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“UNDER SIEGE: CANADA’S PUBLIC PENSION SYSTEM IN 1995”

GWYNETH PEARCE*

RÉSUMÉ
Dans cet article, l’auteure examine l’état actuel des lois concernant le régime gouvernemental de pensions du Canada alors que le gouvernement fédéral évalue diverses options de changements au régime de pensions au sujet duquel on émet constamment des avertissements qu’il est en danger d’effondrement financier. L’auteure étudie les importants développements dans les domaines législatifs, des politiques et des litiges survenus au cours de la dernière année et qui ont trait aux prestations d’invalidité du RPC, aux prestations de retraite du RPC et aux prestations de la Sécurité de la vieillesse. De plus, elle souligne les tendances émergentes et les principales questions à surveiller au cours de l’année à venir.

A. INTRODUCTION
This article is being published on the eve of major change to Canada’s public pension system. Federal and provincial ministers of finance are meeting in the fall of 1995 for a statutory five-year review of Canada and Quebec Pension Plan contribution rates. The federal government is about to release a major paper on aging and the future of the Old Age Security/Guaranteed Income Supplement (OAS/GIS) programme. Change is clearly on the way, but, from a poverty law perspective, this change may appear to be a cost-cutting attack on universality rather than true reform of the system.

* © Copyright 1995, Gwyneth Pearce. Gwyneth Pearce is a research lawyer 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 author and not necessarily those of the Ontario Legal Aid Plan.
B. LEGISLATIVE DEVELOPMENTS AND BLUEPRINTS FOR CHANGE

The government set the tone for changes to come by announcing in its February 1995 budget that an income-based clawback will be built into OAS benefits at source as of July of 1996, based on the recipient's tax return for the year before. In addition, Old Age Security (OAS) recipients will be required to report worldwide income. Further income-testing provisions are expected to be legislated in 1997.¹

The federal government also went ahead this year with some largely procedural changes to the pension system. Bill C-54² was pushed through into law in July of 1995, with all but a handful of sections proclaimed in force. The amendments contained in the Bill permit the government to deem persons of retirement age to have applied for a Canada Pension Plan (CPP) retirement pension where they have been on a CPP disability pension which has been terminated, waive certain information and application requirements for GIS recipients, make CPP and OAS benefits exempt from legal action by creditors, introduce incapacity rules for OAS applications, and permit remedial action in the event of erroneous government advice without the need for a written statement. The loudest opposition to Bill C-54 was directed at provisions expanding the classes of people who will be entitled to disclosure of personal information about CPP and OAS recipients.³

The focus of proposals for future substantive change to the CPP system has been the potential for increases in contribution rates. For 1995, the combined employee-employer contribution rate was 5.4% of contributory earnings. However, other proposals are likely to be on the table, including raising the retirement age from 65 to 70, downsizing survivor's pensions, eliminating the year's basic exemption, and changing drop-out provisions.⁴ In addition, it is likely that the


3. Privileged CPP and OAS information may now be made available to Statistics Canada and Canada Post employees. In addition, CPP information may be released to "a person designated by the Minister as a health care professional". Advocates for the disabled have expressed concerns that this latter provision is subject to misuse, as there do not appear to be any guarantees that information will not be released to health care professionals who are adverse in interest to the disabled person: Council of Canadians with Disabilities, "Presentation to the Standing Committee on Human Resources Development of the Parliament of Canada" (21 February 1995).

government will be considering recommendations specifically aimed at the CPP disability pension scheme. Those recommendations include income-testing for disability pensioners, finding cost-effective ways of verifying continued disability, reviewing the divergence of experience between the CPP and QPP, and reviewing the entire role of CPP disability benefits in light of existing Unemployment Insurance and Workers’ Compensation schemes.\(^5\)

In the February budget, the government indicated that future reform of Canada’s pension system will be guided by several principles, including: undiminished protection for poorer seniors, continued full indexation of benefits, calculation of OAS benefits on the basis of family income rather than individual income, greater cuts to higher income earners, and reduced program costs.

The drive to remodel Canada’s public pension system is being fuelled by warnings that the system is “going broke”. In February of 1995, the Chief Actuary of the Superintendent of Financial Institutions released its latest report on the health of the CPP.\(^6\) The report warned that the CPP would run out of money in 20 years if contributions were not increased, and that annual expenditures were expected to rise from 7.8% of annual contributory earnings in 1995 to 11% of annual contributory earnings in 2015 and to 14.2% of annual contributory earnings in 2030, when the aging of the population is expected to stabilize. Documents released about the same time in support of the federal budget indicated that the cost of providing OAS and GIS benefits at current rates would increase by 60% by the year 2000.\(^7\)

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6. The Canada Pension Plan requires that an actuarial report be prepared every five years for the purposes of the finance ministers’ contribution rates review. This report, which was tabled in the House of Commons on February 24, 1995, was based on data as of December 31, 1993. There is a separate requirement in the Canada Pension Plan for a periodic actuarial report to be prepared every three years. The previous triennial report was released in April 1993.
7. Supra, note 1.
C. CPP Disability Benefits

The Chief Actuary's report indicated that the most significant factor affecting the cost of the CPP in recent years has been the increasing cost of CPP disability benefits. There has been a marked rise in both the number of new disability cases and the average duration of disability benefits. The increasing cost of CPP disability benefits has been attributed to various factors, including a push by provinces to reduce welfare rolls by encouraging CPP applications, an increase in findings of disability with less physical evidence and a less restrictive definition of disability.

