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THE CANADA PENSION PLAN: THE YEAR IN REVIEW

RANDALL ELLSWORTH and GWYNETH PEARCE*

RÉSUMÉ
Dans cet article, les auteurs étudient les plus importants développements législatifs et politiques de 1996 de même que les importantes décisions prises au cours de l’année en ce qui a trait au Régime de pensions du Canada. Les auteurs font également état des initiatives gouvernementales visant à réformer le régime de pension du Canada et présentent une analyse critique de certaines des options qui sont à l’étude.

A. INTRODUCTION
The Canada Pension Plan\textsuperscript{1} turned thirty in 1996, as Ottawa launched a major review which has led to fundamental changes in the way the plan is funded and administered. Clearly, one of the targets of CPP reform is the disability benefit scheme. "Unprecedented" increases in the cost of CPP disability claims were reported in 1996.\textsuperscript{2} At the same time, the federal department responsible for administering the CPP, Human Resources Development Canada,\textsuperscript{3} began to apply new guidelines for determination of disability, and the Pension Appeals Board\textsuperscript{4} appeared to become increasingly restrictive in its interpretation of the disability test. It was a year of shifting ground on both adjudicative and political levels.

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* Copyright 1997, Randall Ellsworth and Gwyneth Pearce. The authors are research lawyers with the Clinic Resource Office of the Ontario Legal Aid Plan (CRO). The CRO provides legal research and resource and training materials to practitioners in Ontario community legal clinics. Opinions expressed herein are those of the authors and not necessarily those of the Ontario Legal Aid Plan.

1. Canada Pension Plan, R.S.C. 1985, c. C-8, as amended [hereinafter "the CPP"].
3. Hereinafter "HRDC".
4. Hereinafter "the PAB".
B. LEGISLATIVE AND POLICY DEVELOPMENTS

1. Legislative Changes

Several significant amendments contained in a bill passed in July 1995 but which remained unproclaimed at that time were finally declared in force as of January 1, 1997. Supporting amendments to the regulations were also announced. A major structural change resulting from these amendments is that Old Age Security appeals, which had previously been heard separately, will now be merged into the CPP appeal system. CPP Review Tribunals now become CPP-OAS Review Tribunals.

The January 1997 amendments also include changes to allow for broader delegation of powers by the Minister; to permit more information-sharing between federal and provincial authorities; to tighten up the expanded definition of “family allowance recipient”; to eliminate the Schedules listing coun-


6. Hereinafter “OAS”.

7. See section 2 of the CPP. A person seeking to challenge a negative OAS decision must now make a request for a reconsideration by the Minister before commencing a Review Tribunal appeal. Prior to January 1997, the reconsideration step was optional in OAS matters: see sections 27.1 and 28 of the Old Age Security Act, R.S.C. 1985, c. O-9, as amended. However, a further appeal to the Pension Appeals Board is only an option in CPP cases. The Review Tribunal remains the final appeal body for OAS matters, subject to the possibility of judicial review.

8. Prior to Bill C-54, the CPP provided that any delegation of powers was to be effected by regulation. All references to specific department officials have now been replaced by the general term “the Minister”. Broad delegation powers are assumed by virtue of section 24 of the federal Interpretation Act, R.S.C. 1985, c. I-21, as amended.

9. Section 81(1) of the Canada Pension Plan Regulations, CRC 1978, c. 385 as amended (hereinafter “the CPP Regulations”) now allows the federal government to provide information from an individual’s CPP file to a provincial government under an information-sharing agreement pursuant to section 105(2) of the CPP, as long as it is used for the purpose of “the administration of” one of a number of provincial programs, including, for the first time, workers’ compensation programs. The previous requirement that the information be used to determine eligibility or entitlement under the provincial program has been dropped.

10. The definition of “family allowance recipient” is relevant to the application of child rearing dropout provisions. Section 42(1) contains a basic definition of “family allowance recipient”, which is expanded in section 77 of the CPP Regulations, to include persons eligible for the current Child Tax Benefit as well as spouses of persons in receipt of the former family allowance.
tries with reciprocal social security arrangements with Canada;\(^\text{11}\) to facilitate the use of electronic communications;\(^\text{12}\) to require more particulars in notices of appeal to the Review Tribunal and applications for leave to appeal to the PAB;\(^\text{13}\) and to specifically provide for preliminary written motions and adjournments in PAB appeals.\(^\text{14}\)

2. **Policy Changes**

(a) **Disability Determination**

In September 1995, HRDC issued a new policy directive entitled "*Medical Determination of Disability under the Canada Pension Plan*".\(^\text{15}\) This directive took effect immediately but it was not made widely available until the spring of 1996.\(^\text{16}\) It is extensive and is intended to take precedence over other policy documents pertaining to the medical determination of disability. In particular, the 1995 Disability Policy specifically rescinds the old "*Policy Guideline on the Determination of Disability*",\(^\text{17}\) which had been in effect since 1989. Interestingly, CPP management has credited the new policy for an unexpected decline in the actual number of CPP disability beneficiaries in 1996.\(^\text{18}\)

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11. It was viewed as “administratively difficult and cumbersome” to keep the Schedules current: see *Regulatory Impact Analysis Statement* following SOR/96–521 in *Canada Gazette Part II*, Vol. 130, No. 26 (December 25, 1996). Concluded agreements will continue to be published in *Canada Gazette Part II*.

12. The *Canada Pension Plan Regulations*, C.R.C. 1978, c. 385, as amended [hereinafter *CPP Regulations*] now provide that requests for reconsideration are to be conveyed “electronically or by any other means acceptable to the Minister”, while the phrase “delivering or mailing” in the *Review Tribunal Rules of Procedure*, SOR/92–19, as amended by SOR/96–523, has been changed to the broader term “conveying”.


16. For many of us, the first indication of new policy guidelines was a reference to them in an Annex to the information paper on the CPP released by the federal, provincial and territorial governments of Canada in February 1996, “An Information Paper for Consultations on the Canada Pension Plan”, *infra*, at note 85.

17. Appendix 2–3-C in the *CPP Operations Manual* [hereinafter “the 1989 Disability Policy”].

18. In September 1996, the Auditor General of Canada reported that the number of beneficiaries had decreased for five straight months. See *Report of the Auditor General of Canada*, supra, at note 2. The Auditor General of Canada welcomed the new disability determination policy as a positive move, in that it attempts to more clearly define eligibility criteria, but suggested that it might have been more appropriate for such key
One important difference between the 1989 Disability Policy and the 1995 Disability Policy is that the new guidelines do not attempt a definition of "disability", although they note that some conditions constitute very strong evidence that the individual is disabled for CPP purposes. By contrast, the 1989 Disability Policy defined "disability" generally as:

... any restriction or lack of ability (resulting from an impairment), to perform an activity in the manner or within the range considered normal for the human being. (World Health Organization common definition).

The 1995 Disability Policy clearly accepts that personal factors must be taken into account at least to a certain extent in making a determination of disability. It confirms that an applicant's medical condition is always the "prime indicator" in a disability determination but acknowledges that, in assessing a medical condition, a number of factors must be considered, including "personal attributes".

The guidelines cite a 1974 Pension Appeals Board case, Minister of National Health and Welfare v. Montpellier and state:

It is well accepted among disability experts that, to assess how a particular medical condition affects a person's abilities, personal factors are part of the assessment. To completely remove references to personal factors could, at an extreme, lead to an impairment-related benefit system based exclusively on a particular medical diagnosis instead of an administrative decision on disability. Therefore, the disabling influence of the medical condition is determined by relating it to a "person".

guidelines to have been entrenched in the legislation rather than left to policy. The Report criticizes CPP disability administration for inconsistencies in adjudication and file documentation and recommends the introduction of a formal and systematic quality control review of adjudicators' decisions.

19. Including "a cerebrovascular accident with paralysis, AIDS, cancer with metastasis, advanced multiple sclerosis, advanced Parkinson's disease, or almost any advanced degenerative condition".

20. The other factors listed in the policy are: the nature of the medical condition, functional limitations, impact of treatment, medical statements, and multiple medical conditions.


