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A: REPORT OF

THE PANEL MEMBER TASK FORCE ON

CORE POLICY ISSUES

March 12, 2003

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APPROACH AND RECOMMENDATIONS

The Task Force recommendations which follow address a number of core policy issues facing CPP-Disability.

They evolved primarily from our own experiences as Review Tribunal Members in assessing and adjudicating the rightness or wrongness of Ministerial decisions to deny Canada Pension Plan (CPP) disability benefits.

However, we supplemented these hands-on experiences with our own individual research on global disability issues and four recent studies commissioned by the Office of the Commissioner of Review Tribunals (OCRT). These were: Environics Research (2002), *Client Satisfaction Surveys* (Office of the Commissioner of Review Tribunals); Sue Lott (2002), *Background on CPP Disability and Private Insurance* (Office of the Commissioner of Review Tribunals); Michael J. Prince (2002), *Wrestling with the Poor Cousin: Canada Pension Plan Disability Policy and Practice, 1964-2001* (Office of the Commissioner of Review Tribunals); and Sherri Torjman (2002), The Canada Pension Plan Disability Benefit (Caledon Institute of Social Policy).

In developing recommendations, we were guided by a number of factors, including:

- The complexity of securing amendments to the CPP when provincial consent is required;
- The recognition that the earnings-based CPP's primary intent is to provide retirement pensions to Canadians; and
- The need for financial "accountability and sustainability" with respect to CPP funding

We were also influenced by the central principle of the Canada Pension Plan as set out in 1964 by Judy LaMarsh, then Minister of National Health and Welfare for Canada: "***This plan, the Canada Pension Plan, is one which provides help as of right rather than on a needs or mean tests, for those who…find themselves disabled and unable to carry on work. For those who become disabled, there is at least the comfort of knowing that a pension will be payable on a temporary or permanent basis as needed.***"

List of Recommendations

The recommendations themselves focus on core policy issues facing CPP-Disability with respect to:

- Eligibility criteria,
- The appeal process,
- Benefit payments,
- The relationship between CPP Disability and other programs.

Eligibility Issues

A1 – "Real World" Approach to Employability
Adopt the real world approach of the Villani decision, by amending CPP legislation to provide for an interplay between medical and employment evidence on a person's work capacity.

A2 – Episodic and Periodic Illnesses
Enable persons suffering from episodic and/or periodic illness to qualify for CPP Disability during periods when they are unable to work.

A3 – Payment for Closed Periods
A disability benefit should be paid for the "closed" period during which a person is disabled from working.

A4 – Broaden Definition of Minimum Qualifying Period
Broaden the definition of the Minimum Qualifying Period with its stringent (four-out-of – the-last-six-years) contributory requirement by adding alternative ways of calculating the period during which persons must have contributed to the CPP to qualify.

A5 – Enhance Dropout Provisions
Include partial years in determining the duration of the child-rearing dropout (CRDO) provision, and introduce an "educational dropout" option with provisions identical to those governing the CRDO.

A6 – Definition of Spouse
Ensure that CPP legislation clearly differentiates between the pre- and post-July 31, 2000 definitions of spouse.

Improving the Appeal Process

A7 – Automatic Reconsideration
Following an initial denial of an application for disability benefits, there should be an automatic reconsideration within HRDC.

A8 – Personal Contact during Reconsideration
Whenever possible, there should be person-to-person contact between an Applicant and the person conducting the automatic reconsideration.

A9 – Informed HRDC Reps
HRDC representatives appearing before Review Tribunals should be sufficiently knowledgeable to discuss the evidence and any new facts introduced during hearings.

A10 – Vocational Assessments
Further study should be given to the means of placing before Review Tribunals evidence of Appellants' capacity for work.

A11 – Perceived Impartiality of Appeals
Continue efforts to reassure Appellants that their cases are being heard free of any influence by the Government and the Minister.

Benefit Payments

A12 – Size of Benefit Payments
The same formulae should be used in determining the level of both CPP disability and retirement pensions, and disability benefits should be returned to pre-1998 levels.

A13 -- Retroactivity
The current retroactivity policy should be amended, eliminating the four-month period prior to the first disability payment; and retroactivity should be calculated from the date of disability.

A14 – Incentives for Trial Returns to Work
The current policy of maintaining payment of CPP benefits during a three-month trial work period should be expanded to cover six months and should be enshrined in CPP legislation.

Relation between CPP Disability and Other Programs

A15 – Better Coordination of Early Intervention
There should be greater coordination of federal, provincial and territorial policies to provide early intervention in disability cases.

A16 – HRDC Guidance
Each HRDC regional office should designate an employee to guide persons to programs and services that may assist them in remaining financially self-sufficient.

A17 – Definition of Disability for Disability Tax Credit
The Canada Customs and Revenue Agency should automatically grant a disability tax credit to persons deemed disabled under CPP legislation.

A18 – Prescription Drug Benefits
While urging provincial/territorial governments to maintain prescription drug benefits for persons transferring to CPP Disability from private and public disability programs, the Government of Canada should conduct a study to examine the feasibility of a national prescription drug program for persons with disabilities.

A19 – Common CPP-EI Database
Create a common database for the Canada Pension Plan and Employment Insurance.

A20 – Canada Pension Plan Advisory Council
Reestablish a non-partisan Canada Pension Plan Advisory Council.

PREFACE

The mandate of the Panel Member Task Force on Core Policy Issues was to offer recommendations on “core policies” – that is, those policy issues fundamental to the effective delivery of CPP pension benefits to Canadians with “severe and prolonged” mental and physical disabilities producing an incapacity for “substantial gainful employment.”

The persons appointed to this Task Force brought to the discussions a cumulative total of approximately 30 years as Medical, Legal or General Members of Review Tribunals. These members were: Dr. Cheryl Forchuk, Chairperson (Medical Member); Gord Banting (Legal Member); Maureen Finnegan (General Member); Al Goudie (Legal Member); Keith Jobson (General Member); Denis Sauvé (Legal Member); and Don Hoyt, writer (General Member). They were assisted by Tina Head, OCRT Legal Services.

1. INTRODUCTION

This report aims at exploring those policy concerns which are fundamental to the effective delivery of CPP pension benefits to Canadians with "severe and prolonged" disabilities rendering them "incapable regularly of pursuing any substantially gainful occupation" in the words of the legislation.

Practicality shaped our approach to this large subject. We were very aware of the complexity of amending the Canada Pension Plan because of the requirement for provincial consent. We recognized that not the delivery of disability pensions but the provision of retirement pensions is the primary objective of the CPP. Finally, we accepted the importance of ensuring that the Canada Pension Plan remains both accountable and sustainable.

However, it is the Task Force's view that an acknowledgement of these constraints should not prevent a generous interpretation of what it means to ensure the effective delivery of CPP benefits to Canadians with disabilities in the meaning of the Act. The Federal Court, in its 2001 decision on *Villani v. Attorney General of Canada*, quoted with approval such a characterization of the CPP disability pension by Judy LaMarsh, the federal Minister of National Health and Welfare who won passage of the CPP legislation in 1964. At that time, the Minister said,

> In a sense, therefore, supplementary benefit pensions are more generous, especially for those in lower income brackets, than the new retirement pensions. This approach is justified because of the special need of widows, orphans and disabled contributors, and is certainly warranted on both humanitarian and economic grounds.[1]

In light of these considerations, we believe that certain aspects of the present regime for CPP Disability raise questions that are fundamental to the effective delivery of disability benefits to those Canadians who are disabled in the meaning of the legislation.

The first and most obvious of these is whether the present regime strikes a fair and reasonable balance in determining who has "severe and prolonged" disabilities rendering them "incapable regularly of pursuing any substantially gainful occupation" and is therefore deserving of a CPP disability pension. These eligibility concerns are addressed in ***Section 2***.

Another fundamental area of concern is the fairness and effectiveness of the appeal system. Do Appellants get an even break? Are the odds stacked against them? Do they believe the process is fair and impartial? These issues are dealt with in ***Section 3***.

It is also important ask whether benefit payments to the disabled are adequate and the rules governing them are fair. For example, there would seem to be certain anomalies in the rules regarding retroactive payment of benefits. As well, is it possible to strengthen the present financial incentives for a return to work on a trial basis? These questions are addressed in ***Section 4***.

[1] Quoted in Federal Court of Canada (2001), *Giuseppe Villani and The Attorney General of Canada* (2001, FCJ No. 1217).

Finally, the Canada Pension Plan is "the largest single disability income program in the country."[2] However, there are also an enormous number of other programs run by the federal government, provincial/territorial governments, municipal governments, non-governmental organizations and the private sector. The fit, or lack of fit, between the CPP and these other programs can have important implications for people with disabilities. Concerns about the relationship between CPP Disability and other programs aimed at people with disabilities are addressed in ***Section 5***.

Section 6 examines some of the considerations relevant to assessing the desirability of moving towards a national disability insurance plan that would assume the income support role of CPP Disability and many other programs.

