%
Retail	240	.09%	175	33.78%	12.7	50.60%
Small Funds	251 756	99.02%	103	19.88%	0.4	1.59%
Total	254,228	100%	497	95.95% ⁹⁵	25.1	100%

The Australian legislation makes regulation of the pension industry primarily the responsibility of the Australian Prudential Regulation Authority (APRA), but the Australian Securities and Investments Commission (ASIC) and the Australian Tax Office (ATO) also have important roles in pension regulation.⁹⁶

4.3.1 APRA and Pension Regulation

APRA is an integrated financial services regulator that regulates banks, credit unions, building societies, insurance and most of the superannuation industry. It may be described both as proactive and reactive in orientation, engaging in a mix of risk assessment and supervisory intervention (including on-site visits, prudential consultations, analysis of quarterly statistical returns by large funds and annual analysis of all funds, among other activities).

⁹⁵ The reason this figure does not equal 100% is because annuities comprise another 4.05% of assets.

⁹⁶ For further background on pension regulation in Australia, see <http://www.apra.gov.au/Superannuation/>.

APRA has the status of an independent corporate entity and is a statutory body as opposed to a governmental department. APRA consists of four divisions (diversified institutions division; specialized institutions division; policy, research, and consulting division; and a corporate division). It has a head office in Sydney and regional offices throughout Australia. APRA employs 475 people. APRA has a non-executive Board which, among other activities, sets the budget of APRA in consultation with the Commonwealth Treasurer. APRA's budget is funded by levies collected by APRA from regulated institutions (with a small portion of revenue coming from earnings on invested funds and charges for specific services provided). Almost 60% of APRA's budget is devoted to supervision and enforcement. Another 29% is devoted to administrative support and corporate governance functions. Finally, a further 12% is divided between the development of policy and advice giving.

The main accountability feature of APRA is the requirement that it produce an annual report to the Australian Parliament annually. The Commonwealth Treasurer may give APRA directions with respect to its activities or the exercise of its powers under the relevant legislation. Specified types of decisions by APRA are “reviewable” as set out in the Act. Affected parties may request that APRA reconsider its decision, and if not satisfied, may then bring the matter to the Administrative Appeals Tribunal to review the decision (and from there to the Federal Court).⁹⁷ The process by which decisions may be challenged is discussed in more detail below.

The APRA engages in a number of on-going supervisory activities:

⁹⁷ See Administrative Decisions (Judicial Review) Act 1977.

- Trustees and superannuation funds are monitored for compliance with prudential operating requirements (based on a two-year, on site review cycle as well as ongoing data collection, analysis and risk assessment);
- Funds regulated by APRA must inform APRA whenever changes to the fund occur, including any events which have an adverse effect on the financial position of the fund – civil and criminal penalties can follow a failure to comply with notification requirements. Often, funds are approved by APRA with conditions, and similarly, there is an obligation to notify APRA if any of these conditions are not met. A material change to the capital position of the fund also triggers a notice requirement;
- APRA also engages in oversight of winding up of superannuation entities and transfers of members and assets to receiving funds.
- Funds must provide a prescribed minimum level of support to the superannuation fund in each financial year (equivalent to 9% of the employee's income);
- Funds are required to develop and apply an investment strategy that takes into consideration risk, liquidity and the circumstances of the entity involved. This requirement includes an obligation to appoint an investment manager; and
- Funds are subject to strict controls on the circumstances under which funds can be made available to an employer-sponsor;
- All funds must provide APRA with an annual return and auditor's report within four months of the end of each financial year (with larger funds being required to provide quarterly, unaudited, statistical returns). The approximately

3000 returns received by APRA are analyzed using a risk assessment model known as the Probability and Impact Rating System (PAIRS). PAIRS generates two estimates: the probability of failure over a five year time horizon, and the impact of failure should it occur. Based on these estimates, APRA creates a risk profile and supervisory strategy. Four supervisory stances may follow:

- Normal entities are subject to routine information gathering and on-site visits;
- Oversight entities are not subject to a material risk of failure but some aspect of their profile gives rise to the need for more extensive examination such as more frequent visits or greater communication with the board;
- Mandated improvement entities have a risk profile, are unlikely to fail but require vigorous intervention by APRA including issuing directions, enforceable undertakings, etc.; and
- Restructure entities have lost APRA's confidence and APRA will actively intervene to transfer the business and protect beneficiaries from losses.

In addition to APRA, ASIC also regulates many of the same industries, but focuses on disclosure, governance and market conduct issues, while the ATO focuses on tax regulation and the regulation of self managed pension funds. Eligibility for tax concessions, for example, depend on the fund both being approved by and in compliance

with APRA, but also complying with a series of conditions set forth by the *Income Tax Assessment Act, 1997*.

4.3.2 Complaints and Adjudication

Pension regulators in Australia do not have a formal process for dealing with complaints by employees, employers or pension funds. The Australian system has “independent complaint schemes” for each industry and the Superannuation Complaints Tribunal (SCT) is the body that deals with pension issues. Section 11 of the *Superannuation (Resolution of Complaints) Act* notes that the SCT’s purpose is as follows:

11. The Tribunal must, in carrying out its functions or exercising its powers under this Act, pursue the objectives of providing mechanisms for:
 - (a) the conciliation of complaints; and
 - (b) if complaints cannot be resolved by conciliation - the review of the decisions of the trustees to which the complaints relate; that are fair, economical, informal and quick.

Once a complaint has been made and deemed within the SCT’s jurisdiction, the Inquiry process beings and parties are required by law to give the Tribunal all information that it requests (s. 25). While the SCT does not provide an average wait time for this part of the process, it does note that it can take several months for complex matters or when it is difficult to gather the information.

If the complaint is not withdrawn during the Inquiry stage, the Tribunal will then attempt to resolve the complaint through conciliation. A conference is set up at no cost to participants where a trained conciliator leads an informal session without procedural rules with the goal of reaching a settlement (s. 28-29). The statements at the conference are treated as confidential, even if the complaint eventually proceeds to an appeal (s. 30).

Section 31 deals with the results of the conference, noting:

31. (1) If:

- (a) a conciliation conference is held; and
- (b) at or after the conference, the parties agree as to the terms of a settlement of the complaint that would be acceptable to the parties; and
- (c) the terms of the agreement are put in writing signed by or for the parties and lodged with the Tribunal; the Tribunal must treat the complaint as withdrawn under section 21.