22. The guidelines go on to suggest that appropriate questions to ask in determining disability would be:

Q: Given the individual's medical condition, and all its characteristics, is it reasonable to expect that the person could do some kind of gainful work?

Q: Does the medical condition, in conjunction with the individual's educational level and job skills influence against a finding that the individual is capable of working?
In the Montpellier case, a 50-year-old miner with a grade 7 education had developed degenerative disc disease preventing heavy labour, and had tried unsuccessfully to maintain his former employment. The PAB held that, considering his limited education, his honest attempts to secure less stressful employment and his nervousness, irritability and depression, it was unrealistic to expect that the applicant could pursue substantially gainful employment.

This clear recognition by HRDC that disability must be assessed in the context of the individual is a very positive step. However, the new guidelines also specifically emphasize that "socio-economic conditions are not to be considered". Examples of such apparently irrelevant "socio-economic conditions" listed in the guidelines include:

- regional unemployment rates;
- local access to specific jobs;
- the types of major industries in the region;
- the occupational skills needed for those industries;
- the predominant language spoken in the region.

It is not difficult to envision cases in which individual factors compounding a medical disability will be characterized by HRDC as "socio-economic conditions" rather than personal attributes. Language difficulties, for example, have often been cited by caseworkers as a factor contributing to a person's disability. Under the 1995 Disability Policy, it is conceivable that language difficulties could be rejected as an irrelevant consideration.23 It will be increasingly important for caseworkers to relate any non-medical factors to the individual rather than to his or her community.

Another key change in the 1995 Disability Policy is that it interprets the "substantially gainful" test as having two elements: profitability and productivity. The guidelines introduce a formula for assessing profitability of work using an "SGO benchmark"24 of 25% of the average Year's Maximum Pensionable Earnings25 over the three years ending in the year benefits could commence.

23. Indeed, in one recent case, Hammoud v. The Minister of Employment and Immigration (1996), C.E.B. & P.G.R. 8619, the Board stated bluntly, at 6167, that the appellant's illiteracy and limited learning skills:

... cannot be considered to be "disabilities" within the meaning of the legislation which might be considered as entitling her to the benefits of the Act, but rather as literacy or linguistic "deficiencies" which are irrelevant to the determination of entitlement.

24. SGO is an acronym for "substantially gainful occupation".

25. Hereinafter "the YMPE".
This parallels the formula used to determine cessation of employment for retirement pension purposes. According to the 1995 Disability Policy, an individual working to maximum capacity but earning less than the SGO benchmark would "normally" be found to be disabled. An individual earning twice the SGO benchmark or more would be presumed not to be disabled, although the policy recognizes room for exceptions. An individual earning the SGO benchmark or more but less than twice the SGO benchmark would have to present "very strong evidence" to establish eligibility for CPP disability benefits. The policy recognizes that, in some circumstances, there may be profitability without productivity, or remuneration without work activity, and that in such cases, there may in fact be no capacity to work. It should be noted that the old 1989 Disability Policy incorporated a similar formula for determining capacity to work based on a comparison between actual earnings and the YMPE. The new guidelines are, however, far more helpful as they offer practical examples of how the test should be applied.

(b) Rehabilitation and Reassessment
Although the 1995 Disability Policy expressly revokes the 1989 Disability Policy, it is not altogether clear that it was intended to be revoked in its entirety. The 1989 Disability Policy contained guidelines on Reassessments and Rehabilitation and other topics in addition to those on disability determination. Some of these guidelines had already been superseded by policy guidelines released earlier in 1995, entitled "Removing Work Disincentives: CPP Disability Benefit"/"Élimination des Contre-Incentives au Travail: Prestation d'Invalidité du RPC", but there are some gaps between the 1989 and 1995 documents.

With the new disability determination guidelines now in place, HRDC may devote more attention in the coming year to improving its processes for reassessment and rehabilitation.

An individual's entitlement to CPP disability benefits is always subject to reassessment on the basis that he or she can no longer be considered "disabled". In a large number of cases, the triggering event for a reassessment is the fact that the individual has advised HRDC that he or she has gone back to work.27

26. In 1995 the SGO was $8559 annually.
27. Sections 68 and 69 of the CPP Regulations require an applicant to provide information to the Director if so required to determine continuing disability or entitlement to benefits. There is a potential issue as to what constitutes a request for information in this regard. It is arguable that these sections only refer to specific requirements made "from time to time" by the Director, and cannot be interpreted broadly so as to encompass any general obligation to report. However, the standard CPP disability benefit application form requires applicants to agree in writing to notify the Canada Pension Plan of any
However, all individuals who appear likely to experience some improvement in the future are supposed to be flagged for subsequent reassessment at the time of application. Yet HRDC itself estimates that thousands of reassessments flagged in this way have in fact not been processed on time because of system problems. The practical result of these internal delays is that many CPP disability pensioners may wind up facing impossibly large overpayments.

The National Vocational Rehabilitation Project launched in 1993 as a pilot project to facilitate a return to work by disability pensioners with "rehabilitation potential" was scheduled to come to an end in March of 1997, and new referrals in 1996 were limited to short-term rehabilitation initiatives only. In January 1997, HRDC announced a one-year extension to the program, with no change in the annual federal funding commitment. The Auditor General's 1996 Report has urged that HRDC consider expanding the scope of its rehabilitation services to include psycho-social intervention where appropriate in addition to traditional training and placement services, in order to equitably serve all disability pensioners. The Auditor General also adverted to one of the key drawbacks of the NVRP, which has been that participants lose their entitlement to benefits three months after completion of their rehabilitation plan regardless of whether they are able to find a job, and urged that those who improvements in their medical condition and of any work which they may undertake. Further, according to the Report of the Auditor General of Canada, supra, at note 2, the Ministry has launched a direct mail campaign to advise all CPP disability beneficiaries that they have a responsibility to report changes in their circumstances. Therefore, if an individual obtains employment while in receipt of a CPP disability pension, he or she will normally have an obligation to report the work to the Ministry, and may be subject to retroactive disentitlement if the work is not reported. It would in all likelihood be the Ministry's position that these communications constitute ongoing requirements by the Director under sections 68 and 69 of the CPP Regulations. It is arguably a question of fact in each case as to whether the standard agreement to report was signed by, brought to the attention of, or adequately explained to the applicant. It is crucial, too, to bear in mind that returning to work or attempting a return to work does not in itself mean that one has ceased to be disabled. Arguments may still be made that the individual is incapable of regularly pursuing substantially gainful employment.

29. Hereinafter "the NVRP".
32. Ibid.
undertake rehabilitation run no greater risk than those who choose not to. It is to be hoped that HRDC takes these concerns to heart in the coming year as it undertakes the task of devising a rehabilitation program to succeed the NVRP when it expires in 1998.

C. LITIGATION DEVELOPMENTS

1. Disability Benefits – Substantive Issues

There were two recurring themes in disability benefit decisions released by the PAB this past year. First, there were repeated attempts to chip away at the relevance and weight of "subjective" factors and evidence in the assessment of disability. Secondly, there were repeated characterizations of disability as a lifestyle choice, and of disabled persons as responsible for their own unemployability.

(a) Subjective/objective

Few CPP disability appeals are based solely on medical evidence. Caseworkers regularly make submissions as to factors other than the degree of actual medical disability and the Board has often taken such factors into consideration in deciding whether a person is capable of pursuing employment. The most common "subjective" factors referred to are age and lack of education or experience.