[2] Michael J. Prince (2002), *Wrestling with the Poor Cousin: Canada Pension Plan Disability Policy and Practice, 1964-2001* (Office of the Commissioner of Review Tribunals), p. 7.

2. ELIGIBILITY ISSUES

Our experience as Review Tribunal Members has revealed a number of important issues with respect to determining who is eligible for a disability benefit under the Canada Pension Plan.

For example, though the legislation states that a disability must be "severe" enough to make a person "incapable regularly of pursuing any substantially gainful occupation," determinations on eligibility do not always turn on a "real-world" notion of employability. As well, present ways of viewing the disability requirement tend to make it difficult for people with episodic illnesses, however "severe" or "prolonged", to become eligibility for a disability pension. There are also anomalies in the treatment of some people who meet the eligibility requirements, but then later recover sufficiently to return to work

In addition, people with disabilities in the meaning of the legislation often experience hardship as a result of the rigidity of the present approach to defining the minimum qualifying period (MQP) during which persons must have contributed to the CPP to qualify for disability benefits. More flexibility may also be desirable than is possible with the present "dropout" provisions governing when people are allowed not to make CPP contributions and still maintain the same minimum qualifying period. Finally, there exist some ambiguities with respect to the definition of the spouse of a disabled person eligible for CPP benefits.

Recommendation A1 – "Real World" Approach to Employability

Adopt the real world approach of the Villani decision, by amending CPP legislation to provide for an interplay between medical and employment evidence on a person's work capacity.

The most difficult dilemma facing Appeal Tribunals is how to make an objective finding as to whether a physical or mental impediment is disabling to a degree that an Appellant is incapable of pursuing a "substantially gainful occupation" on a "regular" basis.

Currently, "objective" medical evidence of the seriousness of a person's disability is given more weight in many determinations by Human Resources Development Canada. Independent assessments of non-medical factors affecting an Appellant's employability are rarely offered by HRDC adjudicators when rejecting applications for disability benefits.

The Task Force believes it is critical to fulfilling the intent of CPP disability legislation that medical findings be supplemented by a "real world" analysis of an Appellant's capability to find and maintain regular employment.

In 1989, Ministerial guidelines provided for consideration of "socio-economic" circumstances in resolving the question of employability. A significant growth in the disability caseload during the early 1990s prompted a rescinding of these guidelines, effectively eliminating socio-economic factors from the decision-making process.

As Sherri Torjman, in her February 2002 report on *The Canada Pension Plan Disability Benefit*, pointed out:

> The adjudication guidelines adopted in 1995…stress the medical basis of disability determination and rule out socioeconomic factors in adjudicating applications. The tighter medical interpretation of medical disability appears to exclude many potential claimants with conditions that are not verifiable or quantifiable in a laboratory. These include stress-related conditions, mental disorders and environmental sensitivities.[3]

The Task Force strongly recommends that CPP legislation (particularly section 42), regulations and guidelines reflect an interplay between medical and employability evidence. Amendments should be based on the real world approach taken in 2001 by the Federal Court in the case of Villani v. Attorney-General for Canada.

The essence of the lengthy judgment by Justice Isaac in allowing an appeal of a Pension Appeal Board (PAB) ruling disqualifying Villani from receiving CPP benefits cuts to the core of the policy issues facing the CPP. ***"In my view," Justice Isaac stated, "the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language and past work and life experience."***

Members of the Task Force can cite an endless list of examples illustrating the unlikelihood, more often the impossibility, of Appellants finding work due to the extent of their disabilities, coupled with additional factors such as their age (the average disability applicant is between 54 and 65), lack of formal education, narrowly focused skills and the absence of job opportunities.

We ask you to consider how realistic the chances for returning to the work force are for a person who is 60 years of age, has a Grade 8 education or less, has done only manual labour throughout his or her life, lives in a community with sparse employment openings and is coping with an illness which may be severe and prolonged. In one such case, Human Resources Development Canada suggested that the appropriate employment for a person who had lived his entire life in an inland community would be as a ship's purser. Such a prescription is hardly realistic.

Among options considered by the Task Force was a recommendation that Canada emulate a provision of the United States *Social Security Act* which would place the onus on the Minister "to prove that jobs exist in the national economy that the claimant could perform." We concluded that shifting the onus in this way deserved a more detailed study than the Task Force was equipped to do.

Recommendation A2 – Episodic and Periodic Illnesses

Enable persons suffering from episodic and/or periodic illnesses to qualify for CPP Disability during periods when they are unable to work.

Episodic or recurrent physical and mental disabilities may at certain points in time be "severe and prolonged" in the meaning of the CPP. Yet the intermittent nature of these illnesses more likely than not disqualifies their sufferers from receiving disability benefits, on the basis that either they are sometimes capable of some work or have failed to meet the "minimum qualifying period" with respect to contributions.

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[3] Sherri Torjman (2002), *The Canada Pension Plan Disability Benefit* (Caledon Institute of Social Policy), p. 30.

Here is one of many possible scenarios.

A person with multiple sclerosis may have been unable to work for one year, capable of earning sufficient income to make contributions the next year, then forced by illness into unemployment two years, followed by one year of CPP contributions and another year of non-contributions. Such individuals would not qualify for a CPP disability benefit because they would not have made CPP contributions in four of the last six years. Yet they may well have made annual contributions to the CPP going back 10 or 15 years prior to the most recent interruption.

Such cases are far from atypical.

It seems unfair under such circumstances to deny a pension to a disabled person simply because of the rule requiring contributions four out of the last six years. It is precisely for this reason that we are calling for amendments to the legislation, regulations and guidelines governing the Minimum Qualifying Period to accommodate applicants afflicted by episodic or recurrent disabling conditions.

Recommendation A3 – Payment for Closed Periods

A disability benefit should be paid for the "closed" period during which a person is disabled from working.

The difficulty with disabling episodic and recurrent illnesses is that a person may be "severely" disabled in the meaning of the legislation more than once for a definite period, but the disability may not be of indefinite duration and therefore not be "prolonged" according to the Canadian Pension Plan.

As well, lengthy time periods can elapse between the confirmation of a work-disabling illness and a final resolution of the case. It is conceivable that a person unable to work for three years before applying for a CPP disability pension could recover to an extent that he or she can re-enter the job market. Appeal tribunals have granted benefits for these ``closed periods," but the legislative authority to do so is unclear.

For these reasons, the Task Force recommends that in such circumstances a disability benefit should be paid for the ``closed" period during which the person was disabled from working.

Recommendation A4 – Broaden Definition of Minimum Qualifying Period

Broaden the definition of the Minimum Qualifying Period with its stringent (four-out-of-the-last-six-years) contributory requirement by adding alternative ways of calculating the period during which persons must have contributed to the CPP to qualify.

Introduction in 1998 of CPP amendments making contributions four of the last six years an eligibility requirement not only adversely affected persons with episodic or recurrent disabling conditions. It also caused hardship to individuals who could have given up their hopes for

recovery and qualified under the MQP, but instead disqualified themselves by courageously making genuine but sporadic efforts to rejoin the work force.

The Task Force does not recommend elimination of the requirement that people should have made contributions four of the last six years. However, it is our view that this rule should be complemented by some alternate rules for calculating individuals' MQPs.

More specifically, we believe such alternatives are already available in the rules for calculating the minimum qualifying period for other supplementary benefits. As sections 44(3)(a) and 44(3)(b) of the *Canada Pension Plan* put it, a disabled person should be considered to have made contributions for the minimum qualifying period if he or she has made contributions "a) for at least one third of the total number of years included either wholly or partly within his contributory period… but in no case for less than three years; or (b) for at least ten years."

Recommendation A5 – Enhance Dropout Provisions

Include partial years in determining the duration of the child-rearing dropout (CRDO) provision, and introduce an "educational dropout" option with provisions identical to those governing the CRDO.

At present, persons who leave the employment market to raise their children and who eventually become disabled benefit from a "child-rearing dropout", exempting those years of child-raising from calculations of their Minimum Qualifying Period of CPP contributions.

At present, the size of the dropout is calculated in terms of total years, starting at the beginning of the calendar year. This methodology penalizes a mother whose baby is born in mid-January because it does not allow her to drop out until the beginning of the next calendar year. For this reason, the Task Force is recommending that the child-rearing dropout formula be amended to allow partial years to be counted or at least permit pro-rating.

As well, it is the position of the Task Force that an "educational dropout" should be introduced into the MQP formula. Persons who choose to improve themselves or their skills and abilities in the workplace in approved educational and/or training institutions should not be penalized. In other words, they should not have those years in which they made no CPP contributions counted against them in assessing their eligibility for benefits.

We submit that because educational and training courses are based on both fiscal and calendar years, the "educational dropout" period should reflect "partial years" spent in educational and training programs. This provision would also be applicable to potential CPP disability recipients who agree to participate in vocational retraining programs in an effort to obtain substantial gainful employment.