Clearly, however, the gradual expansion of the definition of disability alluded to by the Canadian Institute of Actuaries is now slowing down, if not at a standstill. The political momentum to cut disability pension costs has been mirrored in the past year by a backlash at the Pension Appeals Board.

1. Litigation Developments

(a) Retreat from the "Real World"

The most disturbing trend reflected in the Pension Appeals Board's (PAB) decisions of the past year is a shift away from the "real world" approach to determining whether a CPP disability applicant is capable of pursuing any substantially gainful employment.

In its early jurisprudence, the PAB consistently took the position that it would only consider whether the applicant was capable of doing some kind of substantially gainful employment, and not whether such employment was actually available in the area. The following reasoning in Minister of National Health and Welfare v. MacNeil was typical:

The decision cannot be based on the applicant's usual job, nor indeed on any specific job. Neither can it be based on the availability of suitable work. As we have stated before, it is not necessary that the type of light work is available to him; what is important is that that type of light work exists.

8. From 4.28 per 1000 in 1989 to 6.34 per 1000 in 1994, for males, and from 2.99 per 1000 in 1989 to 5.79 per 1000 in 1994, for females.

9. Up about 6% over the past 6 years.

10. Canadian Employment Benefits & Pension Guide, supra at 5. Clearly, as we noted last year in Review 1994, changes to one program have implications for other programs. If access to CPP becomes more restricted, we can expect to see an increase in demand for provincial social assistance. See S. McCarthy, "Pension Crunch", The Toronto Star (14 August, 1995) at C1-2.


13. Ibid. at 6177.
This reasoning was reiterated in several subsequent decisions.\textsuperscript{14}

In the late 1980's, the PAB appeared to move toward a more realistic approach to determining whether an applicant was capable of pursuing any substantially gainful occupation. In the leading case of \textit{Leduc v. Minister of National Health and Welfare},\textsuperscript{15} the PAB stated,

\begin{quote}
The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, peopled by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case.\textsuperscript{16}
\end{quote}

The PAB followed the \textit{Leduc} lead in a long line of subsequent cases, such as \textit{Minister of National Health and Welfare v. Bilinski},\textsuperscript{17} where it found that it was "not probable in the current modern world"\textsuperscript{18} that the appellant would find light work.\textsuperscript{19}

The approach adopted in the \textit{Leduc} line of cases properly takes into account the circumstances of each applicant and is more in accord with the legislative language, which refers to "the person in respect of whom the determination is made".\textsuperscript{20} Arguably, it is also more in line with the written policy, if not the

\begin{enumerate}
\item \textsuperscript{15} (1988), C.E.B. & P.G.R. 8546.
\item \textsuperscript{16} \textit{Ibid.} at 6022.
\item \textsuperscript{17} (1988), C.E.B. & P.G.R. 8561.
\item \textsuperscript{18} \textit{Ibid.} at 6043.
\item \textsuperscript{20} Section 42(2)(a)(i) of the \textit{Canada Pension Plan}, R.S.C. 1985, c. C-8.
\end{enumerate}
practice, of the Ministry concerning disability determination. However, this past year has seen a retreat from the “real world” approach back towards the strict “capability” approach seen in the early PAB cases. In The Minister of Employment and Immigration v. Campoverde, the PAB held that:

Section 42(2)(a)(i) is concerned solely with the “capability” not the “likelihood” of the applicant regularly pursuing any substantially gainful occupation. It is a question of “capability” which is the proper subject of the expert medical opinion. The issue of “likelihood” is quite irrelevant to the criteria set forth in Section 42(2)(a) defining when a person is deemed disabled.

Similar reasoning may be found in two other recent decisions, Wolfe v. The Minister of Employment and Immigration and Giampa v. The Minister of Employment and Immigration. If it continues, this movement away from the “real world” approach will clearly make it more difficult for applicants to establish eligibility for CPP disability benefits. In particular, the PAB may prove to be less receptive over the coming months to statistical evidence as to the state of the job market and the demographics of employment, and more focused on strict medical findings.

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22. Ministry policy guidelines (Appendix 2-3-C in the CPP Operations Manual) state:

- “Any” (substantially gainful occupation)

  Means an occupation in which the individual might reasonably be expected to be engaged by virtue of:

  (i) possessing the necessary skills, education or training; or

  (ii) having the capacity to acquire the necessary skills, education or training in the short-term whether on the job or otherwise; and

  (iii) having reasonable access to suitable employment given the individual’s limitations.

Note 1. In theory employment suited to any person could be found to exist somewhere. It is not however, the responsibility of the administrators of the Canada Pension Plan to identify or devise rare or exotic occupations for which an individual might be suited. Rather, practical and realistic judgment must be used in matching the capability of the individual to existing occupations.