However, the PAB now appears to be leaning toward a much more rigid approach to the determination process. Some decisions released over the past year suggest that the only relevant evidence in a CPP disability determination is objective medical evidence. In Brown v. Minister of Employment and Immigration, the PAB stated:

Whether or not the disability meets both of these rather narrow and rigid tests ["severe" and "prolonged"] cannot be determined subjectively, but rather it must be determined objectively on the basis of objective evidence founded on medically based, clinically established evidence.33

In Minister of Employment and Immigration v. Hastie, the PAB went so far as to state that:

The phrase "in prescribed manner," appearing in [s. 42(2)(a)], has universally been interpreted by the Board as meaning founded on credible and objective medical opinion, as opposed to the subjective evidence of the appellant.34

This last statement seems clearly wrong. There is no reason to conclude that "in prescribed manner" restricts the type of evidence that may be considered in the determination of disability. It would seem merely a reference to the regulations which detail the information which a contributor is obliged to submit with an application for disability benefits.\(^\text{35}\)

Still, the suggestion that subjective evidence is irrelevant to a determination of disability seems to be gaining favour at the PAB. This shift in CPP disability jurisprudence first manifested itself\(^\text{36}\) in a retreat from the "real world" test established in the landmark *Leduc v. Minister of National Health and Welfare*\(^\text{37}\) case, as to employability of disabled individuals. As anticipated, the PAB is becoming more and more focussed on strict medical findings.

This past year, in *Crossett v. The Minister of Employment and Immigration*, the PAB attempted to further stifle the impact of the *Leduc* case, by holding that *Leduc* and decisions following it were decided in "special and restricted circumstances" which should not be expanded. The PAB listed those circumstances as follows:

1. a total disability depending on combined conditions both medical and non-medical and somewhat complicated in nature;
2. a limitation on the possibility of control of those combined conditions — the difficulty of that control;
3. a formal restriction on driving an automobile as opposed to voluntary relinquishment as here;
4. there being some "unspecified" form of substantial gainful employment, as opposed to a number of specified gainful employments canvassed as here;
5. an unqualified acceptance of symptoms by certain medical witnesses and Board members;
6. a conflict of opinion between medical specialists and the family doctor, with the family doctor being considered in a better position to assess the applicant. The orthopaedic specialist, Dr. Kruger, and the family doctor both find partial disability only in the context of employment;
7. the consideration of slow learning and learning disability; and

\(^{35}\) See s. 68 of CPP Regulations.

\(^{36}\) As observed last year in *Pension Review 1995*, supra, note 5, at 22–24.

(8) the disability applicant being well motivated which is not the case here on the Appellant's own evidence.38

The appellant in Crossett was a 43-year-old labourer with no other work experience and a grade 10 education who had neck and back pain. Clearly, the PAB was trying to justify its disregard for the Leduc line of cases in concluding that he did not meet the CPP test for disability. However, it is very difficult to read the PAB's list of "circumstances" as a list of significant "special" circumstances requiring the application of different legal principles, rather than simply a list of factual differences between the Leduc case and the case before the PAB.

(b) Conditions within appellant's control

PAB jurisprudence over the past year was also defined by attempts on the part of some members to lay blame on the disabled for their disabilities. This is not a new theme by any means. The Board is generally unsympathetic to applicants whose problems are theoretically within their own control, particularly applicants with diseases which are potentially disabling but are controllable with medication,39 or with addiction problems, such as alcoholism.40 The PAB has often given very little consideration to the reality that disability is often a complex of various inter-related problems, and to the possibility that lack of motivation for treatment may be a disabling factor in itself. However, the PAB

39. See Minister of National Health and Welfare v. Hapke (1983), C.E.B. & P.G.R. 8910, where the applicant took his medication for arthritis on an intermittent basis only; Minister of National Health and Welfare v. Holmes (1976), C.E.B. & P.G.R. 8713, where the Board took into account the applicant's refusal to take appropriate medication; and Minister of National Health and Welfare v. Petrollini (1993) C.E.B. & P.G.R. 8517, where the Board noted the applicant's "casual response and approach to her medical problems". See also Butt v. Minister of Employment and Immigration (1995), C.E.B. & P.G.R. 8584, where the appellant dairy worker was experiencing severe low back pain, which prevented her from lifting heavy milk containers. The medical evidence attributed her back problems to obesity and recommended weight reduction and intensive exercise. In fact, the appellant had lost about 60 pounds but was still experiencing pain. The Board held that she could not be considered to be suffering from a severe and prolonged disability as she could recover her capacity to engage in gainful employment by losing more weight.
40. Although the Board does not seem to have directly held that alcoholics are responsible for their own condition, cases where this has been at issue certainly give an impression that the Board is not sympathetic to these applicants: e.g., see Minister of National Health and Welfare v. Glagoloff (1972), C.E.B. & P.G.R. 8561; Minister of National Health and Welfare v. Trainor (1980), C.E.B. & P.G.R. 8796; Minister of National Health and Welfare v. Neary (1974), C.E.B. & P.G.R. 8653.
appears to be denying eligibility in more and more cases on the basis of this sort of contributory fault principle, arguably without adequate justification.

In 1995, there were some troubling suggestions from the PAB that applicants with psychological problems should prove that their problems were not within their control.41 This past year, there were similar suggestions in other contexts.

In Minister of Employment and Immigration v. Hamou,42 the applicant had developed chronic pain syndrome after multiple accidents. There was considerable medical evidence in the record. Several specialists recommended that the applicant take rehabilitation counselling. The PAB concluded that he was not disabled for CPP purposes, primarily on the basis that counselling was never implemented. The PAB stated:

Respondent has an obligation to engage in this type of therapy, and if it is not successful, to provide an appropriate explanation.

The PAB did not indicate what sort of “appropriate explanation” it expected the applicant to provide.

In Feader v. The Minister of Employment and Immigration,43 the appellant, who was right-handed, had severely injured her right wrist. She was unable to return to her previous work because of numbness and pain. The PAB found that her disability did not meet the test of severity, suggesting that the appellant could increase her residual capacity to work by taking courses to develop her non-dominant left hand.44

Finally, in the Hastie case, above, the PAB held that the appellant was not disabled for CPP purposes even though he might be currently incapable of pursuing any substantially gainful employment, as he could regain the capacity to work by changing his “very sedentary lifestyle”. The PAB concluded that:

... inasmuch as the Respondent’s present incapacity is readily remediable on his own initiative, if he chooses to exercise it, [...] it cannot be said to be either severe or prolonged within the meaning of the legislation.45

44. This decision largely adopted the reasoning in an earlier, but recently-reported Board decision, Minister of National Health and Welfare v. Vaughan (1992), C.E.B. & P.G.R. 8632.
45. Hastie, supra., note 34, at 6188.
Decisions such as these set alarming precedents because they inject a highly speculative element into the determination of whether a person is "capable" of pursuing a gainful occupation. This, in turn, increases the burden on disability pension applicants who must not only provide evidence as to their actual conditions, but also as to the feasibility of self-improvement. Arguably, the more reasonable approach to assessing the severity of an individual's disability is by considering the individual's actual capabilities as of the determination date. Further, while an individual's ability to effect positive lifestyle or treatment changes may arguably be relevant to the determination as to whether a disability is "prolonged", the legislative test is whether a disability is "likely to be" long continued and not whether it could potentially be alleviated by positive action on the part of the individual. The potential for improvement should be evaluated on the balance of probabilities, with regard to the person in question and not some abstract standard of behaviour.

Interestingly, the PAB took a step in that direction this past year, in the evaluation of depression as a disability. Depression and anxiety are common consequences of prolonged disability and tend to compound the limitations imposed on the disabled person. In the past, the PAB has sometimes been reluctant to recognize consequential depression and anxiety as part of the disability picture. This reluctance is another manifestation of the PAB's tendency to discount disabilities which are viewed as not being totally beyond the individual's control. This past year, however, in Minister of Employment and Immigration v. McFadden, a majority of the PAB panel rejected the HRDC argument that "endogenous" depression could constitute disability for CPP purposes but depression of a "reactive" nature could not. The majority stated that disability "cannot be

46. See, for example, Massara v. Minister of National Health and Welfare (1984), C.E.B. & P.G.R. 8509.
48. Stedman's Medical Dictionary, 5th ed. (Anderson Publishing Co.; 1982) defines "endogenous depression" as:

... a descriptive syndrome for a cluster of symptoms and features occurring in the absence of precipitants; e.g. severe d. of mood, psychomotor agitation or retardation, diurnal mood variation with increased severity in the morning, early morning awakening and insomnia in the middle of the night, weight loss, self-reproach or guilt, and lack of reactivity to one's environment.