Recommendation A6 – Definition of Spouse

Ensure that CPP legislation clearly differentiates between the pre- and post-July 31, 2000 definitions of spouse.

Legislation redefining the word, "spouse" to include common law partners and partners of the same sex came into effect July 31, 2000.

It was brought to the Task Force's attention that the previous definition of spouse in Section 2 of the *Canada Pension Plan* remains applicable to cases initiated prior to July 31, 2000.

The Task Force suggests that CPP legislation be amended to clarify the differing definitions of spouse in order to correct any ambiguity in the minds of persons seeking disability benefits subsequent to July 31, 2000.

3. IMPROVING THE APPEAL PROCESS

Fair, expeditious and impartial appeals are central to the effectiveness of the Canada Pension Plan, both in terms of responding to Disabled Contributors' needs and meeting public expectations. The Task Force has several concerns about the way the present appeal process works. These include

- The length of time elapsing between the initiation of an appeal and its conclusion;
- The number of appeal levels;
- The lack of personalized contact between HRDC officials and Applicants;
- The absence of non-medical employability assessments from documents prepared for Tribunals by HRDC; and
- A generalized and inaccurate perception that Review Tribunals are not in fact independent of Government.

We have recommended actions to address each of these concerns.

Recommendation A7 – Automatic Reconsideration

Following an initial denial of an application for disability benefits, there should be an automatic reconsideration within HRDC.

Existing legislation provides that persons whose application for CPP disability benefits is refused by the Department can ask for a reconsideration by the Minister. If denied again and still dissatisfied, they can next go before a Review Tribunal. If still unsatisfied, they can go to the third level of appeal, the Pension Appeals Board (PAB). Ultimately, they can have recourse to the Federal Court. All of these appeal options are also available to the Minister.

Ninety days (or more at the Minister's discretion) can pass between each stage of the appeal process. In addition, it can take six to eight weeks for the Office of the Commissioner of Review Tribunals (OCRT) to process decisions. Thus, Appellants can expect a year or more to pass before their cases are resolved one way or the other.

The Task Force recommends that the procedure be accelerated by making Ministerial reconsideration an automatic response to rejection of an application, rather than requiring an Appellant to apply for reconsideration within 90 days of the decision.

The Task Force also discussed at length suggestions that the Pension Appeals Board be abolished as a means of accelerating the appeal process. The consensus was that the issue should be revisited following an assessment of the effectiveness of rolling together the initial assessment and reconsideration procedures at the Ministerial level.

The Task Force also debated whether, given the delays, interest should be paid on benefits owing to Appellants whose appeals are granted. Members pointed out that it is common practice for interest to be paid on outstanding debts. It was argued as well that the Minister should be obligated to pay interest if benefits are initially denied but granted on appeal. Finally, it was pointed out that the general rule of interest on outstanding debts should be applied to CPP

disability beneficiaries. Though the Task Force inclined towards interest being paid, the consensus was that the issue required further analysis.

Recommendation A8 – Personal Contact during Reconsideration

Whenever possible, there should be person-to-person contact between an Applicant and the person conducting the automatic reconsideration.

It is crucial that the reconsideration be done by a person other than the original adjudicator, as is now the practice at HRDC. Yet it is also important that people get to meet face-to-face with whoever decides their eligibility for a disability person.

At present, the first opportunity for Appellants to argue their case in person is before a Review Tribunal. We believe this personalized contact to be a valuable contribution to determining the eligibility of an applicant.

Thus, we recommend that, during reconsideration, it be incumbent upon HRDC to offer Applicants face-to-face meetings to discuss their cases. When such arrangements are inadvisable (because of, for example, prohibitive distances or indisputable evidence that the Minimum Qualifying Period requirements have not been met), Applicants should be contacted by telephone.

Recommendation A9 – Informed HRDC Reps

HRDC representatives appearing before Review Tribunals should be sufficiently knowledgeable to discuss the evidence and any new facts introduced during hearings.

The existing practice of Departmental representatives simply reading the rationale of decisions developed by other officials denies the Appellant and Review Tribunal Members the opportunity to seek elaboration regarding the basis of the Minister's decision.

It is for this reason that the Task Force believes that, whenever possible, HRDC representatives appearing on behalf of the Minister before Review Tribunals should be knowledgeable enough to discuss the evidence and to comment on any new evidence presented by the Appellant.

Recommendation A10 – Vocational Assessments

Further study should be given to the means of placing before Review Tribunals evidence of Appellants' capacity for work.

In each case reaching a Review Tribunal, Appellants and Tribunal Members receive in advance all relevant documentation filed with HRDC. Rarely do these "blue books" contain objective assessments of the effect of medical conditions on the Appellant's capacity for regular, substantially gainful employment.

In the Task Force's view, this void must be filled, but further research is needed on the appropriate means of placing such vocational assessments before Review Tribunals. Among the remedial options reviewed by the Task Force were:

- Putting an onus on the Minister to provide independent vocational assessments paid for by the Government in cases when disability benefits are denied;
- Requiring the Minister to order such publicly funded assessments if requested by Appellants; or
- Enabling the OCRT to undertake non-medical, objective work capacity assessments as part of the appeal process.

Concerns were expressed that Appellants or their Representatives might challenge the objectivity of employability studies initiated by the Minister. Effective rebuttal of negative findings would also require Appellants to produce or develop their own "expert" evidence, and such an exercise would be prohibitively expensive. Yet it is possible that without such evidence, Appellants could be at a serious disadvantage in making their case for benefits. There were also reservations among Task Force members about imposing an onus on the Minister to provide employability assessments that would result in substantial new expenditures.

The major concern of the Task Force is to ensure that Appellants are able to have their cases decided on a level playing field. Just how to ensure that more complete documentation is available to Review Tribunals is a complex subject that we believe deserves further consideration.

Recommendation A11 – Perceived Impartiality of Appeals

Continue efforts to reassure Appellants that their cases are being heard free of any influence by the Government and the Minister.

Michael J. Prince in his 2002 report for the OCRT pointed out that that the appeal system rests "on the principles of natural justice and procedural fairness."[4] Integral to putting these principles into effect is the absolute responsibility of the OCRT, Review Tribunals and their individual Members to assert and demonstrate their independence from the Department of Human Resources Development and, more specifically, the administrators of the Canada Pension Plan.

Tribunal Chairs routinely advise parties to an appeal of this independence. Review Tribunal Members are admonished to refrain from personal exchanges with Ministerial Representatives because Appellants might interpret as signs of collusion.

Despite these activities, Environics in its assessment of client satisfaction with the Review Tribunal appeal process pointed out that a degree of skepticism remains among Appellants, particularly those whose appeals have failed.[5] Though there will always be doubters, the Task Force welcomes, and indeed calls for, sustained efforts by the OCRT to reinforce the visible evidence of Review Tribunals' independence. Continuing reassurance on this score remains crucial to the integrity and fairness of the appeal process.

[4] Prince (2002), p. 49.
[5] Environics Research Group (2002), *Office of the Commissioner of Review Tribunals Client Satisfaction Surveys – Final Report* (Office of the Commissioner of Review Tribunals), pp. 155-158.

4. BENEFIT PAYMENTS

If CPP Disability is the largest single income support program for people with disabilities in the country, then any erosion in CPP Disability benefits cannot help but have a far-reaching impact on people with disabilities, especially persons with the most severe and prolonged disabilities. Since 1998, there would seem unfortunately to have been a reduction in the size of CPP disability benefit payments. There also remain continuing anomalies in the rules governing retroactive benefit payments. Finally, we believe the CPP should expand its incentives for people to return to work on a trial basis.

Recommendation A12 – Size of Benefit Payments

The same formulae should be used in determining the level of both CPP disability and retirement pensions, and disability benefits should be returned to pre-1998 levels.

Legislation amending the Canada Pension Plan Act in 1998 included changes to the ways in which disability benefits are calculated. As well, different formulate were introduced for determining disability pensions and retirement pensions. The net effect of these changes was an estimated reduction of $100 to $200 a year in the maximum payments to disability recipients.

In the interests of fairness, the Task Force recommends that disability payments be returned to pre-1998 levels. In addition, the same formula should be used in calculating CPP retirement and disability payments.

Recommendation A13 – Retroactivity

The current retroactivity policy should be amended, eliminating the four-month period prior to the first disability payment; and retroactivity should be calculated from the date of disability.

CPP legislation stipulates that monthly disability payments begin four months after the month in which a person became disabled. But in no case shall a person be deemed disabled earlier than 15 months prior to the application for a disability benefit.

In our opinion, the four-month delay before starting benefits amounts to a four-month “claw back”. This provision should be abolished, given the often dire financial position of Applicants whose employment income has been terminated because of their disabilities.

As well, the 15-month retroactive limit on benefits is an artificial restriction based entirely on considerations of economy and does not sufficiently take into account that the CPP is important legislation conferring social benefits.