Some caseworkers may not be aware of the Ministry’s policy position on this and other issues. One of the persistent problems faced by CPP advocates is the difficulty in obtaining adequate access to Ministry policy materials, which are not publicly distributed.


24. Ibid. at 6042-3.

25. (16 May 1994), Appeal: CP 3028 (Pension Appeals Board) [unreported].

(b) Psychological Problems

Another apparent trend in the PAB caselaw which gives cause for concern is an increased scrutiny of disability claims based on psychological problems.

The PAB has held in several cases that psychological problems not founded in "objective" physical complaints cannot be the basis for a finding of disability unless they amount to a medically recognized and diagnosed mental illness.\(^{27}\) All too often, the PAB has characterized appellants' problems as the results of "functional overlay" and "psychogenic components" and subject to a "healthy measure of skepticism".\(^{28}\)

A prime example of this Board "skepticism" is the decision released by the PAB this past year in Giampa.\(^{29}\) In that case, the appellant complained of constant generalized pain. One of the reports on file diagnosed a "classical l'homme doloureux syndrome". The report went on to characterize her condition as a "life choice posture ... not ... a disease entity". The Board held that there was insufficient medical evidence to find the appellant disabled, and suggested that her problems were "subjectively caused", stating:

> In my view, the Appellant must establish that her incapacity to engage in gainful occupation must have as its cause her physical condition or a psychological condition which the Appellant is unable to overcome by reasonable conduct on her part. If, however, her failure to engage in a gainful occupation arises from a psychological problem which exists or continues because the Appellant, for some reason (such as gaining sympathy or compensation), wishes the condition not to end, then the Appellant's incapacity must be viewed as subjectively caused. One who suffers from a psychological problem which it is within her ability to overcome, cannot be considered disabled in the sense that those terms are used in the Canada Pension Plan.\(^{30}\) [emphasis added]

Another decision this past year in somewhat the same vein was The Minister of Employment and Immigration v. Iannetti,\(^{31}\) in which the appellant's claim for CPP disability benefits was denied, despite medical evidence that he was suffering from personality disorder and chronic anxiety neurosis. The PAB

\(^{27}\) See, for example, Minister of National Health and Welfare v. Menard (1980), C.E.B. & P.G.R. 8805.


\(^{29}\) Supra, note 25.

\(^{30}\) Ibid. at 6047.

concluded that although he had no will to work, his capacity to work was "unfettered".\textsuperscript{32}

These are dangerous decisions, because they introduce a potential new barrier to disability claims for psychological problems, by suggesting that applicants must prove not only that they are disabled but that they are unable to overcome their disability. This proposition is arguably contrary to the general PAB jurisprudence that a disability does not have to be "permanent", and places an undue burden on applicants with psychological disabilities.

(c) **Evidence**

There were some positive points to report in the PAB caselaw on the evidence needed to support disability claims this past year.

In *Johnson v. The Minister of Employment and Immigration*,\textsuperscript{33} the PAB expressly rejected the contention that expert psychiatric or psychological evidence was necessary to a CPP disability claim based on chronic pain, although it ultimately agreed that the medical evidence fell short of showing that the appellant was disabled.

In *Smith v. The Minister of Employment and Immigration*,\textsuperscript{34} the PAB explicitly recognized that it may not be possible to obtain objective clinical evidence of some conditions which are nevertheless significantly disabling. The PAB found the appellant in that case to be disabled on the basis of low back pain, while acknowledging:

\[
\text{[I]t is of some considerable notoriety that the diagnosis of mechanical low back pain is regularly made and medically accepted without the benefit of objective clinical findings.}
\]

(d) **Incapacity**

The PAB released its first decision this past year on the substantive requirements for "incapacity" under the CPP.

The relatively new provisions in the CPP legislation dealing with incapacity\textsuperscript{35} permit the Minister to deem a disability benefits application which was late because of the applicant's incapacity to have been made at an earlier date. However, there are no guidelines in the legislation to determine what constitutes

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\textsuperscript{32} *Ibid. at 6064.*


\textsuperscript{34} (1994), C.E.B. & P.G.R. 8565.

\textsuperscript{35} Sections 60(8) to 60(11) of the *Canada Pension Plan, supra*, note 20. Section 55.3(1) to 55.3(4) contain similar provisions for persons making late application for division of pension credits because of incapacity.
incapacity, beyond the requirement that incapacity be for a "continuous period". The Ministry has taken the policy position that "continuous" has its "ordinary" meaning of "without interruption". This suggests that any period of capacity, no matter how brief, could bring a period of incapacity to an end and trigger the application time-limits.

In *The Minister of Employment and Immigration v. Hudon*, the appellant suffered from chronic post-traumatic stress disorder and a paranoid disorder precipitated by a mining accident. The PAB held that the appellant was not incapacitated within the meaning of the CPP, pointing out that he was capable of presenting himself to his doctor during the period in question with a wide range of health complaints, that he was intermittently employed at the same mine following the accident and during the period in question, and that he was ultimately capable of applying for CPP benefits without any change in his medical condition. Although this decision does not provide a clear definition of incapacity, it does offer some toeholds for advocates.