49. Stedman's Medical Dictionary, ibid., defines "reactive depression" as:

... a psychotic state occasioned directly by an intensely sad external situation (frequently loss of a loved person), relieved by the removal of the external situation (e.g. reunion with a loved person).
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determined by reference to a narrow dichotomy of that nature” and emphasized that the governing criteria are the statutory criteria.\(^\text{50}\) In that case, the appellant had essentially dropped out of society after becoming increasingly unable to cope with the restrictive nature of his factory job.

2. **Disability Benefits – Procedural Issues**
   
   (a) Late applications
   
   The introduction of the “late application rule” in 1992 has opened new doors for applicants who had previously been shut out because of their inability to meet contributory requirements through the passage of time.\(^\text{51}\) However, this new avenue to eligibility has also created a new set of problems for advocates. Numerous cases have been lost because of procedural complications and uncertainty as to the operation of the “late application rule” rather than on the actual merits.

   The “late application rule” is contained in section 44(1)(b)(iv) of the CPP, which states that a disability pension is payable to:

   ... a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled had an application for a disability pension been received prior to the time the contributor’s application for a disability pension was actually received.

   This section has not yet produced enough caselaw to resolve the many unanswered questions raised by its convoluted and ambiguous language. In the words of one PAB member, McQuaid J.:

   [T]he Minister might give some serious thought to the draftsmanship of Section 44(1)(b)(iv). Otherwise it promises to be fertile field for future contention.\(^\text{52}\)

   However, potential problems are becoming easier to flag. According to policy directives, HRDC’s standard approach in processing a late application is to determine the latest date on which the applicant could have applied for disability benefits and met the contributory requirements then in effect. HRDC then

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50. “A severe and prolonged mental or physical disability”.


proceeds to consider whether the applicant was disabled on that date, and, if so, the late application succeeds. In practice, the HRDC approach is no doubt much more efficient administratively, as it avoids the need for time-consuming disability determinations in all cases. It is also consistent to some extent with HRDC's practice in dealing with timely applications, which are also screened for contributory requirements before a disability assessment is undertaken. However, this approach is arguably the reverse of what is contemplated in the legislation. The eligibility provisions define an applicant's contributory period by reference to his or her actual or deemed disability date, and therefore seem to require that the date of disability be set before an assessment of contributions and contributory requirements is made. Further, HRDC's approach to processing late applications is not in the best interests of all applicants, and some applicants may wind up with reduced pensions or falling through the cracks altogether, as a result of inappropriately strict adherence to policy in this context. The late application rule provides for the setting of a notional application date. Arguably, the governing principle should be that this date should be set so as to maximize the benefits payable to the late applicant, assuming that the test of disability can be met. Nothing in the legislation requires that it be set as late as possible, as the HRDC policy suggests.

The most common problem with the HRDC approach is that a late applicant's disability date will normally be set as of the date when he or she last met contributory requirements even if the actual onset of disability was much earlier. As a general rule, the sooner a contributor's contributory period ends, the larger the earnings-related portion of his or her disability pension will be. In cases where an earlier disability date would result in a higher pension for a client, it may be worth making the argument that the standard HRDC approach to late applications is inappropriate and that the client's contributory period should be closed as of the actual disability onset date and not as of the date when contributory requirements were last met.

53. C-57 Quick Reference Guide, an internal undated document obtained from the Ministry in 1993, states:

When reviewing an application under Bill C-57, the question that must be answered is:

What is the latest date (year and month) that this individual could have applied for a disability benefit and met the contributory requirements applicable at that time?

The Guide goes on to state that "the starting point for calculating the minimum qualifying period is the last year with valid contributions".
Difficulties may also arise in determining how the late application rule interacts with the disability deeming provision in section 42(2)(b). The basic rule is that an applicant's contributory period ends at the date of onset of disability, except that the onset date may be set no earlier than 15 months prior to the date of application. The contributory requirements which the applicant must meet are determined by the legislation in effect at the date of application. In a typical timely application, HRDC determines whether contributory requirements were met on the earliest possible date for disability onset, 15 months prior to the date of application, and, if so, proceeds to make a disability determination. In a typical late application, the 15-month window is not factored into the determination of eligibility, and HRDC simply determines whether the applicant was disabled as of the last date when contributory requirements were met. However, the 15-month window may be critical to the success of some late applications. We are aware of one case in which a person became disabled in late 1985, after having contributed to the CPP from 1982 through 1985, but was refused benefits on a late application in 1992, apparently on the basis that the "two out of three" rule was not yet in effect in his last year of valid contributions. Had this person made a timely application in early 1987 after the introduction of the "two out of three" contribution rule, he would have been found eligible. As a result of the 15-month window, his contributory period could still be closed off in 1985. Arguably, HRDC could and should have used the same approach in dealing with the late application. The notional application date could have been fixed up to 15 months after the end of the last year of valid contributions by factoring in the deemed disability window. In situations like this, it is very important to return to the actual statutory language and to point out the potential arbitrariness of policy-driven decisions.

(b) The res judicata roadblock
Given the flexibility of the "late application rule", and the uncertainty surrounding its operation, it may be tempting to rely on it in every case involving a claim

54. Section 42(2)(b) of the CPP provides:

a person shall be deemed to have become ... disabled at such time as is determined in prescribed manner to be the time when he became ... disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

55. As of January 1987, a contributor who does not meet the minimum qualifying period test can still be eligible for a pension if he or she has made contributions for at least two of the last three years in his or her contributory period. If there are only two years in that contributory period, he or she must have made contributions for both of those years: see sections 44(1)(b)(ii) and (iii) of the CPP.
to past benefits. However, two 1996 decisions of the PAB point out some of the pitfalls of invoking the “late application rule” as a matter of course, especially where there have been prior unsuccessful applications.

In Minister of Human Resources Development v. Andryjowich and LeBlanc v. Minister of Employment and Immigration, the PAB dismissed appeals by late applicants, stating that the “late application rule” does not permit the revival of a prior timely application which has already been denied, as this would amount to a “revisiting of the very issue” previously dealt with, contrary to the doctrine of res judicata. In principle, this proposition is valid. However, the way in which it has been applied by the PAB gives some cause for concern.

In the Andryjowich case, the respondent stopped working in 1979 because of neck and back pain but did not apply for CPP disability benefits until 1988. His application was denied on the basis of insufficient earnings and contributions and an appeal to a Review Committee was unsuccessful. In June 1992, after the introduction of the “late application rule”, he re-applied. The Minister denied this application on the basis of insufficient contributions, and because the respondent had been in receipt of a retirement pension since 1990. The respondent appealed to a Review Tribunal, which found in his favour and determined that he had become disabled in August 1987. The Ministry successfully appealed to the PAB. The PAB held that the Review Tribunal had acted without jurisdiction, apparently because it had considered the “late application rule” in making its decision. The PAB also interpreted the Review Tribunal’s decision as using the “late application rule” to reinstate the respondent’s unsuccessful 1988 application, which it held was unreasonable. The PAB stated that the determination of the respondent’s 1988 application was res judicata. This is a disturbing decision, particularly because the PAB did not explore the possibility that the “late application rule” might still be of assistance to the respondent. As the obstacle to eligibility in this case was contributions and not disability, it is quite possible that the respondent could have been eligible had the PAB set a notional application date for the purposes of the “late application rule” prior to 1988. Arguably, it was in precisely this type of situation that the “late application rule” was intended to apply.