(2) The Tribunal may give details of a settlement to the Commissioner that it thinks may require investigation by the Commissioner.

If the complaint cannot be resolved by Inquiry or Conciliation, the complaint proceeds to a Review. Parties prepare written submissions for the Tribunal which consists of one to three members. They consider this information and all other material from the process (except the confidential aspects of the Conciliation stage). The Tribunal is intended to engage in a purposive rather than technical fashion. As provided in s. 36 of this legislation:

36. The Tribunal, in reviewing a decision:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) is to act as speedily as a proper consideration of the review allows, having regard to the objectives laid down by section 11 and the interests of all the members of the fund to which the complaint relates; and
- (c) may inform itself of any matter relevant to a review of a decision in any way it thinks appropriate.

The Tribunal may then affirm the provider's decision, remit it for reconsideration, vary the decision or set it aside and substitute its own. It should be noted that if the Tribunal is satisfied that the provider's decision was fair and reasonable in the circumstances, then it must affirm the decision. The Tribunal can also request a reference on a question of law from the Federal Court.

It is mandatory for the employer to implement the Tribunal's decision, and failure to do so can result in enforcement by the ASIC. Once again, the length of time for the determination is difficult to estimate because it varies based on the complexity of the matter. The Tribunal's decision can be overturned on a question of law and can be appealed to the Federal Court under section 46 of the *Superannuation (Resolution of Complaints) Act, 1993* provided it is commenced within 28 days of the decision:

Like FSCO, APSA is a risk-based regulator which engages in a mix of *ex ante*, ongoing and *ex post* regulation, though it appears to devote more resources to ongoing regulation, including onsite inspections every two years. Australian pension regulation also is characterized by a number of features which contrast with pension regulation in Ontario. Whereas FSCO features a Government appointed Superintendent as both its CEO and a member of the Board, APSA is an independent corporate entity with a non-executive Board. Whereas FSCO has its budget set by the Ministry of Finance, the APSA Board participates in setting its budget. Australia also employs an intermediate Tribunal designed to resolve complaints arising from APSA activities in an "economical, informal

and quick” fashion, with a further appeal to a general Administrative Appeals Tribunal and from there to Federal Court.

4.3.3 Accountability

APRA has its strategic priorities set and reports back on those priorities in an interesting format. That format is an exchange of letters on expectations of APRA between the Treasurer of Australia and the Chairman of APRA. This format follows a Review of Corporate Governance of Statutory Authorities and Office Holders (the “Uhrig Report”) and a Report by the Taskforce on Reducing Regulatory Burden on Business (the “Banks Report”), each of which recommended a clear statement of priorities from Government to APRA, and in particular direction to APRA on how best to balance the goals of pursuing safety and investor protection and market efficiency.

The exchange of letters in the Spring of 2007 focused on APRA developing a broader set of performance indicators, particularly in relation to timeliness, stakeholder satisfaction and compliance costs.⁹⁸ The letters also commit APRA to developing a “service charter” to more clearly spell out the regulator’s rights and responsibilities as well as those of regulated entities. While referring to APRA as an independent regulator in an operational sense, the letters also confirm that the Government in Australia is responsible for setting the policy agenda in the regulatory field and that accountability for

⁹⁸ The letter from the Treasurer can be found at <http://www.apra.gov.au/AboutAPRA/upload/Statement-of-Expectations-from-Treasurer-20-Feb-07.pdf>; the response from the Chair of APRA can be found at

the regulation of the financial sector remains, to some extent, a governmental responsibility as well.

4.4 Pension Regulation in the United Kingdom

The pension landscape in the UK shares some of the attributes of Australia. Over 90% of members are in 1858 pension plans (or “schemes”) of over 1000 members or more. There are 74,113 DC schemes and a further 8,622 DB (and hybrid) schemes, all with under 1000 members. Schemes over 1000 members number 220 DC schemes and 1434 DB (and hybrid) schemes. The leading trend in the pension environment in the United Kingdom is the decline of DB schemes.

As in Australia, pension regulation in the United Kingdom is the jurisdiction of a specialized national regulatory body funded through levies on pension plans. The Pensions Regulator was established by the *Pensions Act, 2004*,⁹⁹ and commenced operation in 2005. It is an executive body, accountable to the Secretary of State for Work and Pensions, although not part of any government department. Its costs are funded through levies on pension funds.¹⁰⁰ It is governed by a Board, responsible for regulatory policy direction, governance and ensuring compliance with administrative and statutory requirements.

⁹⁹ 2004 c.35.

¹⁰⁰ Source, Pensions Regulator Annual Report, 2006 – see <http://www.thepensionsregulator.gov.uk/pdf/AR20062007.pdf>.

The *Pensions Act* 2004 prescribes four objectives to the work of the Pension

Regulator:

- 1) to protect the benefits of members of work-based pension schemes;
- 2) to provide ongoing support to pensions professionals;
- 3) to promote good administration of work-based pension schemes; and
- 4) to reduce the risk of situations arising that may lead to claims for compensation from the Pension Protection Fund.

In the words of the Chair of the Pensions Regulator, it seeks to position itself as a

“credible, professional, pragmatic, approachable, risk-based regulator.”

A recent study by the Pension Policy Institute (PPI) concluded that the future of defined benefit pension schemes is uncertain. DB pension schemes have become less and less prevalent in the UK in recent years, partly because of an increasingly heavy legislative burden and the fact that Britons tend to be living longer. The PPI suggests that private sector employers are tending to switch from offering a DB pension option to a defined contribution (DC) alternative, which the institute makes clear "place greater risk on the employee" and can often be "less generous".

4.4.1 Approach of the UK Pension Regulator

The Regulator's primary priority is to protect the security of pension plan member benefits. To this end it has identified 5 main risk areas of particular concern:

- 1) poor administrative practices;
- 2) poor investment practices;
- 3) unduly high charges;
- 4) poor decisions on retirement choices; and
- 5) lack of member understanding.

Consistent with its statutory objects and its emphasis on risk, the following principles guide the day-to-day activities of the Regulator:

- 1) take a proportionate approach to risk;
- 2) use the approach that is most likely to improve the overall administration of schemes and protection of benefits, commensurate with achieving the desired outcome and managing the risks;
- 3) act in accordance with the principles of good regulation and the protection of human rights; and
- 4) focus clearly on outcome to be achieved rather than on process.