One of the issues which may arise in the coming year is how the incapacity provisions interact with the general provisions on late applications under the CPP.

(e) **Attendance at School**

The PAB has typically upheld decisions based on the government’s policy of equating "regular" attendance at an educational institution with "light work". Thus, as a rule, evidence that a disability pension applicant was attending school at the time of application has almost automatically resulted in a denial of benefits.

However, in one important case this past year, the PAB acknowledged that a capacity for study does not necessarily indicate a capacity for employment. In *Elwood v. The Minister of Employment and Immigration*, the PAB found that


37. Policy Directive #04/92-CPP-03 was apparently issued in 1992 but, as usual, was not publicly released and has only recently come to the attention of most advocates.


39. In *Policy Directive #26/92-CPP-17*, which went into effect on June 26, 1992, but, again, has only recently come to the attention of CPP advocates, the Ministry adverted to this issue and noted somewhat cryptically:

   When reviewing some disability cases, it is possible that both [the late application] provision and the incapacity provision may come into play. Where both provisions apply, the incapacity provision will prevail.

a 25-year-old paraplegic who was able to take a 60% course load at university was still disabled for the purposes of the CPP. The PAB stated:

The principle that one can deduce from these previous decisions is that full-time attendance at an educational institution amounts to a persuasive indication of a capacity to work. Other factors must be considered such as the degree of incapacity, the study load, the difficulty in attendance and participation in the program, etc.

It is also necessary to keep in mind that persons suffering from a disability do not remain static. They must occupy themselves, try to improve their lot, be active. Such activity does not necessarily indicate a capacity for regular employment.41

2. **Policy Developments**

Meanwhile, the federal government has changed its own policy on disability pensioners and school. New policy directives went into effect on August 31, 1995, as part of what was billed as a general effort to remove work disincentives from the CPP.42 The policy directives state that disability pensioners will not be disentitled solely on the basis that they are attending school or university, where there has been no medical improvement.43 This appears to be a welcome move. However, it should be noted that recipients who undertake schooling as a rehabilitation initiative run the risk of being deemed capable of engaging in substantially gainful employment after the schooling is completed, whether or not it has in fact made employment any more attainable.44 Thus, skeptics might view the policy changes as being primarily part of a strategy to reduce the CPP

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42. The preamble to the Policy Guidelines ("Removing Work Disincentives: CPP Disability Benefit"/"Élimination des Contre-Incitations au Travail: Prestation d'Invalidité du RPC") states that the guidelines are "designed to assist beneficiaries with social integration and vocational rehabilitation measures". Human Resources Development Minister Lloyd Axworthy, announcing the policy measures in the spring of 1995, pledged (*News Release #95-22 (7 April, 1995)*):

> The removal of barriers to employment continues to be a high priority for me. Persons with disabilities should have equal opportunity to work, to retrain and achieve self-reliance.

43. Some CPP beneficiaries are already receiving disability benefits while attending school on a full-time basis, through the CPP vocational rehabilitation pilot project: *Review 1994, supra* note 4 at 42-3.

44. The Policy Guidelines indicate that beneficiaries will be expected to notify CPP when a program has been successfully completed. Reassessment will follow, and if the person is found to have regained the capacity to work "through obtaining more transferable work skills", benefits will cease.
disability pension rolls rather than a strategy to improve employment prospects for recipients.

The school policy was one of four policy initiatives aimed at increasing access to the job market, which were announced by the government this past spring and became effective in August. The other policy changes are that disability pensioners will no longer be subject to reassessment solely for taking part in volunteer activities, that pensioners who return to work will be entitled to continued benefits for a three-month trial period to test their capacity for work, and that pensioners with recurrent or degenerative disabilities who attempt a return to work will be entitled to re-apply for benefits on a fast-track basis in the event of a recurrence. There are certain time-limits on this last fast-track policy. Individuals must re-apply within 6 months of stopping work, and within 5 years of the initial termination of benefits. In most cases, persons re-applying in the event of a recurrence will meet earnings and contributions requirements because they will be entitled to a “disability drop-out”. However, it is not yet clear how the CPP will deal with persons who initially qualified only under late application provisions.

All of these changes are to policy only. No statutory or regulatory amendments have been made. Therefore, the underlying eligibility test for CPP disability remains the same: whether an individual is “incapable regularly of pursuing any substantially gainful occupation”. This test may be rewritten if the federal government gives serious consideration to the possibility of permitting individuals with disabilities to undertake part-time work and receive partial CPP benefits. Advocates should be prepared for new problems and issues related to re-entry of the workforce as the policies begin to be implemented in the year to come.

D. CPP Retirement Benefits

Under the current rules of the CPP, contributors may obtain a full retirement pension at the age of 65, and are eligible for a partial pension as of the age of 60. But the concept of working up to “retirement age” at 65 is now increasingly

45. Where a contributor is applying for a disability pension, he or she is entitled to “drop out” from his or her contributory period any months during which the contributor was “disabled”: section 44(2)(b)(iii) of the Canada Pension Plan, supra note 20.

46. The Policy Guidelines flag this issue and indicate that an internal legal opinion has been requested. The Guidelines suggest that in appropriate cases, a late applicant’s work period may be treated as a “failed work trial” to permit continued eligibility.