56. Supra., note 52.
59. This finding in itself is open to challenge. The “late application rule” is one element of the test for eligibility. The Review Tribunal had jurisdiction to determine whether the respondent was eligible for benefits: ss. 82, 84 of the CPP.
In *LeBlanc*, released shortly after *Andryjowich*, the appellant was injured in 1983 and first applied for *CPP* disability benefits in March 1986. The application was refused on medical grounds and was not appealed. In 1990, the appellant attempted a brief return to work but was re-injured after several months. In 1993, she re-applied for *CPP* disability benefits, and was again refused. However, this time, she appealed the refusal. In keeping with *HRDC* policy, the *PAB* determined that the appellant could not qualify from a contributory standpoint after September 1986, and held that she could therefore only succeed by relying on the "late application rule". The *PAB* concluded that this would require a reconsideration of the issue determined on the first application in 1986, and that this was barred by *res judicata*. The appellant in this case was unrepresented. It is arguable that she might have had a better chance of success if she had instead pursued an application for reconsideration on the basis of new facts.\(^{60}\) It seems clear that the "late application rule" was intended to prevent applicants from losing eligibility over time because of insufficient contributions, not to permit a second determination as to disability at the same point in time.\(^{61}\)

There was a third significant decision this past year involving the doctrine of *res judicata*. In *Headlam v. Minister of Employment and Immigration*,\(^{62}\) the appellant first applied for disability benefits in 1985. Benefits were denied on the basis that she was not considered to be disabled. She re-applied in 1988 and benefits were again denied by both the Minister and a Review Committee. In 1991, leave to appeal to the *PAB* was also denied. In 1993, the appellant applied for a third time, and again her application was denied, but this time she obtained leave to appeal to the *PAB*. However, the *PAB* held that the issue of the appellant's entitlement to disability benefits was *res judicata* as it had been

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60. Section 84(2) of the *CPP*.

61. A complicating feature of this case was that the appellant did make a return to work for several months in 1990. The *PAB* found that this fact in itself precluded her from succeeding under the "late application rule". The *PAB* stated, at 6200:

> In my view, that provision is only available to an applicant who was disabled while meeting the contributory requirements of the Plan and who has continuously been disabled up to the date of the application for benefits... or at least to the date at which in light of section 42(2)(b) and 69 of the *Plan*, benefits would be payable (that is, 12 months before the application was made).

This in itself is a troubling finding, as it implies that an applicant can only rely on the late application rule if he or she continues to suffer from the same disability at the time of actual application. This operates to prevent an applicant from claiming for a "closed" period of disability in the past.

finally determined by the PAB in 1991. The PAB held that there were no new facts, and, if there had been, the appellant would have to apply to the Review Committee that heard the matter in first instance. The PAB relied on an earlier decision, *Mac Isaac v. Minister of Employment and Immigration*,63 in which the PAB had properly held that a finally determined application was subject to the rules of *res judicata* and could not be revived by a subsequent application unless the application was clearly for reconsideration on the basis of "new facts" under section 84(2).64 There was, however, a key difference between *Mac Isaac* and *Headlam*. In the former case, the appellant was seeking to overturn a prior final decision of the PAB, whereas in the latter case, the appellant appeared to be exercising a valid right of appeal to the PAB from a Review Committee decision on a re-application at a later date. In the *Headlam* case, the fundamental problem was that the appellant apparently had no new evidence to differentiate her application in 1993 from her application in 1988. An appellant is only expressly required to show "new facts" to obtain rescission or amendment of a prior decision by the same tribunal under section 84(2) of the CPP. That said, it would be highly unusual for the PAB to reach a different result on eligibility on a re-application without any new evidence demonstrating a deterioration in the appellant's medical condition or other relevant change in circumstances. Although the PAB may have reached the right result on the evidence in *Headlam* in finding that the appellant was not disabled, its conclusion that the prior determination as to disability was *res judicata* was questionable. A finding that the appellant was not disabled in 1988 should not, in itself, bar a finding that the appellant was disabled in 1993. Although the circumstances in *Headlam* may have been such that the appellant was in fact trying to re-open substantially the same issue, the application of *res judicata* in the context of disability assessments at different times should rarely be justified. It is worth noting that Walker J.A. expressed this same concern and caution in a concurring judgment in *Headlam*, indicating that he preferred to base his decision on the lack of evidence of disability rather than on the operation of *res judicata*. Interestingly, just a few weeks later, Walker J.A. concurred in the judgment in *Andryjowich*, above, without similar exhortations.

These three decisions suggest that the PAB and Review Tribunals may be increasingly inclined to dismiss re-applications in a summary way by invoking

64. Section 84(2) of the CPP provides:

The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.
res judicata. Advocates may be able to avoid a hostile reception at the PAB by highlighting evidential differences between the re-application and prior applications, by considering a reconsideration on new facts where appropriate, and by preparing arguments to meet the res judicata issue if it is raised.

3. Charter Challenges

The contributory requirements under section 44 of the CPP and the effect of the “deemed disability” provision in section 42(2)(b) on eligibility are unique to the disability pension scheme within the CPP. It is arguable that these provisions are discriminatory, contrary to section 15 of the Canadian Charter of Rights and Freedoms, as they impose a disadvantage on disabled contributors not imposed on other contributors to the CPP. Only disabled contributors are subject to a recency test in that their contributions must have been made within a certain time frame. Only disabled contributors have their contributory period determined on the basis of a “deemed” event (deemed disability date) rather than an actual event (such as retirement, age, death etc.).

Undaunted by rejection at the PAB, advocates continue to work on Charter challenges to the CPP disability provisions, looking for a chink in the wall. This past year, another challenge had its day in court. In Xinos v. Minister of Employment and Immigration, the appellant had made CPP contributions from 1966 to 1978, but had not been in Canada between 1979 and 1988. Shortly after returning to work in Canada in 1989, he was injured. He was denied benefits on the basis that he did not meet minimum contributory requirements. The Charter challenge here focused on the recency test and section 15 of the Charter. The PAB dismissed the appeal, holding that while retirement benefits were available to all contributors who met basic requirements, whether disabled or not, disability benefits were additional benefits available only to the disabled, and therefore the view that the disabled were disadvantaged by the benefit scheme could not be supported. In the alternative, the PAB held that any violation of section 15 would be saved by section 1 as the different policy objectives for retirement and disability pensions justified different contributory requirements. An application to the Federal Court of Appeal for judicial review of this decision was dismissed orally in March of 1997.

65. (1996), C.E.B. & P.G.R. 8609. The appellant in Xinos was represented by Injured Workers’ Consultants in Toronto.

66. Xinos v The Attorney General of Canada and The Minister of Employment and Immigration, (March 19, 1997), #A-212–96 (Fed. C.A.) [unreported].
There had been at least three previous *Charter* challenges to the CPP disability provisions at the PAB. In *Minister of National Health and Welfare v. Kartisch*, the applicant was disabled by asbestosis. He had made CPP contributions between 1966 and 1976 but had not worked since 1978. He applied for CPP disability benefits in 1985 and 1986, but was denied on the basis that he did not meet the minimum contribution requirements because the earliest he could be deemed to be disabled was October 1984. The PAB heard argument only on the issue of whether the deemed disability rule violated section 7 of the *Charter*. The PAB rejected the challenge, holding first that there was no deprivation under section 7 as section 7 did not protect economic or property rights, and, secondly, that if there was a deprivation, it was not contrary to fundamental justice as the deemed disability rule:

... allows disability to be consistently and accurately established on a retroactive basis and for a reasonable period.

Again, in *Minister of National Health and Welfare v. Johnston*, the applicant was denied a disability pension on the basis of insufficient contributions. The applicant in this case challenged the contributory requirement provisions under section 15 of the *Charter*, arguing that they were more onerous than the requirements for eligibility for retirement, death, survivor’s or orphan’s benefits under the CPP. The PAB rejected the challenge, holding that, while the CPP was an omnibus plan, it encompassed two separate schemes, one based on compulsory savings (retirement/survivor’s benefits) and the other a quasi-insurance scheme (disability benefits), and that the fundamental difference between the schemes required different eligibility criteria. In *Minister of National Health and Welfare v. Sinclair*, the applicant challenged the disability pension eligibility criteria under both section 7 and section 15 of the *Charter*. In that case, the applicant had applied for disability benefits in May of 1987. She had made valid contributions to the CPP in 1966, 1967, 1969, 1970 and 1972 to 1978. However, because of the operation of the deemed disability rule, the earliest her contributory period could end was May of 1986. She did not therefore meet minimum contributory requirements. The PAB adopted the reasoning in *Kartisch*, above, in rejecting the section 7 challenge, and adopted the reasoning in *Johnston*, above, in rejecting the section 15 challenge.