The Regulator has adopted a “risk and intervention” model. This approach is based on an assessment of risk posed by a scheme and the potential impact to scheme members should the risk materialize. Interventions can take the form of educative, enabling or enforcing activities.

4.4.2 Regulatory Activities

The *Pensions Act, 2004* demarcates the sphere of pensions that fall within the Regulator’s mandate and jurisdiction. It identifies three types of pension schemes which the Regulator governs.

- 1) Occupational pension schemes: The Regulator monitors funding, governance and administration of scheme.

- 2) Personal pension schemes where direct payment arrangements exist in respect of one or more members of the scheme who are employees: the Regulator only addresses the administration of the scheme
- 3) Stakeholder pension schemes: the Regulator monitors: the scheme's registration, designation and compliance with the charge cap and other duties imposed on employers, trustees and managers in relation to all work-based pensions; provides information, education and assistance in relation to work-based pension schemes to administrators, advisers to trustees and managers, employers and advisers to employers.

The Pension Regulator's activities fall under one of three areas: 1) education and guidance to trustees, employers and scheme actuaries; 2) working in partnership with other stakeholders; and 3) intervention into particular pension schemes.

The Regulator has identified a number of activities falling under each of these areas. These are discussed below.

(i) *Education and Guidance*

The Regulator plays a role in clarifying roles and responsibilities of all parties in DC schemes, including sign-posting pension plan members to existing information and tools to avoid information overload; reviewing existing information and initiatives and identifying whether any gaps exist; outlining main administrative processes; outlining example service standards; highlighting the importance of internal controls and regular reporting; outlining the pros and cons of the review of pension fund investments; providing e-learning modules, codes of practice, and good practice guidelines that set the markers on the standards the regulator expects.

(ii) *Working in Partnership*

The Regulator as part of its Defined Contribution consultation working group has developed good practice guidance and identifying channels of communication to ensure it can be spread across appropriate audiences; working with industry, the Financial Services Authority (FSA) and government to develop good practice guidance. Neither the FSA nor regulator will begin an investigation or enforcement action without informing the other if there is a previous agreement that the other should be the sole investigator or enforcer; in cases of parallel investigations by the FSA and the Regulator, both parties shall notify each other of significant developments and discuss future steps in advance if fund insolvency has occurred or is imminent the Regulator will work with the Pension Protection Fund (PPF) to minimize the financial impact on it.

(iii) *Intervention*

Intervention by the Regulator in any instance should be proportionate to the level of risk at issue. While each case will be examined on its own merits, the Regulator is assisted by risk profiles provided by Dunn & Bradstreet (D&B).¹⁰¹ Similar to the PAIRS system in Australia, D&B has developed a rating system for pension funds, providing each with a “failure score,” which is designed to predict the likelihood that an employer will cease operations in the next 12 months without being able to pay its creditors. D&B uses a statistical modeling technique which scans D&B databases to determine which data characteristics are common to failing companies and uses this knowledge to generate

¹⁰¹ Pension Protection Fund, *The Purple Book: DB Universe Risk Profiles* (London: 2006). See www.thepensionsregulator.gov.uk/pdf/PurpleBook.pdf.

scoring algorithms. The Regulator adopts D&B probabilities to make its own calculations of insolvency risk. The D&B analysis suggests a correlation between large funds and smaller insolvency risk and also between funds with a surplus having lower risk of failure than funds in deficit.

The overview findings of D&B were published as “The Purple Book” in December of 2006, as a collaborative initiative of the Regulator and the Pension Protection Fund. It is expected to be updated annually. The overview is based on detailed information of ca. 5,800 schemes which represent about 50% of all schemes or 85% of members. It contains information about scheme demographics, funding, funding sensitivities, insolvency risks, asset allocation and short term risk concentration. The Regulator will intervene only when a problem persists or if there is a materially significant detrimental impact on the pension scheme or the regulator’s objectives.

4.4.3 The Regulator’s Powers

The powers of the Regulator fall into three defined areas, each with its own set of related activities (these activities can fall into one of the three spheres of activity described above):

(i) Investigating schemes

The Regulator, through a system called the “scheme return” systematically collects data for each regulated scheme. The Regulator also expects to receive reports of

significant breaches of the law from 'whistleblowers', and reports of notifiable events from trustees and employers. Trustees or scheme managers are responsible for notifying the Regulator promptly of changes to 'registrable' information such as the scheme's address, details of trustees, or the types of benefit provided by the scheme. The Regulator receives reports where a scheme is unable to comply fully with the new scheme funding framework.

(ii) *'Putting things right'* (when action is needed to protect member benefits)

Where intervention is necessary, the Regulator can issue an improvement notice to individuals or companies, or a third party notice, requiring specific action to be taken within a certain time; can take action, on behalf of a scheme, to recover unpaid contributions from the employer if the due date for payment has passed; and where wind-up is pending and it is believed that members' interests may be at risk, the Regulator can issue a freezing order. This order temporarily halts all activity within the scheme, so that the Regulator can investigate concerns and encourage negotiations. The Regulator also can prohibit trustees who are deemed not to be fit and proper persons for the role. Finally, where breaches have occurred, the Regulator can impose fines and can prosecute certain offences in the criminal courts.

(iii) *Acting Against Avoidance* (these are used when the Regulator believes the employer is deliberately avoiding its pension obligations)

In these circumstances, the Regulator can issue contribution notices (these allow the Regulator to direct that, where there is a deliberate attempt to avoid a statutory debt, those involved must pay an amount up to the full statutory debt either to the scheme or to the board of the Pension Protection Fund); financial support directions (these require financial support to be put in place for an underfunded scheme where it is concluded that the sponsoring employer is either a service company or is insufficiently resourced); and restoration orders. If there has been a transaction at an undervalue involving the scheme's assets, these allow the Regulator to take action to have the assets (or their equivalent value) restored to the scheme.

4.4.4. Complaints

If there is a complaint or if the regulator decides to investigate a breach within its jurisdiction, the first step is a determination carried out by a Determinations Panel.

A determination may take place when the Regulator has investigated a case and has grounds for believing that a breach may have occurred which is within its power to sanction or prosecute; a problem has arisen in a scheme that the regulator considers can be put right with the use of one its powers; or an application has been made by trustees, managers, members or employer of a scheme for the Regulator to use one of its powers.