47. Human Resources Minister Lloyd Axworthy, addressing the Standing Committee on Human Rights and Status of Disabled Persons on November 9, 1995, on the issue of CPP reform, indicated that the government would like to explore “the notion of partial benefits for CPP recipients” as an incentive to get disabled persons into the work force.
illusory. Statistics show that about two-thirds of Canadians now retire from the work force before the age of 65, and one-third retire before the age of 60. For many Canadians, inability to find work paves the way to retirement, and retirement is in reality “disguised unemployment”, which leaves little room for individual choice. Ironically, the income security provided by CPP retirement benefits is being threatened by proposals for “reform” even as more and more Canadians are being forced into retirement because of the employment market.

The combined impact of demographic trends and threatened cuts will unquestionably increase the numbers of CPP applicants seeking legal assistance to pursue their claims for benefits in the months and years to come. Three of the key issues arising in this area are likely to be the eligibility test for early retirement benefits, the availability of pension credit-splitting, and the extension of benefits to surviving spouses.

1. **The “Wholly or Substantially” Test**

In order to be eligible for a retirement pension before the age of 65, an individual must demonstrate that he or she has “wholly or substantially” ceased working. This test was seen as a compromise between the need to advance the general purpose of retirement benefits, as replacement income for individuals who had withdrawn from the workforce, and the need for flexibility to accommodate different retirement choices.

Ministry policy states that:

> For the purposes of administering Section 68.1, a person is considered to have “wholly” ceased employment if he/she has ceased to be engaged in any form of paid employment or self-employment at the end of the month prior to the month the pension is to commence.

The word engaged is taken to mean actively working. It should be noted that a person will not be considered engaged during a period of annual, sick or retirement leave that takes place between the last day at work and the formal terminative date.

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49. Sections 67(2)(c) and 68.1 of the *Canada Pension Plan, supra* note 20.


51. This is an excerpt from an apparently un-numbered and undated policy directive titled “Flexible Retirement.”
An applicant is considered to have "substantially" ceased working if he or she is earning not more than 25% of the average YMPE for the past three years - in other words, not more than the current maximum annual retirement pension payable at age 65.52

The interpretation of the term "substantially" may have an increasing impact on the choices made by Canadians considering retirement. Statistics show that current trends towards opening up the employment market to more part-time and temporary jobs have touched older as well as younger members of the workforce. A growing number of older workers are reducing their hours and thus "opting for a gradual transition into retirement".53 A strict interpretation of the early retirement test would have the effect of making this gradual retirement option unaffordable for many older workers, who would be unable to supplement their reduced incomes with CPP funds.

The government has traditionally taken the position that the purpose of the CPP is to replace lost income and not to supplement reduced income.54 However, this becomes an increasingly artificial distinction as the concept of retirement becomes increasingly notional. An individual who has been found eligible for and has begun receiving an early retirement pension may continue to receive it even if his or her earnings increase beyond the threshold pension level. Thus, early retirees may return to work to supplement their income after taking early retirement without affecting their CPP benefits, although they are not permitted to build up further CPP credits from their work earnings. The current CPP rules may force more and more older workers into taking a premature full retirement rather than a gradual retirement, as they might have preferred. Many of these retirees may find themselves looking for work again at some point in the future.

2. Pension Credit-Splitting
One area of CPP law that regularly produces a considerable amount of litigation and may be expected to continue to do so in the coming year is pension credit-splitting. This is an issue that particularly affects Canadian women, many of whom are now facing a bleak future with inadequate retirement incomes. A federal study commissioned by the Canadian Advisory Council on the Status of Women, released this past spring, found that 70% of Canadian women aged 45 to 54 were in the labour force in 1991, but half of those earned less than $20,000

52. Section 54.3 of the Canada Pension Plan Regulations, C.R.C. 1978, c. 385 [hereinafter CPP Regulations]. The maximum annual retirement pension payable in 1995 was $8558.28.


a year. Middle-aged working women were described as a generation "making the transition from a 'traditional' role to a more self-sufficient role", and unable to build up adequate pension savings in the process. The report, authored by pension expert Monica Townson, concluded that the current wage gap between men and women will translate into a pension gap when the women retire, and recommended mandatory credit-splitting between spouses once the younger spouse reaches retirement age.\(^5\)

The process of division of unadjusted pensionable earnings, more commonly referred to as "DUPE" or credit-splitting, is now available to spouses or common-law partners who have separated or divorced since January 1, 1978. If a division is ordered, all unadjusted pensionable earnings attributable to both partners during the time they were together are totalled and split equally, subject to annual maximums.\(^5\) Thus, the person who accumulated the fewest CPP pension credits during the marriage or common-law relationship benefits.