A person’s qualifying disability may well have been apparent and diagnosed some time before a benefits application is made. Delay in applying could have occurred because of unawareness or

misunderstanding of the law and its deadlines, not to mention a reluctance to seek public assistance, a determination to overcome the disability, or some other factor.

For these reasons, it is the Task Force's view that retroactivity should be applied from the date of disability, rather than the date of application. The 15-month retroactivity restriction should be eliminated altogether, as should the four-month delay.

These changes should also be applied to benefit payments for children of Disabled Contributors.

Recommendation A14 – Incentives for Trial Returns to Work

The current policy of maintaining payment of CPP benefits during a three-month trial work period should be expanded to cover six months and should be enshrined in CPP legislation.

There is general agreement that medical advances have increased the likelihood that some people with severe disabilities are able to recover sufficiently to return to work. It is for this reason that CPP Disability now has a policy of paying CPP benefits during a three-month trial work period.

It is unrealistic to expect that all of those with "severe and prolonged" disabilities will benefit from such incentives. However, our experience is that a significant number would welcome the chance to work again.

The Task Force urges, therefore, that this financial incentive be expanded to cover a six-month trial return to work, subject to the caveat that employment earnings would not exceed total CPP benefits. This incentive should also be enshrined in the *Canada Pension Plan*.

Many beneficiaries are understandably fearful that any attempt at a return to work could result in a loss of benefits. For this reason, this incentive should be coupled with a mechanism to "fast-track" people back to CPP if their disability proved too severe for them to continue working.

5. CPP DISABILITY IN RELATION TO OTHER PROGRAMS

Though CPP Disability is the largest income support program in the country for people with disabilities, it is far from the only program aimed at this group. HRDC offers a number of other programs, as do provincial/territorial governments, municipal governments, non-governmental organizations and the private sector. While this diverse array of programs increases the chances persons with disabilities may find the program or program mix that best meets their needs, problems can also arise when there so many providers of so many disparate programs and services.

One difficulty is that there is often a lack of coordination among these efforts, particularly during the crucial early period of disability. We believe that HRDC can do more in helping people through the present maze of programs. As well, most programs define very differently the disabilities required to qualify for assistance; this situation is confusing for people with disabilities and adds to the cost and effort of applying for support. In other cases, gaining a CPP disability benefit can have an adverse financial impact on its recipients because their changed financial situation may mean reduced support from other programs. Even within the federal government, one obstacle to coordinated policy development is that data-gathering and analysis often flows upward in "stove-pipes" that never converge. Finally, it is important to recognize the key role of non-governmental organizations (NGOs) as advocates and providers of services and support for disabilities by giving these organizations a greater role in policy development.

Recommendation A15 – Better Coordination of Early Intervention

There should be greater co-ordination of federal, provincial and territorial policies to provide early intervention in disability cases.

The Task Force concurs with Michael Prince's assertion, "Today, new technology, medical treatments and skills training are making it possible for some people with severe disabilities to become part of and remain in the work force."[6] We also agree with the finding of a Parliamentary Task Force in 1996 that early intervention by skilled professionals in education, training and vocational rehabilitation, together with financial incentives, is crucial.

By the time people with disabilities reach the Appeal Tribunals, they are often dispirited, lacking in self-esteem and harboring feelings of both helplessness and uselessness. For this reason, we believe it is important that intervention occur before people apply for assistance from the CPP.

However, there are obstacles to overcome. One of these is a perception among some seekers of disability benefits that the objective of vocational rehabilitation efforts is to prevent them from receiving a pension, as opposed to enabling them to resume a productive role in society.

As well, "stovepipes" afflict efforts to offer early intervention because multiple governments, agencies, NGOs and companies are involved in the provision of these services.

[6] Prince (2002), p. 71.

Thus, early intervention must involve coordination among private insurers and government agencies at all levels to identify clients with a potential to achieve successful rehabilitation.

Recommendation A16 – HRDC Guidance

Each HRDC regional office should designate an employee to guide persons to programs and services that may assist them in remaining financially self-sufficient.

It is often very difficult for a person to find his or her way through the maze of federal, provincial, territorial and municipal government, private sector and NGO programs and services to the ones that meet their needs and for which they are eligible.

Negotiating this labyrinth would be much easier if HRDC designated employee/advocates in its regional offices to guide people with disabilities to the appropriate programs to help them remain financially self-sufficient.

Recommendation A17 – Definition of Disability for Disability Tax Credit

The Canada Customs and Revenue Agency (CCRA) should automatically grant a disability tax credit to persons deemed disabled under CPP legislation.

Our research has shown that the most controversial issue in the disability field is defining the term itself.

The European Community, the International Labour Organization and the World Health Organization have all searched for a universally accepted definition. Developed countries have put in place a variety of criteria – the degree of diminished earning capacity, the inability to perform everyday tasks or the anticipated duration of a disabling condition.

It is common in Canada for persons to qualify for benefits from one disability scheme but not another because of differing eligibility yardsticks. The differences often have more to do with organizational interests than the needs of people with disabilities. Indeed, this plethora of different eligibility criteria can be confusing to people with disabilities and complicate their efforts to get the support they need.

It should be a long-term goal to seek agreement among federal, provincial and territorial agencies and private insurers on consistency in the factors determining a person's access to disability benefits. In the shorter term, we would encourage the CCRA to adopt in its test for eligibility for the Disability Tax Credit the same definition of disability as the Canada Pension Plan.

The Hon. John Manley, Minister of Finance, in his response on behalf of the Government of Canada to the seventh report of the Standing Committee on Human Resources Development and the Status of People with Disabilities, stated:

> Providing tax assistance to persons with disabilities has always been a top priority of this Government. Through the DTC (Disability Tax Credit), the Government of Canada gives recognition to the effect of a severe and prolonged physical or medical impairment on an individual's ability to pay tax.

The Task Force agrees with this unequivocal commitment by the Government to persons suffering "severe and prolonged" disabilities. An important step towards fulfilling this commitment would be to grant automatically the Disability Tax Credit to CPP disability benefit recipients because they have passed the "severe and prolonged" test for eligibility under the Canada Pension Plan.

Recommendation A18 – Prescription Drug Benefits

While urging provincial/territorial governments to maintain prescription drug benefits for persons transferring to CPP Disability from private and public disability programs, the Government of Canada should conduct a study to examine the feasibility of a national prescription drug program for persons with disabilities.

There appears to be enormous variation across Canada in the way provincial and territorial governments and private insurance companies respond to the existence of CPP Disability. Some offset the support from their programs to people with disabilities by an amount corresponding to the CPP Disability benefit. In other cases, the support provided is the same same whether a person is receiving the CPP benefit or not. This complex situation merits more discussion among public and private sector insurers against the financial consequences of disability.

The Task Force is particularly concerned that the granting of CPP pensions may have adverse effects on a person whose costs of prescription drugs have been wholly or partially underwritten by another source. In our view, loss of such assistance poses a threat to an individual's health and constitutes a disincentive to return to work.

For this reason, the Task Force recommends that the federal government examine the feasibility of setting up a national prescription drug program for people with disabilities. In the meantime, the government should strongly urge provincial governments to continue providing assistance for the purchase of prescribed medications to persons in receipt of CPP disability pensions.

Recommendation A19 – Common CPP-EI Database

Create a common database for the Canada Pension Plan and Employment Insurance (EI).

Accurate and detailed information constitutes the foundation for better coordination of disability-related federal, provincial and territorial agencies, improved policy development and monitoring the sustainability of the system.

A database combining the data now gathered by the Canada Pension Plan and Employment Insurance could identify trends in areas such as the frequency and types of disabling injuries and illness, the extent and effect of newly identified illnesses and the financial consequences of disability policies. Such a system could also track current global research on disability issues.

It should be emphasized that the objective of such an exercise would be to provide, not information on individuals, but a comprehensive source of data on disability trends, issues and policy concerns as a basis for coordination and collaboration within and between governments.

Recommendation A20 – Canada Pension Plan Advisory Council

Reestablish a non-partisan Canada Pension Plan Advisory Council.

In addition to governments and insurance companies, many non-governmental organizations have long been involved in delivering programs and services to people with disabilities, as well as advocacy on their behalf. People with disabilities themselves also have strong views on their own needs and the effectiveness of policies, programs and services intended to meet their needs.

Up until 1998, these groups and individuals were represented on a nonpartisan Canada Pension Plan Advisory Council that provided policy input into decisions affecting the CPP. Among the steps taken to recast the CPP that year was the shutting down of this advisory council.

It is the Task Force's strong recommendation that this nonpartisan Canada Pension Plan Advisory Council should be reestablished. Its mandate should be to:

- Conduct ongoing assessments of the fiscal and social integrity of the CPP,
- Carry out research on global disability policies, and
- Offer independent advice to government on constructive and productive policy changes.