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3. **Pension Credit-Splitting**

The CPP provides a mechanism whereby pensionable earnings accumulated during a marriage or spousal relationship defined in the legislation may be divided equally between the former spouses on divorce or separation. This process, which is commonly referred to as “pension credit-splitting”, results in a benefit to the person who had the lowest pensionable earnings during the cohabitation period, as pensionable earnings form the basis for determining a person’s entitlement to CPP retirement and disability benefits.

Some of the murky areas of the pension credit-splitting provisions received some much-needed clarification this past year with the release of the *Minister of Employment and Immigration v. Neil and Roy* decision. Neil contains a useful review of the pension credit-splitting process and the role of the Minister’s discretion under section 55.1(5) in particular. In that case, the respondent husband and intervenor wife had been married in 1971, had separated in 1988, and had divorced in 1989. They had agreed in a settlement not to apply for a division of unadjusted pensionable earnings. In 1992, the intervenor attended a Ministry office to obtain information and, while there, completed a DUPE form. The Minister received the form and went ahead with a DUPE. The evidence demonstrated that the DUPE had the net effect of reducing the respondent’s monthly CPP payments and increasing the intervenor’s pension credits. The respondent appealed and won before a Review Tribunal. At the PAB hearing, the Minister presented evidence that, even prior to 1995 amendments to section 55.1(5),

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70. A “contributor” is defined in s. 2 of the CPP as including a person who receives a division of pension credits. It is therefore possible for a person who was previously ineligible as a non-contributor to gain eligibility as a “contributor” by applying for a division of pension credits.


72. Section 55.1(5) of the CPP provides:

Before a division of unadjusted pensionable earnings is made under this section, or within the prescribed period after such a division is made, the Minister may refuse to make the division or may cancel the division, as the case may be, if the Minister is satisfied that

(a) benefits are payable to or in respect of both spouses or former spouses; and

(b) the amount of both benefits decreased at the time the division was made or would decrease at the time the division was proposed to be made.

73. Hereinafter “DUPE”.

74. In accordance with the mandatory division provision in section 55.1(1)(a) of the CPP.

75. Until July 1995, the Minister had a residual discretion to refuse a DUPE or cancel a
was policy to consider only monetary factors in determining whether there was detriment to both spouses. The Minister indicated that it is possible, although rarely so, for a division to be financially detrimental to both spouses. The respondent and intervenor both argued that other criteria should factor into a determination of detriment: the wishes of the parties as expressed in their spousal agreement, the risk of one spouse being exposed to costly enforcement litigation, and the possible introduction of acrimonious relations between the former spouses. Without expressly accepting the Minister's interpretation of "detriment", the PAB allowed the Minister's appeal, holding that, even enlarging the inquiry beyond monetary factors, a case for detriment to both spouses had not been made out.

In Neil, the PAB also expressly held that:

... the 60-day prescribed period for cancelling a decision applies only to the Minister acting on his own motion pursuant to section 55.1(5) and not to decisions made in respect of regular appeals.76

Finally, in Neil, the PAB also clarified that its jurisdiction to review a refusal by the Minister to cancel a DUPE under section 55.1(5) flows from the general right to appeal a section 55.1 decision,77 stating:

It is noted that any decision under 55.1 is subjected to appellate review without limitation. Since subsection 55.1(5) of general section 55.1 is not excluded, ministerial decisions made thereunder are therefore appealable, including a decision that the division of pension credits is not detrimental to both spouses.78

This proposition, which marked a departure from the traditional PAB view that it has no jurisdiction to interfere with or compel the exercise of Ministerial discretion,79 was echoed in Doherty v The Minister of Employment and Immigration,80 a case involving the incapacity provisions in section 55.3,81

DUPE within 60 days of the order if satisfied that the division would be "to the detriment of both spouses or former spouses". The provision is now much more specific.

76. Neil, supra, note 70, at 6112. This holding was consistent with the decision in Minister of National Health and Welfare v. Bidon (1994), C.E.B. & P.G.R. 8535.

77. Section 81 of the CPP.

78. Neil, supra, note 70, at 6112. The emphasis appears in the original decision.


81. The Minister may deem an application for a DUPE to have been made at an earlier date.
several months later. In *Doherty*, the *PAB* properly recognized that while section 55.3 confers a discretion on the Minister, a decision made under that section was a decision subject to appeal under section 81, and the Review Tribunal's decision to decline jurisdiction over the matter was wrong in law.

The appellant in the *Doherty* case had applied for a DUPE almost 10 years after her divorce in July 1981. The evidence showed she had been a victim of longstanding physical abuse in her marriage of more than 30 years and had been traumatized by the divorce. She was aware of her right to seek a DUPE but was intimidated by the prospect and was unable to bring herself to do so until after her former husband's death. The *PAB* held that the medical evidence did not support a finding that the appellant was incapable of forming or expressing the intent to seek a DUPE, but acknowledged that this did not mean:

... that the fear of spousal retribution could never operate to create an incapacity to form the requisite intention.82

The *PAB* held that the appellant was not incapable of pursuing her rights but rather "felt dissuaded" from doing so. Clearly, this is a tenuous distinction in cases involving family abuse.

**D. REFORMING THE CANADA PENSION PLAN**

An attempt to reform the *CPP* was one of the major social policy initiatives undertaken by the federal, provincial and territorial governments over the past year. The first indication that such reform was going to be more than the usual five year review of the *CPP* contribution rates (which is mandated by the legislation83) was the federal budget in 1995. At that time, federal Finance Minister Paul Martin stated:

Canadian seniors deserve to know that those public pensions will be there for them. That in turn requires reform to ensure that the pension system is sustainable in the long term.84

Martin indicated at that time that a discussion paper on the pension system would be forthcoming, and that its focus would be "fairness and sustainability".85

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83. Section 113.1 of the *CPP*.


It was to be over a year before the discussion paper on the CPP was finally released. Entitled "An Information Paper for Consultations on the Canada Pension Plan", it was to serve as the starting point for consultations with Canadians around changing the CPP. It was released at a time when the public viewed the CPP with increasing pessimism. Concern had been expressed about such things as the rising contribution rates, the CPP's "unfunded liability", the fact that the CPP was going broke and the impact that members of the baby boom generation would have upon the CPP when they all retire.

The CPP provides universal coverage for all employed and self-employed people earning above an annual minimum amount, it is fully portable, it immediately vests with the contributor, the benefits it provides are fully indexed to inflation and, due to the large size of the Plan, it has significant economies of scale for administrative expenses. Further, with respect to eligibility for the disability benefits provided, there are no differential contribution rates or exclusions from coverage based on the personal health or the disability history of the contributor. In fact, the CPP is one of the least understood income maintenance programs in Canada and the CPP Paper did little to redress this problem.

1. The Consultation Process

The consultation process itself was disappointing, to say the least. The federal, provincial and territorial finance ministers announced the release of the CPP Paper on February 9, 1996, and confirmed that there would be cross-country hearings. However, there was very little public information available on where

86. Released by the federal, provincial and territorial governments of Canada, (February 1996) [hereinafter CPP Paper].


89. See for example, Canada Pension Plan Advisory Board, Extending the Level of Pension Awareness in Canada (Ottawa, 1993) at 11–12 and Report of the Auditor General of Canada to the House of Commons, (Ottawa, 1993) at 490–491.

and how to acquire copies of the discussion paper and the discussion paper itself was not publicly available for more than a week after its "release". The 1–800 number which was established to allow Canadians to access information about the consultation process was advertised on only a handful of occasions. Further, more than a month after the release of the CPP Paper, no information on the form of the consultation process was available. By the end of March, 1996 it was revealed that the consultation process would begin by mid-April and would last for approximately six weeks, but there was no information as to who would conduct the consultations, where they would take place, when they would take place or how they would take place. There was not even any process for organizations and individuals to place their names on a contact list so that such information could be distributed when it became available. Callers to the 1–800 number were told that they might check back in a week or two to see if any further information was available.91

The public hearings which were finally conducted were chaired by David Walker, a federal Liberal MP from Winnipeg. Generally, two MPP's from the province in which the hearings were being conducted also sat on the panel. The hearings featured a combination of brief presentations and a roundtable discussion amongst the participants. Participants were selected by the CPP Consultation Secretariat in order to ensure a "balance" of opinions.92

2. The CPP Paper
The CPP Paper contained a brief overview of the history of the CPP and a review of the issues giving rise to the need for reform. It was explained that the growth of the "cost" of the CPP had exceeded the growth of the rate of contributions to the CPP. This was because of changing demographics,93

91. These observations are based on the author's calls to the 1–800 number and discussions with people at the CPP Consultation Secretariat, which was established to oversee the process.