(a) **Spousal Agreements**

However, depending on the circumstances, a spousal agreement may prevent credit-splitting from taking place. In order for a spousal agreement to effectively bar credit-splitting: (1) it must include a provision which expressly refers to the CPP and indicates the spouses' intention that there be no credit-splitting, (2) the provision must be expressly permitted under governing provincial legislation, and (3) the provision must not have been invalidated by a court order.\(^7\)

The few PAB cases to date interpreting these requirements are inconsistent in approach. In *The Minister of National Health and Welfare v. Orr*,\(^5\) the PAB was willing to overlook poor draftsmanship of a spousal agreement to find that it was the clear intention of the parties that there be no division of credits. In that case, the agreement contained a clause stating that the spouses agreed to:

\[...
\text{give up and relinquish any claim to any benefits each may have against the other's Canada Pension or any other pension plan.}
\]

\(^5\) *Canadian Employment Benefits & Pension Guide* No. 413 (24 April, 1995), at 3-4; "Women face poverty, study says", *The [Toronto] Globe and Mail* (18 April, 1995) at A10. The study also recommended increasing CPP benefits for low-income earners and raising the combined benefits under the OAS and GIS programs to at least the poverty level.

\(^5\) Sections 55(4) and 55.2(5) of the *Canada Pension Plan*, supra note 20.

\(^7\) Section 55.2(3) of the *Canada Pension Plan*, supra note 20. Note that these provisions apply only to spousal agreements dated on or after June 4, 1986. Different rules apply to earlier spousal agreements.

The PAB found that this clause met the first requirement of a binding spousal agreement despite the lack of any express section reference and the fact that it was located under the heading “Release From Claims Arising out of Death of Parties” rather than in another more appropriate part of the document. Similarly, in *Minister of National Health and Welfare v. MacBean*\(^5\) the PAB held that a general clause releasing the spouses from all claims on each other’s property “including … pensions including Canada Pension Plan …” was sufficient to meet the statutory requirement of express reference to the CPP.

However, in other decisions, the PAB has applied this requirement more strictly. In *The Minister of Employment and Immigration v. Taylor*,\(^6\) a separation agreement between the parties included the following provision:

> Neither the Husband nor the Wife shall make any claim or demand on any pension in the name of, for the benefit of, or accruing for the other, and each party acknowledges and agrees that any and all pensions are the sole and exclusive property of the party who has such in their name.\(^6\)

The PAB held that although there was evidence that it was the intent of the parties to waive any claim to each other’s CPP credits, the agreement could not bar a division of credits, as:

> The provision in the agreement does not mention the *Canada Pension Plan*. The words *Canada Pension Plan* would have to appear in an agreement for the Act to be expressly mentioned.\(^6\)

The PAB has been more consistent in ousting spousal agreements on the basis of the requirement of express language in governing provincial legislation.

In the *MacBean* case, the PAB held that:

Subsection 55.2(3)(b) requires provincial law to expressly permit a provision in a spousal agreement of the sort contemplated by subsection 55.2(3)(a). That subsection contemplates a very specific provision, one which mentions the Act called *Canada Pension Plan* and one which indicates an intention with respect to a division under that Act. Accordingly, provincial law which does not speak of such a term in an agreement with a similar degree of specificity, will not be sufficient.\(^6\)

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63. *Supra* note 57 at 5965.
In *Minister of National Health and Welfare v. Blackwood*, Minutes of Settlement between the parties included a clear statement that neither party intended to seek a division of CPP pension credits. However, the governing provincial legislation, the Alberta *Matrimonial Property Act*, made no mention of the CPP or indeed any type of pension. The PAB held that as there was no mention of pensions in the legislation, it could not be said that the legislation contained an "express" permission of spousal waivers. The spousal agreement was therefore ineffective to bar a division of pension credits. An appeal from this decision was dismissed by the Federal Court of Appeal.

It seems clear that Ontario's *Family Law Act* does not "expressly" permit spousal waivers of DUPE rights. This conclusion is implied in the decision of the Divisional Court in *Albrecht v. Albrecht*, which found that the appellant wife was entitled to split her husband's CPP credits although she had signed a general release, and that no court order could produce a contrary result. The Ontario Law Reform Commission has recommended against enacting legislation in Ontario specifically permitting spouses to waive mandatory division at source.

(b) Minister's Discretion

Until July 1995, the Minister had a residual discretion to refuse a DUPE or cancel a DUPE within 60 days of the order if satisfied that the division would be "to the detriment of both spouses or former spouses". It was unclear in what circumstances this discretion might apply, but it was arguable that it could be relied on to challenge any DUPE. The provision is now much more specific. The Minister can only exercise the discretion to refuse or cancel a DUPE if satisfied that benefits are payable to both parties and that a DUPE would result in a decrease of benefits for both parties.


69. Section 46(3) of the CPP Regulations, *supra* note 50. Note that the PAB was able to circumvent this time-limit in *Minister of National Health and Welfare v. Bidon* (1994), C.E.B. & P.G.R. 8535 by treating a spouse's request for a cancellation as a request for a reconsideration rather than a request under section 46(3), which, according to the PAB applied to Minister-initiated cancellations only.