6. A National Disability Insurance Plan?

Michael Prince titled his CPP study *Wrestling With The Poor Cousin: Canada Pension Plan Disability Policy and Practice, 1964-2001*.In meticulous detail, he examined shifts and changes in CPP policy over a 37-year period. His inescapable conclusion is that the disability element of the plan has been subservient to maintaining the integrity of the retirement pension components.

Support for this view is readily apparent in a 1996 document published by the federal Department of Finance during the efforts to create a federal-provincial-territorial consensus around what would become the 1998 reforms to the Canada Pension Plan. The short document, entitled *Principles to Guide Federal-Provincial Decisions on the Canada Pension Plan*, states: "Disability and survival benefits are important features of the CPP. However, they must be designed and administered in a way that does not jeopardize the security of retirement pensions."[7]

During the 1996 consultations on these questions, a number of interested and quite varied parties put forward as an alternative the withdrawal of disability assistance from the CPP and its inclusion in a National Disability Insurance Plan. When the concept was broached during 1996 federal-provincial consultations on the CPP, there was neither universal acceptance nor rejection. The federal report on the consultations observed: "Many favor moving disability benefits outside the CPP – some because they favor creation of a separate comprehensive system of support for the disabled; others because they believe disability benefits threaten the key purpose of the CPP which is to provide retirement benefits."[8]

Because of the sometimes conflicting pressures that work to the detriment of CPP Disability recipients, the birth of a national disability plan may be inevitable. However, the labour may be difficult due to the complexities of achieving federal-provincial-territorial agreement on the plan's content, uniformity of disability policy and, perhaps most controversial of all, an acceptable funding formula.

The idea, at best, is in its embryonic stage and may not become a fully debatable issue for many years. The Task Force is not equipped or prepared to judge the merits of removing the disability element from the CPP. Nevertheless, we consider it in the interests of disabled Canadians that governments at all levels determine without delay the means of resolving differences and conflicts in the administration and delivery of disability programs.

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[7] Federal/Provincial/Territorial Consultations Secretariat (1996), *Principles to Guide Federal-Provincial Decisions on the Canada Pension Plan* (Finance Canada: http://www.cpp-rpc.ca/princips/principe.html).
[8] Federal/Provincial/Territorial Consultations Secretariat (1996), *Report on the Canada Pension Plan Consultations – June 1996* (Finance Canada: http://www.cpp-rpc.ca/finrep/cpp-e.pdf), p. 13.

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B: REPORT OF

THE PANEL MEMBER TASK FORCE ON

CANADA PENSION PLAN (CPP) DISABILITY

LEGISLATION AND REGULATIONS

March 11, 2003

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SUMMARY AND RECOMMENDATIONS

The Task Force felt that the whole appeal process, from the internal Departmental appeal at the Reconsiderations phase through an appeal to the Pension Appeals Board was excessively time consuming, stressful, frustrating and financially burdensome for the Applicant/Appellant. Two key recommendations of the Task Force address this issue and should be highlighted:

- ***Detailed Reasons for Denial at the Reconsideration Phase/Face-to-Face Meeting.*** The Task Force strongly recommends that the Departmental procedures at Human Resources Development Canada ("HRDC") be changed to require that Adjudicators provide detailed, applicant-specific reasons for denial of an appeal at the Reconsideration stage (**Rec. B1**). Furthermore, where deemed useful, the Task Force strongly recommends that Adjudicators be permitted and encouraged to meet face to face with an Appellant prior to completing a Reconsideration (**Rec. B2**). It is the Task Force Members' expectation that giving an Appellant a chance to explain his or her situation in person to an Adjudicator would increase both the actual "fairness" of the Reconsideration and an Appellant's perception of fairness. The Task Force predicts that such a changed practice would reduce the number of appeals to a Review Tribunal, and would lead to more effective overall administration of the CPP disability benefits system.

- ***Eliminate Appeals to the Pension Appeals Board ("PAB").*** The current appeal process includes two hearings *de novo* – one at the stage of an appeal to a Review Tribunal and the second at the stage of a further appeal to the PAB. This seems an unnecessary and costly duplication which only adds additional stress for the Appellant. The Task Force recommends that appeals to the Pension Appeals Board be eliminated (**Rec. B11**). The Task Force also notes that if the recommendations above concerning detailed reasons for a denial decision and meeting face-to-face are adopted, an Appellant will still have two opportunities to make a case in person.

Guiding Principles

The Task Force has been guided in its deliberations and recommendations by the Mission Statement of the Office of the Commissioner of Review Tribunals ("OCRT"):

> To ensure expert, independent, unbiased quality service to all parties to an appeal to a Review Tribunal by treating all parties to the appeal equally, fairly and with understanding, respect and dignity.

The work of the Task Force has also been shaped by the principles that the appeals process should be efficient, uncomplicated, not financially burdensome, and conducted in an informal manner by persons knowledgeable on disability issues. The Task Force sees two notable strengths in the present appeal "system" which should be maintained:

1. The informality and flexibility of the present Review Tribunal Hearing process is a particular strength and (with only minor exceptions) the Task Force has deliberately rejected suggestions which would serve to introduce increased formality.
2. The qualifications of Review Tribunal Panel Members (medical, legal and general) together with the extensive ongoing training received by Panel Members through the OCRT assure that Panel Members are well versed in current legal issues (e.g., the *Villani*

decision) and medical issues (e.g., fibromyalgia) and familiar with the problems of persons with disabilities as viewed by disability and cultural advocacy groups.

List of Recommendations

The Task Force has made recommendations calling for:

- improvements to the effectiveness of the Reconsiderations phase of the application and appeal process;
- enhancements to the operation of the appeals procedures under the *Canada Pension Plan* ("CPP") Act and Regulations;
- changes to the administration of the OCRT;
- better training and tools for Panel Members;
- a number of technical amendments; and
- policy reviews in two areas.

Reconsideration Process – Departmental Procedures

B1 – Detailed Reasons
The Department should provide detailed reasons for denying applications for disability pensions.

B2. - Meetings in Person
At the Reconsideration stage, the Minister should encourage a Departmental Adjudicator to meet with the Applicant at any time the Adjudicator deems this would be helpful. An interpreter should attend the meeting if necessary.

B3 – Independent Medical Exams, Functional Capacities Exams and Vocational Assessments
Encourage the Department to make greater use of Independent Medical Examinations, Functional Capacities Examination, and/or Vocational Assessments to provide objective information concerning a person's capacity for work or employability.

Amendment to Legislation & Regulations – Tribunal Process

B4 – Certificate of Readiness
Amend the Review Tribunals Rules of Procedure to permit the Commissioner of Review Tribunals to require the parties – Minister and Appellant – to sign a "Certificate of Readiness" before a Review Tribunal Hearing is scheduled.

B5 – Settlement Mechanism
Clarify the mechanism for "settlement" of an appeal by amending the CPP Regulations to include a rule, similar to S. 19.1 for the Pension Appeals Board, empowering the Commissioner of Review Tribunals to dispose of an appeal in accordance with "any agreement made between the parties to the appeal, signed by them and filed with the Commissioner".

B6 – Withdrawal Mechanism
Broaden the formal mechanism for withdrawal of an appeal by amending Section 9 of the Review Tribunal Rules of Procedure to permit filing of a Notice of Withdrawal with a Review Tribunal as well as with the Commissioner.

B7 – Erroneous Advice
Amend Section 82(1) of the CPP to empower the Commissioner to include among the powers of a Review Tribunal the power to confirm or vary the decision of the Minister under Section 66(4) of the CPP (erroneous advice).

B8 -Related Professions
Review the list of "related professions" set out in paragraph 74.3 concerning the professional qualifications of persons who, in addition to "persons qualified to practice medicine in a province", are eligible to be appointed to the Review Tribunal Panel and sit as representatives of the medical community.

B9 – Independence of OCRT
Amend the relevant legislation to increase the independence of the OCRT and Review Tribunal Members, by including the OCRT in Schedule 1.1 of the *Financial Administration Act* and taking such other steps as are necessary to establish the financial independence of the OCRT.

B10 – Appointment Process
Make the process for appointing Review Tribunal Members more transparent.

B11 – Eliminate Appeals to the PAB
Amend the legislation to eliminate appeals to the Pension Appeals Board and to rename the OCRT the "Office of the Commissioner of Appeal Tribunals" and to change the name of Review Tribunals to "Appeal Tribunals" to reflect the changed mandate of these bodies.

B12 – Oaths/Subpoenas
In the event that the PAB is abolished, it may be appropriate to enhance the powers of the new Appeal Tribunal to include the power to administer oaths and issue subpoenas.

Administration of the OCRT

B13 – Strengthen Counselling
Strengthen the counselling provided by the OCRT staff to ensure that Appellants are aware of basic issues of their case and of the services potentially available to them through the OCRT. These services include providing multilingual services.

B14 – Counselling Checklist
In consultation with Panel Members, create a "checklist" to help Scheduling Officers foster useful consideration by Appellants of the information to be presented at a Hearing.