Each panel has one Chairman appointed by the Regulator and then at least six other members who are nominated by the Chairman (s. 9) and must have specific legal,

business or pension knowledge. The panel is independent of the regulator and therefore not involved in investigating the case. In general, the Determinations Panel proceeds with a standard procedure which begins with a warning notice, gives the parties 14 days to make submissions and then ends with the Determinations meeting (s. 96). However, if the issue is urgent a ‘special procedure’ can be followed which results in immediate consideration of the claim (s. 98). The rationale for omitting the warning notice is so that action can be taken to protect members without delay or to prevent employers from changing their illegal pension policies before they are investigated. If the panel uses special procedure, the *Pensions Act, 2004* notes they must review the decision as soon as possible after the determination (s. 99). After a decision from the Determination’s Panel, any affected party has 28 days from the date of notification to appeal to the Pension Regulator Tribunal, which is an independent judicial body established in s. 102.

The Pensions Regulator tribunal is the independent body set up to hear references on determinations. The tribunal will issue its own guidance on the form and content of a reference. The tribunal may consider any evidence available to it in relation to the subject of the appeal. This includes evidence that was not available at the time of the original determination. The tribunal will decide whether to:

- (1) confirm the determination and any order, notice or direction it made;
- (2) vary or revoke the determination and any order, notice or direction it made; or
- (3) substitute a different determination, order, notice or direction.

The Pensions Regulator must act in accordance with the direction of the tribunal. Interestingly, while the pension regulator in the U.K. is a specialized body, the adjudicative body overseeing pension regulation is a specialized tribunal within an integrated agency. The Tribunal is part of an executive agency of the Department for Constitutional Affairs called the UK Tribunals Service that is composed of five appellate tribunals (VAT and Duties Tribunals, Special Commissioners, Financial Services & Markets Tribunal, Pensions Regulator Tribunal and Claims Management Services Tribunal). The Pension Regulator Tribunal has a President who is the judicial head, Chairmen who are other judicial members with legal qualifications and Lay Members who must have special experience in the financial regulatory environment or the operation of pension schemes.

The Pension Regulator Tribunal hears references from decisions of the Regulator pursuant to a broad, statutory authority (s.103). After a decision, a party can ask the Tribunal to review its decision if they believe the decision was made incorrectly because of actions of the Tribunal staff or if new evidence has become available. According to s. 104, decisions on questions of law can also be appealed to the Court of Appeal as long as the party makes a written or oral request to the Tribunal within fourteen days.

4.4.5 Performance Evaluation

Among the more traditional benchmarks of regulatory activity is the annual “perceptions tracking survey” which the Regulator obtains. Analyzing the report for 2006

yields important baseline data about how the Regulator and its achievement of objectives are perceived.¹⁰² The tracking survey involves 750 telephone interviews with a range of participants and stakeholders, including employers (small, medium and large), lay trustees, pension scheme managers, in-house pension scheme staff, legal and accounting professionals retained by pension schemes (lawyers, actuaries and accountants), third party administrators and professional trustees.

The tracking study provides data to assess how well the Regulator is performing in key areas. Performance indicators and assessment (measured by the percentage of responses in the top two boxes out of a numerical scale of five) include:

- understanding the Regulator's powers in relation to clearance and anti-avoidance powers (60%)
- understanding funding arrangements associated with defined benefit schemes (67%)
- perceiving the Regulator as a trusted source of information (78%)
- perceiving the Regulator as effective in providing codes of practice (77%)
- perceiving the Regulator as providing useful guidance (70%)
- perceiving the Regulator as proportionate in its enforcement activities in light of the risk posed (43%)
- perceiving the Regulator as consistent (51%)
- perceiving the Regulator as proactive in reducing risks to pension scheme benefits (55%)

¹⁰² Due to a switch in providers of the survey, and its methodology, the 2006 survey is viewed as a start-up baseline, and it is not possible to compare responses to the earlier perception tracking survey in 2005. See <http://www.thepensionsregulator.gov.uk/pdf/perceptionsTrackerPresentation2006.pdf>.

- perceiving the Regulator as working well with Government to ensure regulation is appropriate (35%)

Some of the informational highlights of the tracking study include:

- knowledge of the Regulator is correlated with scheme size so that knowledge rates are higher where the scheme is larger.
- While 73% of respondents strongly agree or agree that the Regulator has sufficient authority, only 50% strongly agree or agree that the Regulator is prepared to use those powers.
- The five most useful “touchpoints” for respondents, in order of favour, were the Regulator’s website, email, telephone, e-learning toolkit and letter.
- Functional and service performance measures, while positive overall, fell below benchmarks.

In addition to surveying stakeholders on the perception of the Regulator, the Regulator has used the survey mechanism to gather data to assist with pension scheme accountability. In September 2006, the Regulator conducted a governance survey, which in turn led to a discussion paper issued by the Regulator in April, 2007.¹⁰³ A further governance survey was carried out in March of 2007. The survey mechanism appears to have been extremely successful as an accountability measure and as a resource in strategic planning for the U.K. Regulator.

¹⁰³ See <http://www.thepensionsregulator.gov.uk/pdf/discussionPaperGovernance.pdf>.

To conclude, the Pension Regulator in the U.K. is characterized by a number of distinctive features. The focus on education, partnership and outreach is notable, as is the accountability mechanism for assessing this activity through a perception tracking survey. Like Australia, the U.K. employs an intermediate panel for addressing complaints prior to referral to an adjudicative tribunal. Finally, the D&B data reflects an innovative collaboration with the private sector in service of regulatory objectives.

4.5 Pension Regulation in the United States

By comparison with Australia and the United Kingdom, the United States is characterized by somewhat fragmented and reactive regulation.¹⁰⁴ Pension plans are governed by the federal *Employee Retirement Income Security Act, 1974* (ERISA). The Employee Benefits Security Administration (EBSA), a division of the Department of Labor, is responsible for implementing and enforcing ERISA.¹⁰⁵ Additionally, certain pension taxation issues are administered by the Internal Revenue Service (IRS), including compliance and enforcement activities. If an employer goes bankrupt, its pension obligations (up to a specified maximum) are assumed by the Pension Benefit Guaranty Corporation (PBGC), a government agency which also monitors high-risk pension funds and identifies transactions which could jeopardize pension funds in order to work with those funds to protect pension benefits. Under-funded plans have an annual reporting obligation to the PBGC.