70. Section 55.1(5) of the *Canada Pension Plan*, *supra* note 20.

71. Section 55.1(5) as amended by Bill C-54, *supra* note 2.
In a significant decision this past year, the PAB suggested that another layer of Ministerial discretion is built into the DUPE decision process. In Wiemer v. The Minister of Employment and Immigration, the parties had entered into a separation agreement after a 17-year common-law relationship. The agreement included a general release clause but did not specifically mention the CPP. The PAB held that whenever the legislation provides that a DUPE shall take place "following the approval by the Minister of an application", the Minister must exercise discretion and decide whether or not to approve the application on the basis of the circumstances and merits of the case. The PAB acknowledged that the spousal agreement was not binding under the statutory requirements, but held that its provisions should still be given "due consideration" by the Minister in determining whether to approve a division, stating:

The decision should be based on the particular circumstances of the case including the intentions of the parties in establishing their conjugal relationship, their intentions in terminating it, the nature of any agreement entered into and the degree of finality to the relationship which the parties intended.

The PAB held that the Minister had simply ignored the spousal agreement after finding that it did not meet the statutory requirements and therefore referred the matter back to the Minister for further consideration.

While the Wiemer case seems to open the door to equitable arguments at the PAB, fundamental principles of statutory interpretation dictate that any exerc...

72. This decision is doubly significant because it marks a shift away from the PAB's traditional reluctance to interfere with or compel the exercise of Ministerial discretion. See Minister of National Health and Welfare v. Benovich (1993), C.E.B. & P.G.R. 8510 and O'Brien v. Minister of National Health and Welfare (1993), C.E.B. & P.G.R. 8519.


74. In other words, under sections 55.1(1)(b) and 55.1(1)(c) of the Canada Pension Plan, supra note 20.

75. This discretion is not evident in the statutory language. Section 55.1(1) states that a DUPE shall take place following approval by the Minister. Section 54.2(1) of the CPP Regulations, supra note 50 states that the effective date of the approval of a DIPE is the last day of the month in which the application is received. This suggests that "approval" may have been intended to be simply a time-triggered event, rather than a determination on the merits.

76. Wiemer, supra note 71 at 6030.

77. In other decisions to date, the PAB has generally proved unreceptive to arguments based on equitable factors. In The Minister of National Health and Welfare v. Svendsen (1986), C.E.B. & P.G.R. 8510, the PAB held that an agreement barring credit-splitting was binding on the appellant despite her spouse's failure to comply with maintenance obligations under the same agreement. Similarly, in Sobieski v. The Minister of Na-
exercise of discretion by the Minister should be informed by the intent behind the credit-splitting scheme. Credit-splitting was introduced in 1977 with the intent of providing some financial security for spouses who had not worked outside the home and had not had the opportunity to make direct contributions to the CPP.78 This original intent was reinforced by legislative amendments in 1986, which had the effect of preventing contributors from relying on general property waivers in spousal agreements to avoid credit-splitting.79 It is arguable that, while the Minister should give full consideration to the merits and circumstances of each case, the Minister should be reluctant to thwart legislative intent by depriving spouses of access to CPP credits.

At best, it could be said that there may be instances where a division, as argued by Mr. Hannah, will produce unfair results. But it is a fact which has already been stated by this Board that an equal division does not necessarily produce a fair result. One only needs to hear evidence from the parties to these "division of unadjusted pension earnings" cases to realize that sometimes a spouse should have more than half and sometimes less. However, the law must be certain and an equal division is certain; it thus achieves justice according to law. This Board has in the past and in the face of certain inequities upheld the principle of equal division. I see no reason to depart from that principle in this case, even though it may be that some of the divided earnings of Mr. Hannah will not be used by Mrs. Hannah. By statute, she is entitled to the benefits of the division and therefore to use the benefits as she pleases.


79. In part, these amendments were a response to the PAB decision in The Minister of National Health and Welfare v. Preece (1983), C.E.B. & P.G.R. 8914. In the Preece decision, the PAB took the position that where a spouse had made a general release of his or her right to claims on the other spouse's property in a spousal agreement, the spouse should be deemed to have waived any future benefit which could arise from credit-splitting. The Preece decision and the decisions which followed it had a significant impact on many spouses who found that they had unintentionally signed away their future CPP rights.
3. **Survivor’s Pension**

The Pension Appeals Board rejected a challenge under the *Canadian Charter of Rights and Freedoms (Charter)* to the rules on CPP survivor’s pensions this year. Currently, a survivor’s pension is only payable if the applicant was, at the date of her late spouse’s death, 35 or over, or under 35 and either disabled or the main provider for one or more dependent children of the deceased. The age of the applicant at the date of her late spouse’s death determines the amount of survivor’s pension payable as well as basic eligibility. Applicants over 45 are entitled to a greater pension than those under 45, on a sliding scale.80

In *Law v. The Minister of Employment and Immigration*,81 the appellant’s husband had died when she was only 30 years old. She had no children and was not disabled, and was therefore found ineligible for a CPP survivor’s pension. The appellant argued that all of the age-related features of the survivor’s pension rules discriminated on the basis of age, contrary to section 15 of the *Charter*. The PAB held that while there was an age-related distinction in the CPP rules, it did not amount to discrimination in the constitutional sense, and, even if it did, any violation would be justified under section 1 of the *Charter*. Again, the PAB appeared to have been motivated in large part by concerns for the public purse. It was clearly significant to the members of the PAB that if the age-based restrictions on survivor’s benefits were to be thrown out, expenditures under the CPP would increase, according to the evidence in the case, by $60 million a year in 1995 and by up to $213 million in 2020.