B15 - Enhanced Information for Appellants
Enhance information and tools available to Appellants and their Representatives by creating, distributing and posting on the OCRT Website, a Handbook useful for Appellants and their Representatives and a procedural manual specifically for Representatives.

Training and Tools for Panel Members

B16 – Enhanced Training
The Task Force recommends that the already extensive training of Panel Members be enhanced, by regularly addressing a number of current legal and procedural issues.

B17 – Enhanced Tools
The OCRT should continue to enhance the tools available to Tribunal Members.

Technical Amendments to Legislation and Regulations

B18 – "Common Law Partner", "Actually Received"
Amend the CPP to be consistent in its use of the term, "common law partner," and not "spouse," and to refer consistently to an application being "actually received" (see e.g. Sections 60(9), 42(2) (b) and 54.2(1) (b) of the legislation and Section 43(1) of the Regulations).

Policy Reviews

B19 – Retroactivity
The question whether there should be limits on the period of retroactivity for Disability Payments and Child Benefits Payments should be reviewed; and, if it is decided that there should be limits, the rationale for those limits should be stated.

B20 – Cap on Converting Retirement Pension into a Disability Pension
The question of what is the justification for any cap converting a retirement pension where a person has a severe and prolonged disability should be reviewed and, if it is decided that there should be a cap, the rationale should be stated.

PREFACE

During the summer of 2002, the Commissioner of Review Tribunals asked several Members of the Review Tribunal Panel to serve on a *Task Force on Legislation and Regulations*.[9] Its purpose was be to review the operation of the current appeals process for persons whose applications for disability benefits under the *Canada Pension Plan* have been denied.

The terms of reference for the Task Force were as follows:

> The Review Tribunals' Legislation and Regulations Task Force will develop suggestions on how the decision making process and appeal procedures of the disability provisions of the *Canada Pension Plan* Act and Regulations might be "modernized" in light of the experiences of the OCRT and Review Tribunals since their inception in 1991.
>
> The Task Force will report on or about the end of September 2002 in order that its suggestions may be combined with those of the Panel Members' Task Force on Disability Insurance/Programs and the Panel Members' Task Force on CPP-D Core Policies. It is expected that the combined suggestions will be presented to the House of Commons Sub-Committee on the Status of Persons with Disabilities at a sub-committee meeting to be held on or about October 2002.

The Task Force held three teleconferences, engaged in lively email correspondence on many topics and met in Toronto on October 5-6, 2002. Several Task Force members met informally in Toronto on the occasion of an OCRT Medico-Legal Workshop on November 21, 2002.

The Task Force invited and received submissions from other Panel Members (See the annex below). Its members also communicated with the Chairs of the Review Tribunal Task Forces on Insurance and on Core Policies.

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[9] The Members of the Task Force are: Barbara Bjarneson, Bernard Clayman, David Edgar, Derek Knipe, Janet Lew, Bruce MacKeen, Anna Mallin (Chair) and Paul Wilson. The Task Force was assisted by Chantal Proulx, a lawyer on the staff of the Office of the Commissioner of Review Tribunals.

1. INTRODUCTION

In 2001, more than 5,151 individuals appeared before *Canada Pension Plan* and Old Age Security Review Tribunals. Most individuals were appealing decisions made by the Minister of Human Resource Development Canada ("HRDC") regarding their eligibility for payment under the *Canada Pension Plan* ("CPP") or *Old Age Security Act* ("OAS").

This Report reflects the opinions of eight Review Tribunal Panel Members and presents their recommendations to make the appeal process under the disability provisions of the *Canada Pension Plan* ("CPP-D") function more fairly and efficiently.

The Task Force's discussions may be classified into two broad themes:

- how to ensure that Appellants better understand the process and what is required from them; and
- how to improve the appeal process in general.

In ***Section 2,*** we offer as background a brief descriptive account of the appeal process from the perspective of the Review Tribunal.

In ***Section 3***, we provide a statement of the important principles that guided the Task Force through its deliberations.

Section 4 puts forward key recommendations for improvements in the fairness and effectiveness of the HRDC procedures used when the Department reconsiders an application for disability benefits.

Section 5 contains the majority of the Task Force's recommendations and focuses on amendments to the CPP and its regulations with respect to the tribunal process. This is the heart of this Task Force report. It includes recommendations on:

- informing Appellants;
- the authority of the Commissioner of Review Tribunals ("Commissioner");
- improving the credibility and performance of Tribunal Members;
- enhancing the Tribunal's ability to do its work; and
- the sequence of appeals and the roles of appeal bodies.

Section 6 proposes significant administrative improvements at the Office of the Commissioner of Review Tribunals ("OCRT").

Section 7 puts forward suggestions for making available enhanced training and tools for Review Tribunal Members.

Section 8 sets out several "technical" amendments to the CPP that were brought to the attention of the Task Force by fellow Panel Members.

Finally, ***Section 9*** addresses two important policy questions that were raised frequently in the course of our discussions.

2. APPLICATION AND APPEAL PROCESS

Because Review Tribunals hear such a high proportion of appeals concerning disability pensions, the Task Force felt it important to describe briefly the steps in the application and appeal process.

Application

An Application for a disability pension is made to Human Resources Development Canada's Income Security Programs Branch and consists of three parts:

- an application for benefits,
- a questionnaire concerning the Applicant's work and medical history, and
- a medical report provided by the Applicant's physician describing the Applicant's medical problems and prognosis for improvement.

Additional medical reports and other evidence may also be submitted in support of an application.

Initial Denial[10]

HRDC denies applications for disability pensions most frequently on the grounds that the Applicant does not meet the statutory test of having a "severe and prolonged" disability such that the Applicant is incapable of regularly pursuing any substantially gainful occupation.

Reconsideration[11]

When an application is denied at the initial stage, the Applicant is informed in writing that he/she has the right to"Reconsideration". "Reconsideration" is an internal administrative process where the application is reviewed by a second medical Adjudicator within HRDC (one who was not involved in the initial review of the application). After this review, the Applicant is informed of the Adjudicator's decision in writing.

Appeal to a Review Tribunal[12]

When an application is denied at the Reconsideration stage, the Applicant is informed that he or she has the right to appeal the decision to a Review Tribunal through the Office of the Commissioner of Review Tribunals ("OCRT"). Currently, most Appellants appear

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[10] The Task Force was unable to discover the percentage of applications granted at the initial application stage.
[11] The Task Force was unable to discover the percentage of applications granted at the Reconsideration stage.
[12] The Task Force was unable to discover what percentage of Reconsideration decisions is subsequently appealed to a Review Tribunal.

before a Review Tribunal within an average of 12 to 18 months after the date of an initial application to HRDC.

Appearing before a Review Tribunal is the first opportunity many Applicants have to explain their case in person. While they may have applied for a pension more than a year earlier, any human contact with HRDC is usually limited to receiving information gathered through completing forms and submitting applications.

Review Tribunal

A Review Tribunal is a quasi-judicial body constituted under Section 82(7) of the CPP. The Tribunal is composed of three persons:

- a Legal Member,
- a Medical Member and
- a Member of the community.

These Members are drawn from a panel of between 100 and 400 persons from across Canada appointed by the Governor in Council. Aside from appeals relating to applications for disability pensions, Review Tribunals also hear appeals concerning retirement benefits, survivor's benefits, division of pension credits and matters under Old Age Security legislation. Panel Members serve on a part-time basis and usually sit once a month, generally hearing eight appeals in three days.

Review Tribunal Hearing

The Review Tribunal Hearing is closed to the public and evidence is kept confidential. In almost all cases, the Appellant attends the Hearing. At approximately 45 per cent of the Hearings, Appellants are accompanied by a Representative. A Representative of the Minister may also be present, always a public servant from CPP Disability at HRDC.

Witnesses are entitled to appear before Tribunals and are often family members or friends who provide "first-hand" accounts of the Appellant's condition and capacity to work. Expert witnesses rarely appear before Review Tribunals, even though decisions are often heavily influenced by reports from physicians and other medical specialists.

The Review Tribunal Hearing is a hearing *de novo*. The Review Tribunal reviews all of the information that has been presented by the Appellant and HRDC. The Review Tribunal provides each of the parties with a full and fair opportunity to present further evidence, to examine the other party and to make submissions. The Tribunal Members also regularly ask questions of all parties.

Procedures are guided by the principle of helping the parties "make their best case." Considerable latitude is exercised, at the discretion of the Chair, in allowing questioning of both the Appellant and the Minister's Representative to determine the effect of an Appellant's physical or mental condition on his/her capacity to work. Tribunal Members make clear to Appellants that the Tribunal is an impartial body and that the decisions made by the Tribunal are independent of the HRDC and the OCRT.

While Tribunal Members attempt to make Hearings relatively informal and uncomplicated, some Appellants still find the Hearing a very stressful and emotional experience. Appellants are frequently people with limited education and little familiarity with legal or bureaucratic processes. Some Appellants are frustrated by their experience with HRDC and some may feel intimidated by the Hearing process.