¹⁰⁴ For additional information, see Morton Klevan, Carol Hamilton and David Ganz, “Supervision of Private Pension Plans in the United States” in OECD Study.

¹⁰⁵ In addition to pension plans, EBSA is also responsible for administering approximately 2.5 million health plans and other welfare benefit plans. See <http://www.dol.gov/ebsa/aboutebsa/main.html>.

In order to overcome the complexity of the many different state laws in the American federal system, there is a broad provision in ERISA that indicates it pre-empts all state laws with only a few minor exceptions (s. 1003). ERISA provides for minimum standards for vesting, funding, participation, and breaks in service to protect employees as well as fiduciary standards and reporting requirements which govern pension plan managers.

In the summer of 2006, Congress enacted Public Law No. 109-280, the *Pension Protection Act of 2006*, which updates and amends ERISA. This Act:

- Requires companies that under-fund their pension plans to pay additional premiums;
- Extends a requirement that companies that terminate their pensions provide extra funding for the pension insurance system;
- Requires that companies measure the obligations of their pension plans more accurately;
- Closes loopholes that allow under-funded plans to skip pension payments;
- Raises caps on the amount that employers can put into their pension plans, so they can add more money during good times and build a cushion that can keep their pensions solvent in lean times; and
- Prevents companies with under-funded pension plans from digging the hole deeper by promising extra benefits to their workers without paying for those promises up front.

The U.S. pension plans, as elsewhere, are divided into DB and DC plans. While about half of the pension covered workforce are in defined benefit plans (down from 87% in 1985), there are ten times as many defined contribution plans in the U.S. (670,000 defined contribution plans versus 60,000 defined benefit plans). The total assets controlled by pension plans in the U.S. is well over \$4.5 trillion, and account for 20% of all outstanding equities and 17% of all corporate bonds.

4.5.1 Regulatory Activities

The regulatory focus of EBSA is on voluntary compliance. As the U.S. Report to the OECD observes:

The fiduciary responsibility, reporting and disclosure and enforcement provisions of ERISA were adopted against the backdrop of the voluntary nature of our private pension system, the large number of plans, their diversity in terms of size and type of plan, and the limited resources of the government to police such a large number of plans.¹⁰⁶

The fiduciary standards under ERISA are largely procedural (save for self-dealing restrictions).

EBSA is headed by a political appointee who serves at the pleasure of the President, the Assistant Secretary of Labor for Employee Benefits Security. The Deputy to that office is the senior civil servant in EBSA and is responsible for the operation of

¹⁰⁶ OECD study, *supra* note , at p. 282.

the agency. The agency has four divisions: (1) The Office of Enforcement; (2) The Office of Participant Assistance; (3) The Office of the Chief Accountant; and (4) Regional Offices (10) with assigned geographic jurisdiction. While policy direction is given centrally, the field offices have significant discretion with respect to enforcement and participant assistance services. EBSA allocates 105 of its 900 positions in its field offices to help participants voluntarily resolve their claims against their plans.

The main prong in EBSA's enforcement strategy arguably is voluntary compliance. This process involves EBSA sending out a letter to the responsible parties citing the violation at issue and requesting correction ("make whole" relief, disgorgement, etc). The letter indicates that failure to resolve the concern voluntarily will result in EBSA pursuing the matter in Federal Court to compel the correction, plus a civil penalty. For minor civil violations, plans may correct their violations, notify EBSA and receive a written confirmation that the violation has been corrected. Where the plan brings the matter to EBSA's attention and initiates correction, a reduced fine is payable.

Where voluntary compliance is unsuccessful and litigation ensues, fines and penalties can run up to \$1000.00 per day, and ERISA provides for a penalty of 20% payable to the government of the amounts recoverable from a responsible party as a result of a settlement agreement or court order correction the violation. EBSA compliance activities include investigations as well as strategic outreach and public information activities. As EBSA only has approximately 400 investigators to supervise over 730,000 pension plans, with over \$4.4 trillion in assets, EBSA has moved to a strategic planning

process, identifying significant issues on which the regional offices then direct resources.

The current priorities include:¹⁰⁷

- 1) effective targeting for investigation (as opposed to random or comprehensive audits);
- 2) protecting at-risk plan participants and beneficiaries (defined to include situations where the retirement security of plan participants and beneficiaries is harmed as a result of ERISA violations); and
- 3) deterring violations (for example, by publicizing violations and corrections).

Of these priorities, it may be helpful to elaborate how EBSA targets cases for investigation. In contrast to the risk analysis undertaken in Australia through the PAIRS program, the U.S. process of case selection is more decentralized and varies across the ten regional offices. Participant complaints, customer service leads and congressional inquiries (which themselves typically are complaint driven) play a significant part in that process (along with the news media, trade journals, bankruptcy court documents, real estate records, information from other regulatory bodies such as the IRS, FBI, SEC, etc). Because much of the enforcement activity of EBSA is complaint driven, whether directly or indirectly, effective outreach and education programs to ensure plan participants know their rights is a key priority of EBSA.

¹⁰⁷ See “ERISA Strategic Enforcement Plan” 2000 at <http://www.dol.gov/ebsa/regs/fedreg/notices/2000008504.htm>.

Consistent with its focus on voluntary compliance, EBSA places significant emphasis on education and outreach activities, which are tracked in the summary from its Annual Report below:

More Than 2,000 Education And Outreach Events Held In FY 2006

EBSA also conducts education and outreach events for workers, employers, plan officials and members of Congress. These nationwide activities include assisting dislocated workers who are facing job loss, educating employers of their obligations under ERISA, using a train-the-trainer format to inform Congressional staff of EBSA programs for their use in constituent services, and providing employees with information concerning their rights under the law. In FY 2006, EBSA conducted 2,134 outreach events.

Outreach, Education and Assistance Statistics	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	% Change FY01 - FY06
Dislocated Worker Rapid Response Sessions	245	858	695	674	651	920	+276%
Congressional Briefings	95	78	215	290	197	211	+122%
Compliance Assistance Activities	219	257	458	576	598	522	+138%
Other Participant Assistance and Public Awareness Activities	500	417	711	572	501	481	-4%
Total Outreach Events	1,059	1,610	2,079	2,112	1,947	2,134	+102%

Extensive Publication And Web Site Usage Furthers Outreach Efforts

EBSA also reaches workers, retirees, employers, plan service providers, and the public through its printed materials and Web site – www.dol.gov/ebsa. English and Spanish language publications featuring participant and compliance assistance information are available through EBSA’s toll-free number. Publications are also available electronically on our Web site, which includes consumer information, relevant laws and regulations, technical guidance, seminar schedules, and other valuable resources. EBSA’s Web site – which received a record 1.8 million visitors in FY 2006 – allows the agency to maximize its resources to reach a wide audience.