92. At the hearing which Randall Ellsworth attended in Toronto, there was also an open microphone available for members of the audience to participate with questions and observations. Even on the actual day of the hearings, many of the audience members expressed concern that they had heard nothing about the hearings until that same morning. Even some of the participants had not had their participation confirmed until that morning.

93. For example, people are living longer and therefore retirement benefits are payable for a longer period of time and fewer Canadians are actually in the work force, which means those who are will be required to pay more in contributions in order to support the increasing number of pensioners. See CPP Paper at 20–21.
changing economics, benefit enrichments and increases in the amount and duration of disability benefits.

With no changes to the CPP, the contribution rate was anticipated to rise to 14.2% of covered earnings in 2030, which was considered unacceptable. The CPP Paper proposed changes under two headings: strengthening financing and reducing costs (i.e., benefits).

(a) Strengthening Financing

In short, this meant raising the contribution rates by some amount. The amount that the contribution rates would be raised could be reduced if action was also taken to reduce the costs of the CPP. The CPP Paper advocated an acceleration of the contribution rates to 12.2 per cent by the year 2002. (This rate would be reduced to 10.9 per cent if there was a 10 per cent reduction in benefits and to 10.3 per cent if there was a 15 per cent reduction in benefits.) This was referred to as the "steady state" rate, meaning that once it was reached, it would never have to be altered to keep the plan financially sound. The justification for this proposed "steady state" rate was twofold: it would place more of the financial burden of maintaining the plan on present contributors and ensure that they would pay a greater share of the benefits they would receive and it would result in a larger reserve fund of approximately 6 years' worth of benefits (which would

94. Slower growth in the number of people in the labour force and in labour force productivity resulted in a slower growth in salary and wages. Thus rapid contribution rate increases were necessary to compensate for this slower growth in the contribution base. See CPP Paper at 22-23.

95. These included the full indexation of benefits, expansion of the eligibility for survivor's benefits and the introduction of the child rearing drop-out provision which allowed Canadians who had lessened or terminated their attachment to the labour force in order to care for children under the age of 7 to protect their entitlements under the CPP. See CPP Paper at 23-24.

96. CPP Paper at 24.

97. The year 2030 was presumably chosen as being the year in which all the "baby boomers" would have retired; i.e., 65 years after 1965 which is assumed to be the last year of the "baby boom". The contribution rate of 14.2% would be the "pay as you go rate"; that is, contributions would have to equal 14.2% of covered earnings in order to cover expenditures (benefits) under the CPP in that year.

98. For a more detailed discussion of the history of financing the Canada Pension Plan see R. Ellsworth, "Reforming the Canada Pension Plan: The Search for Fairness and Sustainability...but for Whom?", (April 1996) The I.A.V.G.O. Reporting Service Vol. 10:3 at 17.

produce greater investment earnings and thus remove the necessity to have a higher contribution rate.\textsuperscript{100}

The \textit{CPP Paper} also proposed freezing, reducing or eliminating the year's basic exemption (YBE). At present, no contributions are made by either an employer or an employee on the first $3500 of an employee's earnings.\textsuperscript{101} Freezing, removing or reducing the YBE would mean that low income earners would have to pay an even larger share of their income as \textit{CPP} contributions, although it would expand the number of people who would be eligible for benefits. It would also increase the total amount of contributions to the \textit{CPP} and reduce the need for an increase in the level of the contributory rate.\textsuperscript{102}

(b) Reducing Costs (Benefits)

Not surprisingly, the majority of the recommendations for reducing the payment of benefits under the \textit{CPP} focussed on the retirement and disability pensions, as combined these benefits account for more than 80% of expenditures under the \textit{CPP}.\textsuperscript{103}

(i) Retirement Pensions

The biggest concern with respect to the rising cost associated with the retirement pension was the increasing life expectancy of recipients. On average, people were living 3.1 years longer now than when the \textit{CPP} was introduced in 1966, which resulted in a benefit payout for a longer period of time. Proposals for reducing the payments under this heading included reducing the amount of the retirement pension for new retirees,\textsuperscript{104} reducing the "low earnings dropout",\textsuperscript{105}

\textsuperscript{100} \textit{Ibid.} at 27–28. At present, the reserve fund is equal to approximately two years of benefits.

\textsuperscript{101} This is an implicit subsidization of low income earners by high income earners, because \textit{CPP} benefits are calculated on a person's full level of income, and not just the amount of income upon which contributions are made.

\textsuperscript{102} \textit{CPP Paper} at 30–31. The discussion paper does suggest that the YBE might be replaced by a tax credit through the income tax system to ease the burden on low income earners.

\textsuperscript{103} Retirement pensions accounted for approximately 62% of expenditures in 1996, while disability payments accounted for 19%; see \textit{CPP Paper} at 12–13. The \textit{CPP Paper} also contained a proposal for eliminating the death benefit (at 41). With respect to survivor's benefits it was stated that "fundamental reform would be complex and time consuming", and the review of these benefits was to continue over the next one or two years (at 40).

\textsuperscript{104} \textit{Ibid.}, at 34. At present the benefit rate for retirement pensions is 25% of a contributor's average pensionable earnings. The \textit{CPP Paper} proposed reducing this amount to 22.5%.

\textsuperscript{105} \textit{Ibid.}, at 34–35. At present, any contributor who has contributed for more than ten years
raising the age of retirement and only partially indexing retirement pensions to the rate of inflation.

(ii) Disability pensions
The CPP Paper contained several recommendations which were directed solely at disabled applicants and recipients. The first was changing the eligibility period to qualify for CPP disability benefits. At present, a person can be eligible for a disability pension if he or she has contributed to the Plan in two out of the last three years. The discussion paper proposes changing this to four out of the last six years in order to ensure a greater "attachment" to the labour force (i.e., higher contributions) although it does acknowledge that this would result in less "attachment" to the CPP (i.e., fewer people eligible).

The CPP Paper also contains two proposals which deal with the interaction of the disability pension and the retirement pension. Presently, a disabled recipient receives his or her full retirement pension when he or she turns sixty five. One proposal suggests that disabled recipients should only receive an actuarially reduced retirement benefit, similar to the benefit payable to those who have

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106. Ibid., at 35–36. The CPP Paper proposed raising the retirement age (and thus eligibility for a pension) to 66 or 67 from 65. This change would be phased in gradually, over five to ten years, in order to give those affected an opportunity to adjust their financial affairs. The discussion paper did recognize that some of the "savings" associated with this change would be offset by the necessity of having to pay CPP disability benefits for a longer period of time; i.e., until the disability recipient turned 67. However, another difficulty with the proposal is that such a change in the retirement age would be in direct conflict with people's employment choices, as more people are choosing to retire before the age of 65; see Statistics Canada, Canada's Changing Retirement Patterns (Ottawa: Ministry of Industry, 1996) at 16–17.

107. CPP Paper at 36–37. The paper contained two proposals for deindexing pensions. The first was to limit the indexation of all present and future retirees' pensions to the rate of inflation minus 1 per cent. It was recognized that this approach would have the greatest detrimental effect on those who relied upon the CPP longest (in most cases, this would be women). The second proposal was to limit the partial indexation to a specific period of time (i.e., the next ten years) so that people receiving their retirement pensions during that time period would be making some contribution to "lessening the burden" on younger generations.

108. Ibid., at 38.
taken early retirement. The second proposal involved basing a disabled recipient’s retirement pension on the average wage at the time he or she became disabled (rather than at the time he or she turned 65).