### E. Old Age Security

Statistical reports predict that 15% of Canadians will be 65 or older by the year 2011, and a full 23% will be 65 or older by the year 2031.82 The federal government may be justifiably concerned that its plans to erode the universality of OAS benefits by increased use of income-testing will unleash another wave of “grey” revolt.

In comparison with the volume of decisions on CPP disability and retirement benefits, there is very little caselaw on OAS and GIS benefits. This may change over the coming months and years if the old age benefit scheme is overhauled. At present, there are really only two key issues involving OAS and GIS benefits:

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80. The pension of a surviving spouse between the ages of 35 and 45 is reduced by 1/120th for each month that she was under 45 at the date of her late spouse’s death.


82. Schellenberg, *supra* note 46 at 1. The percentage of working-age Canadians who are 65 or over is projected to rise to 38.9% in 2030: *Troubled Tomorrows - The Report of the Canadian Institute of Actuaries’ Task Force on Retirement Savings* (January 1995), at 11.
the meaning of "residence" and the definition of "spouse". There were significant decisions relating to both of these issues in the past year.

1. "Residence"
To qualify for a full Old Age Security (OAS) pension, the basic rule is that an applicant must have resided in Canada for at least 40 years after turning 18.83 An applicant who cannot meet the 40-year requirement may be eligible for a partial or pro-rated pension by establishing that he or she has resided in Canada for at least 10 years after turning 18. A person is generally defined as residing in Canada if he or she "makes his home and ordinarily lives in any part of Canada",84 but certain absences from Canada are deemed not to interrupt residence, including absences "of a temporary nature" not exceeding one year.85

The Federal Court held this year that the temporary absence exemption could not be used to automatically exclude applicants with absences of more than one year. In Perera v Canada (Minister of Health and Welfare),86 the applicant arrived in Canada as a landed immigrant in 1981. He travelled to his country of origin in 1986 in order to finally dispose of some family property, but was prevented from returning to Canada by civil war until the end of 1989. The Ministry and a Review Committee held that he could not satisfy the residency requirements for a pension.87 The Federal Court, Trial Division, held that the applicant could apply for certiorari to quash the Review Committee decision, stating:

Whether or not the individual makes his home and ordinarily lives in Canada is a question of fact to be determined in the particular circumstances. Obviously, absence from Canada in excess of the one year period is a factor to be considered, however, it is not determinative of the question.88

This is a welcome decision because it refocusses attention on the need to examine individual circumstances in determining the place of ordinary "residence", and limits the impact of the arbitrary one-year rule for temporary absences.

84. s. 21(1)(a) of the Old Age Security Regulations, C.R.C. 1978, c. 1246, as amended [hereinafter OAS Regulations].
85. Ibid. s. 21(4)(a)
87. In this case the relevant rules were the pre-1977 rules as set out in s. 3(1)(b)(iii) of the OAS, supra note 81.
88. Perera, supra note 84 at 313.
2. "Spouse"

Unlike basic OAS benefits, at least for the time being, the GIS is tied to family income. If a pensioner is "married", the amount of GIS which he or she is eligible to receive depends to a certain extent on the income of his or her spouse. The issue of the definition of "spouse" is also key to eligibility for secondary OAS benefits, including the Spouse’s Allowance and Widowed Spouse’s Allowance.

The term "spouse" is defined as including common-law relationships as well as "legal" marriages, but only where: (1) the "spouses" are of the opposite sex, (2) the "spouses" are living with each other and have lived with each other for at least a year, and (3) the "spouses" have "publicly represented themselves as husband and wife".

The Supreme Court of Canada released its decision this year in Egan v Canada, a case in which a same-sex partner was seeking a Spouse’s Allowance under the OAS Act. It was a bittersweet triumph for same-sex rights. For the first time, the court recognized that sexual orientation was an analogous ground protected by section 15 of the Charter. But the majority of the court went on to uphold the definition of "spouse" in the OAS Act as constitutional. Five of the nine judges found that the definition of "spouse" infringed section 15. However, one of the five, Sopinka J., found that the infringement was nonetheless saved under section 1, holding that the government’s delay in extending spousal benefits to same-sex couples was justifiable as it was still "generally regarded as a novel concept" to equate same-sex couples with heterosexual spouses. The result was a majority ruling rejecting the Charter challenge. The minority of the court would have revised the language of the definition to read:

"spouse", in relation to any person, includes a person who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife or as in an analogous relationship.

89. As noted earlier, one of the government’s planned “reforms” is to phase in a clawback of OAS benefits based on family income rather than individual income.

90. OAS Act, supra note 81, s.2.


92. Ibid. at 5751.

F. CONCLUSIONS
This was a year of setbacks on a number of fronts in the law on Canada's public pension system. The system will be under increasing pressure from now on as a result of changing demographics and the federal reform agenda. In the coming year, advocates should be prepared for more legal battles over once-established guiding principles as to eligibility for disability benefits, and for new opportunities to advance claims for retirement and old-age benefits.