Publication and Web Site Statistics	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	% Change FY01 - FY06
Publications Distributed	932,034	1,407,552	919,388	809,687	974,108	818,000	-12%
Web Site Visitors	777,907	1,295,891	1,727,505	1,586,823	1,398,203	1,793,112	+131%

EBSA’s internal efforts at targeting plans for enforcement or correction activities also revolves around the Annual Report Form 5500 filed by employee benefit plans subject to ERISA. The financial impact of EBSA’s enforcement activities, as set out in their Annual Report, is as follows:

Total monetary results for FY 2006 were more than \$1.4 billion. Included in this figure is \$829 million in assets restored to plans and benefits recovered for individual workers – an increase of more than 200% over FY 2001.

Total Monetary Results	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	% Change FY01 - FY06
Total Results	\$721 M	\$883 M	\$1.4 B	\$3.1 B	\$1.7 B	\$1.4 B	+94%
Prohibited Transactions Corrected and Plan Assets Protected	\$444.6 M	\$566.1 M	\$1.12 B	\$2.53 B	\$984.6 M	\$569.1 M	+28%
Plan Assets Restored and Participant Benefits Recovered	\$272.2 M	\$315 M	\$275.3 M	\$323.9 M	\$709.3 M	\$829.4 M	+205%
Voluntary Fiduciary Correction Program	\$4.2 M	\$1.9 M	\$8.7 M	\$264.6 M	\$7.4 M	\$24.2 M	+476%

Civil Investigation Statistics Demonstrate Success In Targeting

In FY 2006, EBSA closed 3,411 civil investigations, with 2,534 (74.29%) resulting in monetary results for plans or other corrective action. Because of improved targeting, the proportion of investigations closed “with results” has increased by 30% since FY 2001.

EBSA often pursues voluntary compliance as a means to correct violations and restore losses to employee benefit plans. However, in cases where voluntary compliance efforts have failed, or which involve issues for which voluntary compliance is not appropriate, EBSA forwards a recommendation to the Solicitor of Labor that litigation be initiated. In FY 2006, 251 cases were referred for litigation. Together, EBSA and the Solicitor of Labor determine which cases are appropriate for litigation, considering the ability to obtain meaningful relief through litigation, cost of litigation, viability of other enforcement options, and agency enforcement priorities. EBSA cases referred to the Solicitor’s office for litigation are often resolved, with monetary payments, short of litigation. Nationwide in FY 2006, litigation was filed in 170 civil cases.

Civil Investigations	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	% Change FY01 - FY06
Civil Investigations Closed	4,762	4,925	4,253	4,399	3,782	3,411	-28%
Civil Investigations Closed with Results	2,724	2,877	2,939	3,056	2,862	2,534	-7%
% Civil Investigations Closed with Results	57.20%	58.42%	69.10%	69.47%	75.67%	74.29%	+30%

Civil Cases Referred for Litigation	199	241	291	310	258	251	+26%
Civil Cases With Litigation Filed	73	104	108	125	178	170	+133%

EBSA

In addition to these ongoing strategic priorities, EBSA has also established a number of national projects. One of these projects is the Rapid ERISA Action Team (REACT). This initiative, commenced in 2001, is triggered whenever a sponsor files for bankruptcy. In an expedited fashion, EBSA attempts to identify the assets remaining after a bankruptcy to satisfy pension obligations and to evaluate whether legal action is required to ensure benefits are secured.¹⁰⁸

EBSA, while a reactive regulator for the most part, has a wide range of powers at its disposal for enforcement. EBSA has subpoena authority to compel documents and testimony, and can conduct searches/seizures. Interviews with the plan fiduciaries may also be conducted. Approximately 3500 cases are opened per year, leading to app. 2000 findings of violation. In 2002, close to \$700 million was restored to pension plans from EBSA enforcement activities. In addition, in 2002, 154 criminal cases were closed with 134 indictments and \$4.6 million restored to pension plans.¹⁰⁹

4.5.2 Complaints

¹⁰⁸ See http://www.dol.gov/ebsa/erisa_enforcement.html.

¹⁰⁹ Data is from OECD study, p.292.

Each pension plan must have a Summary Plan Description that clearly states the process for registering complaints (s. 1021). If benefits are denied, the plan administrator has 90 days to outline the reason for denial and the specific plan provisions on which the denial is based. A party has 60 days to file for an appeal to which the plan must respond.

In addition to the voluntary compliance measures, both the Department of Labor and the IRS have sophisticated programs for identifying likely areas of non-compliance with the law and targeting examinations at those areas. Where parties do not voluntarily correct violations cited by EBSA, or where the violations are especially egregious, EBSA refers the examination to the Office of the Solicitor of the Department of Labor to bring suit in Federal court (s. 1132). Over \$87 million was restored to employees through informal complaint resolution, reflecting over 165,000 separate inquiries to EBSA Benefits Advisors. It is perhaps notable that while inquiries to FSCO has increased dramatically since 2002, this has not been the case in the U.S., where the number of inquiries has decreased.

Inquiry Statistics	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	% Change FY01 - FY06
Total Inquiries	169,724	184,851	173,598	163,221	159,828	164,863	-3%
Monetary Benefit Recoveries from Informal Complaint Resolution	\$64.3 M	\$48.7 M	\$82.9 M	\$76.4 M	\$88.4 M	\$87.1 M	+35%
Investigations Opened from Inquiry Referrals	1,251	1,347	1,362	1,069	1,067	718	-42%

If a party disagrees with the results of either the voluntary or non voluntary measures, section 1132 of *ERISA* permits that a lawsuit can be filed in a Federal District

Court. In practice, courts require that a party exhaust their administrative remedies by completing the entire claims procedure before filing a lawsuit.