Review Tribunal Decision

After deliberation, Tribunal Members make a decision based on the evidence presented to them. The Chair writes a decision on behalf of the Tribunal, giving reasons. The written decision is then processed through the OCRT and sent to the parties. It takes about eight to 10 weeks for a decision to be issued.

Appeal to PAB

When the parties receive the written decision of the Review Tribunal, they are informed in writing that if they are not satisfied with the decision, they have the right to seek leave to appeal to the Pension Appeals Board ("PAB"). In 2001-02, approximately 50 per cent of appeals denied at the Review Tribunal level were further appealed to the PAB. Of these appeals, about 34 per cent were allowed following a PAB Hearing and approximately 23 per cent were "settled" by the Department and the Appellant.

The PAB Hearing is a second *de novo* Hearing. The parties usually present additional information, sometimes including additional medical reports obtained in response to the reasons set out in the Review Tribunal's decision.

Appeals to the Pension Appeals Board are heard by three judges, each of whom is a judge of the Federal Court or of a superior court of a province.

The PAB currently hears about 670 cases annually. Appellants not satisfied with the PAB decision have the further option of proceeding to the Federal Court on matters of law. In the year 2002, there were approximately 1,500 appeals pending before the PAB.

PAB Hearings are somewhat more formal than Review Tribunal Hearings in that witnesses are sworn and the rules of evidence are generally followed. HRDC frequently calls a medical witness or witnesses to rebut any expert opinion of the Appellant – a practice seldom, if ever, followed by HRDC at the Review Tribunal stage.

3. GUIDING PRINCIPLES

In considering improvements to the appeal process, the Task Force was guided by the following principles:

Fair, Impartial and Knowledgeable Tribunal

Fairness and impartiality are critical to the functioning of Review Tribunals, as they should be for any quasi-judicial body. All parties are entitled to a fair hearing before an impartial body and any impairment of this lessens the credibility of the Review Tribunals.

Tribunals must not only ***be*** fair and impartial; they must also ***appear to be*** fair and impartial. Tribunals are required to function judicially and to give each party equal opportunity to be heard, to ask questions and to clarify evidence upon which they are relying.

Tribunal Members are selected for their experience and knowledge in three distinct areas: legal, medical, and community. Tribunal Members are presented with the constantly changing difficulties of living with a disability and the Task Force wishes to emphasize the need for Panel Members not only to be knowledgeable about these issues, but continually to become *more* knowledgeable with ongoing training concerning ever-changing legal, medical and community issues.

Expertise, Training, and Procedural Flexibility

Task Force members agree that the Panel Members' expertise and training and the procedural flexibility of the Hearings are among the Tribunals' greatest assets. Any attempt to change the process, and especially to strengthen the role of Tribunals, must take this reality into account.

The Review Tribunal process emphasises putting people at ease in order to help Appellants make their best case and to gather the facts necessary to make a fair decision. A Review Tribunal Hearing is not a courtroom. While it might become appropriate to give Tribunals more powers – for example, to subpoena evidence – this change should involve the sacrifice of informality.

Uncomplicated/Understandable

It is essential, especially to the Appellant, that Hearings be as uncomplicated and understandable as possible.

While some of the evidence is best understood by a Tribunal Member with a medical background, it is essential that the Appellant have the opportunity to understand, to the best of his or her ability:

- the important issues of the case,
- the reasons for the Minister's decision denying the application at the Reconsideration stage, and

- what supporting evidence may be helpful to support an appeal.

The Task Force is also keenly aware that if Applicants and Appellants are to understand the process in which they have become involved, further efforts need to be made to ensure that at all stages of the application and appeal process, they have timely access to multilingual services.

Efficient

Appellants are entitled to a prompt Hearing without unusual delays. Frequent adjournments and long waiting periods for Hearings do a disservice to all parties involved in the process. However, efficient processing of an appeal must be carefully balanced against the interests of each party. The Appellant ought to be afforded sufficient opportunity to prepare for the Review Tribunal Hearing. This may include obtaining reports from medical or vocational specialists to support his or her appeal.

Not Financially Burdensome

Task Force members also agreed that Hearings should not present an undue financial burden to the Appellant or to the CPP.

Generous Interpretation of the CPP

The Task Force was guided by the principle of the CPP disability plan as set out in 1964 by the Hon. Judy LaMarsh, former federal Minister for National Health and Welfare:

> This plan, the *Canada Pension Plan*, is one which provides help as of right rather than on a needs or mean tests, for those who…find themselves disabled and unable to carry on work.
>
> "For those who become disabled there is at least the comfort of knowing that a pension will be payable, on a temporary or permanent basis as needed.

4. RECONSIDERATION PROCESS – DEPARTMENTAL PROCEDURES

Consistent with the Guiding Principles set out in the previous section of this Report, the Task Force makes the following recommendations concerning processing of applications at the Departmental level:

Recommendation B1 – Detailed Reasons

The Department should provide detailed reasons for denying applications for disability pensions.

HRDC rarely offers applicant-specific reasons for denials at either the initial or Reconsideration stages. This practice may have the unintended effect of offending or frustrating the Applicant, even when there may be technical reasons for the denial (such as having insufficient contributions to the *Canada Pension Plan)* that have little or nothing to do with the actual condition of the Appellant.

It is only after an applicant has given notice of appeal to the OCRT and a Hearing is scheduled that the Applicant receives a detailed and comprehensive explanation from HRDC of the Minister's decision. Currently, the Appellant receives this Minister's submission about four to six weeks before the scheduled Hearing, generally leaving insufficient time to understand deficiencies in his/her application and to prepare or to gather more information in support of his/her case - such as reports from a medical specialist.

If HRDC were to provide comprehensive reasons for its denial at the outset, there would likely be a smaller number of requests for Reconsideration, fewer appeals before a Review Tribunal or less adjournments of Hearings. The Applicant probably would acquire a better understanding of the requirements for a disability pension under the *Canada Pension Plan* and be more accepting of the denial. Conversely, he/she might obtain additional or appropriate documentation better supporting the Reconsideration or appeal. The Applicant would also be more aware of the importance of seeking the services of a translator or interpreter in a timely manner, if such were needed.

The Task Force considered whether it should recommend that the CPP be amended to eliminate the Reconsideration process. However, members of the Task Force concluded that with some additional resources, a fuller explanation of the decision and greater access to translation services, the Reconsideration phase could be made to work well.

Recommendation B2 – Meetings in Person

At the Reconsideration stage, the Minister should encourage a Departmental Adjudicator to meet with the Applicant at any time the Adjudicator deems this would be helpful. An interpreter should attend the meeting if necessary.

As with the previous recommendation, the Task Force believed that providing more useful information to the Applicant earlier can only help make the process work better.

Many Applicants have limited education and limited literacy skills. Having the opportunity to speak to someone in person not only humanises the process, but gives Applicants another opportunity to understand what is required to support their application. It would also give the Adjudicator an opportunity to understand the human context of the medical information in the file and identify any needs for translation services.

Recommendation B3 – Independent Medical Exams, Functional Capacities Exams and Vocational Assessments

Encourage HRDC to make greater use of Independent Medical Examinations, Functional Capacities Examination, and/or Vocational Assessments to provide objective information concerning a person's capacity for work or employability.

The decision to grant disability benefits focuses on a determination of an Applicant's capacity to work and, post-*Villani*[13], on whether or not an Applicant is employable in the "real world". For this reason, Task Force members believe that HRDC should be encouraged to:

- place increased emphasis on obtaining objective evidence concerning an Applicant's capacity for employment and,
- at HRDC expense, make greater use of independent medical examinations ("IMEs"), functional capacity examinations ("FCEs") and vocational assessments ("VAs").

In the opinion of the Task Force, the additional expense of these evaluations would be offset by a reduction in the number of appeals.

[13] *Giuseppe Villani v. Attorney General of Canada*, Federal Court of Appeal decision dated August 3, 2001

5. AMENDMENT TO CPP AND REGULATIONS – TRIBUNAL PROCESS

In addition to better informing Appellants, the Task Force concluded that the appeal process could be made to work better by amendments to the *Canada Pension Plan* and regulations that would have the effect of:

- increasing the authority of the Commissioner of Review Tribunals;
- strengthening the credibility and performance of Review Tribunal Members; and
- giving Review Tribunals more authority; and
- modifying appeal procedures.

Just as better informing potential Appellants earlier in the process might reduce the number of appeals and Hearings, enhancing the role of Review Tribunals might well reduce the number of further appeals to the Pension Appeals Board arising from Review Tribunal decisions.

Yet the Task Force faced something of a dilemma when considering how to ensure Appellants were better prepared for Hearings without compromising the neutrality of the OCRT. Though the Task Force is concerned that Appellants need as much assistance as possible in preparing their appeals, it is also essential that Review Tribunals and the OCRT remain impartial.

Recommendation B4 – Certificate of Readiness

Amend the Review Tribunals Rules of Procedure to permit the Commissioner of Review Tribunals to require the parties – Minister and Appellant – to sign a "Certificate of Readiness" before a Review Tribunal Hearing is scheduled.