(iii) Drop-out provisions
Along with removing the “low earnings dropout” it was also suggested that the “disability dropout” be reduced or limited. At present, every year in which a person is in receipt of a CPP disability benefit is excluded from the calculation of that person’s retirement pension. The CPP Paper questioned whether only a partial “dropout” should be allowed and whether the combination of the “low earnings dropout” and the “disability dropout” should continue to be allowed. In either case, prohibiting the application of the “disability dropout” would amount to penalizing a person simply for being disabled.

3. Report on the Consultation Process
At the end of the consultation process a report was released which was, essentially, a synopsis of what was heard during the public hearings. The main “themes” which emerged during the consultation included the following:

a) Canadians wanted the CPP preserved and protected as an important part of the retirement income system;

b) the CPP should remain a public pension plan and should not be privatized;

c) at present there is a lack of confidence in the CPP, and Canadians want measures to be adopted to restore that confidence;

d) Canadians have misunderstood the CPP and action should be taken to ensure that they are better informed;

109. Ibid., at 39-40. This suggestion would equate people who voluntary retire (and thus voluntarily accept a reduced retirement pension) with those who are forced out of the work force by reason of disability.

110. Ibid., at 39. In this way the purchasing power of a disabled recipient’s retirement pension would be frozen at the level it was at when the person became disabled. The CPP Paper suggests that this would more closely tie the retirement pension’s value to the work history of the disabled recipient.

111. Supra., note 105.

112. Ibid., at 40.


114. Ibid., at 13-20.
e) compensation for disability should be removed as a benefit under the CPP.115

4. Alternative Proposals

The CPP Paper's proposals were by no means the only proposals for amending the Canada Pension Plan to deal with the changing demographic, fiscal and economic situation. In June of 1996 the Quebec government released its own discussion paper on the Quebec Pension Plan ("the QPP").116 The Quebec discussion proposed raising the contribution rates under the QPP to 10.2 per cent by the year 2004 instead of other options, such as raising the retirement age, reducing benefits and removing inflation protection from benefits.117

The National Council of Welfare also released its own critique of the federal/provincial/territorial proposals for reforming the CPP.118 This critique included the support for a gradual (rather than sudden) increase in the CPP contribution rates and an increase in the size of the earnings base upon which CPP contributions are levied.119 Along with examining the proposals in the CPP Paper, the National Council of Welfare actually proposed increasing the benefits paid under the CPP in order to reduce the level of poverty of some of the CPP's beneficiaries.120

Finally, and perhaps most importantly, the B.C. government added a different dimension to the discussion on reforming the CPP. It proposed raising the ceiling on the YMPE.121 In 1996, the YMPE was $35,400. No contributions were made on the amount of an employee's salary and wages which exceeded $35,400. Raising the YMPE would result in more contributions now to the CPP from higher income earners, but would also entail higher benefits payable to those people when they eventually retired (because their retirement pensions

115. Two independent reasons were given for this position. Some wanted disability benefits removed because they believed that the disabled would be better served by a separate comprehensive program. Others simply wanted to sever the disability pension in order to ensure that funding for the retirement pension was more secure (Ibid., at 18–19).


119. Ibid., at 12–16.

120. Ibid., at 18 and 24–25.

would be based on this higher amount of contributions). The B.C. proposal suggested using this increased revenue to maintain the disability benefit and to continue full indexation for the YBE.122

5. Emerging Consensus(?)

Due to the amending formula established under the CPP,123 the B.C. proposal (and its implicit rejection of the options for reform set out in the CPP Paper) seemed to indicate that a consensus on the appropriate reforms would be difficult to achieve. Such a consensus seemed more difficult because several provinces (most notably Ontario and B.C.) opposed any increase in CPP contribution rates unless there was a corresponding decrease in Employment Insurance premiums.124 In fact, it was reported that an apparent agreement on reform was thwarted because of these two issues.125 Provincial Blackmail", The Toronto Star (8 October, 1996) A18.

By February of 1997, it appeared that an official agreement had been reached, although it is unclear as to when the proposed amendments to the CPP would come into effect.126 The agreement reached seems to contain the following provisions:

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122. E. Greenspon, “B.C. proposes CPP overhaul”, The Globe and Mail (23 September, 1996) A1. Another aspect of the B.C. proposal that does not seem to have received much attention is that it would require more contributions from those very same “baby boomers” who were endangering the CPP’s stability. For the most part, it is people in their mid-30’s and older who would be most likely to be earning more than the present YMPE. More contributions from this group of people would seem to address, at least in part, the “intergenerational fairness” argument so favoured by those who are most opposed to the operation of the CPP in its present form.

123. CPP, supra, section 114. Any federal legislation which affects CPP benefit levels or contribution rates cannot come into effect until the third year after an intention to introduce such measures has been laid before Parliament. Further, any federal legislation which alters CPP benefits, contribution rates or the management of the CPP funds cannot come into effect unless the cabinets of at least two-thirds of the provinces (not including Quebec) representing two-thirds of the population of the provinces (not including Quebec) have signified their consent.


125. 169

126. In his speech to Parliament introducing the draft legislation to amend the CPP, entitled the Canada Pension Investment Board Act, the Finance Minister indicated that the changes would come into effect in 1998; Statement by the Honourable Paul Martin, Minister of Finance to the House of Commons (14 February, 1997). However, legislation pursuant to a notice introduced in 1997 could not come into effect until January,
a) a freeze of the Year’s Basic Exemption at $3500;

b) an increase in the contribution rate to 9.9 per cent of contributory salary and earnings, with the increase to take effect over a six year period;

c) creation of an arm’s length agency to manage the CPP fund, with the fund to be invested in a diversified portfolio of securities;

d) the CPP reserve fund will be increased to the equivalent of 5 years worth of benefits, and provincial governments would still be able to borrow from the CPP Investment Fund, but only at market rates;

e) a reduction in the amount of the retirement pension due to a change in the method of calculating the pension;

f) a reduction in the amount of the disability benefit;

g) tighter administrative eligibility requirements for the disability benefit;

h) an increase in the minimum number of years in which a person must have contributed to the CPP in order to be eligible for a disability benefit (to 4 out of the last 6 years);

i) a disabled recipient’s retirement pension will be based on the average wage at the time he or she became disabled, not at the time when he or she retires, and;

j) a $1000 reduction in the amount of the death benefit.127

These proposals seemed to have the support of all the provinces except for Saskatchewan and British Columbia.128 It appeared that this agreement was made possible because the federal government agreed to the demands of some provinces to link an increase in CPP premiums with a corresponding decrease in EI premiums.129 It was also suggested that the B.C. proposals (and others)

2000. While some of the proposed changes might not necessarily be subject to the three year time limit, arguably some of the proposals would “alter...either directly or indirectly...the general level of benefits provided...or the contribution rate” and so, by reason of section 114(2) of the CPP could not come into effect until 2000.


128. Statement by the Honourable Paul Martin, Minister of Finance to the House of Commons (14 February, 1997).

129. E. Greenspon, “Martin strikes CPP deal”, The Globe and Mail (14 February, 1997) A1. It is important to note that if EI revenue is reduced (through a decrease in EI premiums) and there is a corresponding increase in CPP revenue (through an increase in CPP premiums) the financial burden will be greater for employees than for employers. This is because for every dollar of contributions by an employee under the EI plan the employer
might form the basis of a second round of reforms of the CPP after the financial issues have been dealt with.\textsuperscript{130}

E. CONCLUSIONS

There is no question that, at present, the Canada Pension Plan is an integral part of the social safety net in Canada. It is likely that the recent reforms will be determinative as to whether the CPP will continue to play this role. Clearly, disability benefits will be particularly vulnerable to any restructuring initiatives which take shape in the months to come.

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...contributes 1.4 dollars. Under the CPP, for every dollar contributed by the employee the employer contributes one dollar. Therefore employers make a greater contribution to every dollar of revenue raised under EI than they do under the CPP. Further, an increase in CPP premiums will impact disproportionately on the self-employed, because while they have to contribute to the CPP they do not currently contribute to the EI fund.

\textsuperscript{130} Supra note 128. It is, however, difficult to imagine what interest most of the parties would have in extending benefits after having spent most of this round of reform focusing on curtailing them.
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