To conclude, though reactive in orientation, and inclined to ex-post regulatory intervention rather than ongoing intervention, the combination of a focus on education and outreach with aggressive corrective measures undertaken by EBSA, appear to have been successful in its own right, and to have a substantial deterrent effect

5. Improving the Regulation of Pensions: An Analysis of the Alternatives

The focus of this study has been to analyze pension regulation in Ontario. In this fifth and final section, some concluding observations will be offered as to activities that could enhance the efficiency and effectiveness of pension regulation in Ontario.

Analyzed from the perspective of “good regulation” discussed at the outset, the performance of FSCO (including the FST) is mixed. The competing rationales for pension regulation and the ambiguity of the PBA make it difficult to conclude FSCO advances clearly identified policy goals. The limited tracking of data makes it difficult to conclude that FSCO produces benefits that justify costs or that it minimizes costs and market distortions. Its focus on risk and the tendency to devote significant resources to a small number of complaints impairs its ability to promote innovation through market incentives and goal-based approaches. Nonetheless, FSCO has demonstrated that it is a

responsive and responsible regulator, which has been successful at realizing significant value with limited resources.

In light of the comparative perspectives discussed above, and the earlier review of FSCO's structure, activities and priorities, it is possible both to recognize the many areas where the effectiveness and efficiency of FSCO is evident, and those areas where alternative approaches could enhance pension regulation in Ontario. The limitations on available data and data analysis means that the conclusions offered as to the efficiency and effectiveness of FSCO are necessarily tentative. For example, FSCO reports how many inquiries are received in a given year which relate to pension plan administration. However, FSCO does not know whether plan members with grievances know enough about their rights to conclude that a complaint is warranted, or whether those members know enough about FSCO, and have sufficient confidence in FSCO, to file a complaint with them. If FSCO received a greater or lesser amount of complaints in a given year, would this be considered a sign of success or a sign of failure? When do compliance or transaction costs associated with regulatory intervention deter plans from being created or affect the kinds of plans which are established? How can the benefits of an optimally functioning regulator be calculated? What we do not know about pension regulation is undoubtedly more significant than what we do know.

With this caveat in mind, below I suggest those areas where the efficiency and effectiveness of pension regulation in Ontario may be enhanced.

5.1 Benchmarks, Tracking Data and Performance Evaluation

FSCO and the FST are organizations which appear to be committed to the highest standards of performance. In light of this, it is puzzling that there is not greater transparency in the benchmarks for regulatory and adjudicative performance. Given the successful experience of other pension regulators with tracking milestones and evaluations of perceptions of the regulator by stakeholders, it is noteworthy that such benchmarks either have not been established in the Ontario context, or have been established but are not made public.

For example, the Pension Division in FSCO has no performance goals in relation to examinations. In part, this is a function of the Pension Division's integration within FSCO's overall objectives and goals. FSCO is able to target particular kinds of risks or respond to particular kinds of complaints, but only in a resource and staffing environment shaped by priorities in other regulated sectors. Similarly, FSCO's overall priorities are shaped by governmental decision-making in relation to FSCO's budget, staffing structures and policy direction. The FST appears to have no benchmarks associated with respect to the perception of the Tribunal.

In this sense, enhancing a performance oriented approach may well be predicated on enhancing the autonomy of the Pension Division within FSCO and/or enhancing FSCO's independence from Government. This issue is addressed below.

5.2 Independence

The relationship of the Pension Division within FSCO and the relationship between FSCO and the Minister of Finance represent other areas where there may be opportunities to enhance FSCO's efficiency and effectiveness. There are benefits to the current structure in terms of economies of scale, accountability mechanisms and the integration of pension policy within broader governmental economic and social policy. Further, I am unaware of any suggestion that the Government has attempted to use its statutory powers or its other levers (budget, etc) to influence decisions of the Superintendent in specific cases. Nonetheless, greater independence for a regulator will often lead to enhanced organizational focus, capacity and sophistication, in addition to enhancing its credibility among stakeholders.

As noted above, the fact that FSCO staff remain public servants and that FSCO is funded by a transfer from the Crown rather than its own levies creates challenges for its independence and credibility. To reiterate but one example, recruiting and retaining qualified expert staff (such as actuaries) has proven difficult within the framework of public service salary and benefits guidelines.

The power of the Minister to issue policy statements which FSCO and the FST are compelled to have regard to, the power of the Government to appoint the Superintendent, and the absence of statutory authority for policy-making and rule-making

on the part of FSCO, signal a strong governmental framework for FSCO as a pension regulator.

Aside from the arguments based on the relationship between independence, efficiency and effectiveness, there may also be a perception concern in the various roles of government in relation to FSCO, given that FSCO also regulates pension plans where the Government or Government controlled bodies are the employer. In these circumstances, the Government has a direct financial stake in the regulatory decisions undertaken by FSCO.¹¹⁰ Greater independence from Government in structure and the allocation of resources within FSCO could reduce any perception of conflict.

5.3 Clarifying Statutory Objects & Enhancing Statutory Authority

FSCO, as a creature of statute, can only exercise the powers with which it is provided under its governing legislation. The fact that the PBA lacks a statement of the purposes of the legislation is an omission. This omission creates uncertainty in the FST and the Court's interpretation of the PBA and creates ambiguity as to whose interests FSCO serves (beyond, of course, the public interest). An example of an alternative approach is the U.K. *Pensions Act, 2004*, which provides the following clear statement of objectives:

¹¹⁰ It should be emphasized here that the concern is purely one of perception. It would appear that successive Ontario Governments have respected the functional autonomy of FSCO.

Regulator's objectives

- (1) The main objectives of the Regulator in exercising its functions are—
- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
 - (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
 - (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
 - (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.¹¹¹

In other cases, the lack of particular kinds of statutory authority may affect FSCO's institutional capacity and its relationship with stakeholders. For example, the absence of a statutory rule-making or policy-making process limits both the sophistication and impact of FSCO's policy development, and also means that stakeholders have no reliable means of ensuring input into the policy-making process. Once again, the contrast with other financial regulators who have such powers (the OSC and OEB, for example) is significant.

The concern for the statutory tools of FSCO includes not only what is missing but also statutory constraints that may lead to less efficient and effective regulation. For example, the requirement that FSCO issue a Notice of Proposal when it seeks to intervene in the administration of a pension plan, which in turn gives rise to procedural entitlements for the affected plan administrator, inhibits FSCO from real-time remedies where the circumstances warrant. Other regulators have struck a balance between fairness

¹¹¹ *Supra* note 98.

and effectiveness through carefully crafted interim order powers (for example, the Canadian Competition Bureau), and this represents another area for consideration.

5.4 Communication, Outreach and Education

The communication, outreach and education activities of FSCO appear underdeveloped, by comparison to Australia, the United Kingdom and the United States. While closure and response rates for direct inquiries has greatly improved, and while resources have been invested in improvements to the FSCO website (such as posting pension bulletins on-line), it appears that education and outreach has not been a priority for FSCO. Therefore, this represents an opportunity for enhancement.

It is striking to note that in the U.S., EBSA reports over a 100% increase in its outreach activities, while the U.K. Regulator has devoted substantial resources to pioneering an e-learning toolkit for plan administrators. These initiatives are over and above a significant move to using websites as the primary interface with members and administrators alike.

5.5 Specialized Expertise

Pension regulation is a highly specialized field. The example of the United Kingdom demonstrates the benefits of focused and in some cases innovative regulation in the context of a specialized agency. The Australian example, however, suggests that innovations are also possible within the context of an integrated or partially specialized

body as well. In both of these cases, however, the regulators are national in scope and benefit from economies of scale and depth of expertise associated with large organizations dealing with high volumes of regulation.

It is, of course, possible to realize the benefits of a specialized pension regulator within the framework of shared services and infrastructure of a broader financial regulator such as FSCO. There may be opportunities to enhance the functional autonomy of the Pension Division within FSCO and deepen the pool of expertise from which that pension division draws. An example of such an opportunity is the use of secondments, both from the regulated sector and from peer regulators in other jurisdictions, so that in key portfolios, staff and management are exposed to fresh perspectives, new techniques and an outsider's constructive ideas.

The UK Pensions Regulator adopts a “proactive” secondment strategy which actively recruits lawyers, actuaries, corporate financiers, business analysts and corporate risk management case managers.¹¹² Secondments typically are for three year terms. The program is said to build “valuable bridges,” serve the educational goals of the Regulator, advance its modernization agenda, and which will “oil the wheels of communication” in the future.

FSCO has considered the use of secondments but again in this context may be limited in its ability to take advantage of such opportunities by its status as a division of

¹¹² For information on the secondment program of the UK Pensions Regulator, see <http://www.thepensionsregulator.gov.uk/regulatoryActivity/regPara-01.aspx>

the OPS. Secondments involving non-unionized staff members doing the work of members of unionized bargaining units could be perceived as problematic, coupled with the limits on salary and benefits structures highlighted earlier, combine to pose significant barriers to the success of a secondment program.

Expertise is also an issue for the FST. While many members of the FST have a background in pension regulation, conflict of interest concerns limit the extent to which members with deep roots in pension plan administration may be appointed. The control by Government over appointments has historically allowed issues other than expertise to influence appointments (or at least to be perceived to have such influence). Finally, the part-time nature and relatively brief term of such appointments limits the development of institutional continuity, and the role which training and education can play in enhancing the Tribunal's capacity. Expertise, of course, is a symptom of broader challenges relating to the structure of the FST.

5.6. Adjudication

The lack of a specialized pension adjudicator presents another opportunity for enhancing the effectiveness of pension regulation. There are two dimensions to this issue. The first dimension is that pension adjudication is hampered by being combined with other, disconnected kinds of adjudication (e.g. insurance disputes) in the FST. The second dimension is that the FST lacks sufficient independence from FSCO (the Chair of the

FST, for example, is a member of FSCO's governance structure). These concerns could be addressed in different ways.

The FST could be fully integrated into the FSCO. Under this model, FSCO would operate like the OSC as an integrated regulator, including an adjudicative branch. This was the model of the Pension Commission of Ontario prior to the FSCO and was considered again several years ago when it was suggested that pension regulation might merge with the OSC. The OSC's model has itself been under criticism due to a perception of conflict where a single agency is responsible for policy, enforcement and adjudication.¹¹³ The danger of this approach to pension regulation, therefore, could be to achieve effectiveness at the risk of a perception of fairness.

A second option would be simply to remove pension adjudication from the FST and provide instead a direct appeal or review to a court, as is the case currently in several other Canadian jurisdictions. This could enhance efficiency by removing a source of delay. In this case, the risk would both be diminishing accessibility of pension adjudication and losing the value of specialized expertise in pension adjudication.

A third approach, by contrast, could be to retain the current structure but add a new intermediate level (along the lines of the U.K. Determinations Panel), which could be a pension specific, informal adjudicative body, from which challenges could be taken to the FST.

¹¹³ See Report of the Fairness Committee (March 2004), http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20040818_fairness-committee.pdf.

All of these possibilities share an emphasis on specialized pension adjudication, relatively independent both from Government and the regulator. These appear to be predicates for strong stakeholder confidence, greater deference from the courts and effective adjudication.

Conclusion

At the outset of this study, I summarized the goals of the PBA as follows:

- (1) protecting and safeguarding pension benefits for members of regulated pension plans;
- (2) providing clear and predictable standards for the creation, operation and dissolution of regulated pension plans; and
- (3) setting out the circumstances justifying regulatory intervention in the administration and management of pension plans.

Pension regulation in Ontario is neither inefficient nor ineffective in a global sense; however, it appears to be neither as efficient nor as effective as it could be in relation to these goals.

In this study, I have raised a number of areas where there are opportunities to enhance the efficiency and effectiveness of pension regulation and pension adjudication in Ontario. These areas include more transparent benchmarks and performance evaluation for FSCO and the FST, augmenting the statutory tools available to FSCO, strengthening

the expertise available both to FSCO and the FST, more emphasis on education, outreach and communication within the FSCO, and greater structural independence for the Pension Division within FSCO, and for FSCO within Government. The possible benefits of such enhancements are highlighted by an analysis of pension regulation in the rest of Canada as well as Australia, the United Kingdom and the United States.

Pension regulation is not self-fulfilling. While the goals of the PBA could be clarified, even the most precise and purposive scheme of regulation requires a regulator to fulfill these goals. That regulator will invariably operate within an environment of scarce resources, competing stakeholder interests, shifting policy and economic realities, imperfect information and challenges of complexity. Enhancing the efficiency and effectiveness of pension regulation in Ontario is a goal of continuous improvement, based on an increasing body of knowledge and perspective on the criteria for efficiency and effectiveness appropriate to this context. The aim of this study has been to contribute to that goal.