This procedural change would require the parties to:

- review a list of issues that might be relevant to their case, and
- confirm formally that medical reports and other evidence relevant to the appeal have been obtained.

The purpose of this recommendation is to ensure that all parties are ready to proceed before a Hearing is scheduled (or to arrange a postponement if they are not prepared) and to require an Appellant to review a checklist of items before the Hearing is scheduled. Where necessary, an interpreter should be provided to the Appellant at this stage.

Recommendation B5 – Settlement Mechanism

Clarify the mechanism for "settlement" of an appeal by amending the CPP Regulations to include a rule, similar to S. 19.1 for the Pension Appeals Board, empowering the Commissioner of Review Tribunals to dispose of an appeal in accordance with "any agreement made between the parties to the appeal, signed by them and filed with the Commissioner".

At present, the Commissioner has no formal authority to dispose of an appeal when the parties have agreed that the Hearing not proceed. Currently, Hearings are simply cancelled upon notification of a settlement. However, sometimes Appellants are unclear about the details of a settlement (such as the date payments are to start or the amount of payments) and then later object that they "did not understand". The proposed mechanism would allow the Commissioner to confirm that both parties are in full agreement and would provide a formal legal disposition of the matter.

Recommendation B6 – Withdrawal Mechanism

Broaden the formal mechanism for withdrawal of an appeal by amending Section 9 of the Review Tribunal Rules of Procedure to permit filing a Notice of Withdrawal with a Review Tribunal as well as with the Commissioner.

At present, the Review Tribunal Rules of Procedure only contemplate filing a notice of withdrawal with the Commissioner. This provision leaves a formal uncertainty as to how to handle withdrawals during a Review Tribunal Hearing.

Recommendation B7 – Erroneous Advice

Amend Section 82(1) of the CPP to include among the powers of a Review Tribunal the power to confirm or vary the decision of the Minister under Section 66(4) of the CPP (erroneous advice).

Currently, only the Minister may correct errors of erroneous advice.

In the Task Force's view, it is contrary to natural justice to have the body whose actions are questioned have the final decision concerning resolution of a complaint about that same body's actions. Under OAS legislation, Review Tribunals can decide questions of erroneous advice – as was confirmed in *HRDC v. Beryl Tucker*; Docket #t-1711-00; 2002 FCT 492 dated April 30, 2002.

Recommendation B8 – Related Professions

Review the list "related professions" set out in paragraph 74.3 concerning the professional qualifications of persons who, in addition to "persons qualified to practice medicine in a province", are eligible to be appointed to the Review Tribunal Panel and sit as representatives of the medical community.

The members of the Task Force believed that this list merited review, but they did not have sufficient information to suggest detailed amendment of the list.

Recommendation B9 – Independence of OCRT

Amend the relevant legislation to increase the independence of the OCRT and Tribunal Members, by including the OCRT in Schedule 1.1 of the Financial Administration Act and taking such other steps as are necessary to establish the financial independence of the OCRT.

In the eyes of many Appellants, the OCRT and individual Tribunals are viewed as "extensions" of HRDC. This impression is not weakened by the fact that the OCRT is financially and administratively dependent upon, and falls under the authority of, HRDC.

Though the OCRT and Review Tribunals take great pains to make clear to parties that they are independent of CPP administration, it should be clearly established in law that the OCRT and, by extension, Review Tribunals are separate from and independent of HRDC.

For this reason, the Task Force recommends that the financial and administrative independence of OCRT be confirmed through its inclusion in Schedule 1.1 of the *Financial Administration Act* and by taking such other steps as are necessary. Such measures would strengthen both the perception and the reality of Review Tribunal autonomy.

Recommendation B10 – Appointment Process

Make the process for appointing Review Tribunal Panel Members more "transparent".

The Task Force felt that the public perception of Review Tribunals' independence would be improved if nominations to the Review Tribunal Panel were invited by advertising for applicants.

Recommendation B11 – Eliminate Appeals to the PAB

Amend the legislation to eliminate appeals to the Pension Appeals Board and to rename the OCRT the "Office of the Commissioner of Appeal Tribunals" and to change the name of Review Tribunals to "Appeal Tribunals" to reflect the changed mandate of that body.

As described in Section 2, Appellants under the current appeal process have the unusual opportunity for two *de novo* appeals, one before a Review Tribunal and one before the Pension Appeals Board ("PAB"). In addition, parties in certain circumstances have a right to appeal to a court of competent jurisdiction on matters of law.

The Task Force concludes that with additional resources, a fuller explanation of the Departmental decision and greater access to translation services, the appeal to the PAB would be unnecessary. It further concludes that the appeal process would be both shortened and improved by eliminating appeals to the PAB.

Having two *de novo* appeal processes means additional costs for all parties, including preparation, legal, medical and witness costs.

The costs in terms of lost time can also be considerable. The PAB must make an initial determination whether to grant leave to appeal; this usually takes about one month after application to the PAB. The hearing itself occurs up to two years later, with the issue of decision occurring some months later.

The PAB hears about 670 cases annually; and as of November 27, 2002, there were 1,512 appeals pending before the PAB (In contrast, Review Tribunals heard some 5,000 appeals in 2001 and hearings are normally held within 8-9 months of receipt by the OCRT of a Notice of Appeal.) With the additional workload for members of the Federal Court (from which PAB members are drawn) arising from the recent anti-terrorism legislation, it is expected that the burden on Federal Court judges will be even heavier, causing further delays in PAB Hearings.

In addition to the costs in terms of money and time, an appeal to the PAB entails additional stress and anxiety during which an Appellant remains uncertain as to how to "get on with life". These circumstances are particularly difficult when an insurance company or provincial or municipal agency is requiring an Appellant to pursue an appeal even in situations where the appeal is unlikely to succeed (for example, in situations where an Appellant meets the criteria for private disability insurance of not being able to perform his/her "own job", but not the more stringent CPP requirement of "incapacity to work").

The Task Force considered how the appeal process might be streamlined in such a way as to benefit Appellants and reduce the overall costs to all parties. The Task Force came to the conclusion that on balance the interests of all parties would best be served in such a streamlining by eliminating the appeals at the PAB rather than the Review Tribunal stage. The reasons for this determination include:

- Eliminating the Review Tribunal stage would lead to an enormous increase in the already heavy workload faced by Federal Court judges who are also PAB members.
- Review Tribunal Members are trained and knowledgeable in the substance of the issues that come before them, particularly disability matters (Recommendations 16 and 17 below call for expanding even further the training program and enhancing tools available to Review Tribunal Members.)
- Choosing Review Tribunal appointees in a more transparent and open manner (as called for in Recommendation 10 above) will likely result in a further strengthening of the qualifications of Members and enhance community respect for the work of Review Tribunals.
- The fact that Review Tribunal Members in most cases live and work in the communities from which appeals they hear are generally drawn appears to put some Appellants at ease and avoids the "outsider" syndrome.
- Review Tribunals are mobile and hear appeals in small, scattered communities within their area, as well as the larger centers. This mobility brings them closer to the Appellants that come before them, thus reducing both travel time and inconvenience for Appellants.

In short, Review Tribunals are knowledgeable, specialized bodies, drawn from and representative of the communities from which the appeals arise. Though the PAB has broader judicial experience, it is the Task Force's view that the Review Tribunal Panel Members' medical, legal and disability training and focused disability hearing expertise provides a more sensitive appreciation of issues brought before it.

The Task Force also notes that the PAB's granting of 34 per cent of the appeals before it does not mean that the initial decision by the Review Tribunal was "wrong". By the time an appeal reaches the PAB, the Appellant has a much better understanding of the process, the CPP eligibility requirements and what evidence is needed to win a case. In fact, the Appellant will have received the "Minister's Submission" provided just prior to a Review Tribunal Hearing, as well as the "Reasons for Decision of the Review Tribunal" supplied after the Review Tribunal process. Both explain to the Appellant in detail for the first time why the evidence he/she submitted did not lead to a determination that he/she was "disabled" within the meaning of the *Canada Pension Plan*. Especially in situations where the Appellant has no Representative, it is currently only after the Review Tribunal process that the Appellant possesses a full understanding of his/her situation and the information necessary to prepare an effective appeal.

Implementation of Recommendations 1, 2, 3 and 4 made earlier in this report would ensure that well before a Review Tribunal Hearing, an Appellant possessed an understanding of what additional information might enhance presentation of his/her case. The Task Force reiterates that greater resources should be directed to helping an Appellant become well informed early in the appeal process as to what evidence might be useful to support his/her case.

The Task Force also notes that under Section 84(2) of the present CPP legislation, a negative Review Tribunal decision can be reopened on the basis of "new facts" (such as a new diagnosis, or a confirmed prognosis that the Appellant's level of function will not "improve" sufficiently to allow re-entry into the work force, etc.). For these reasons, elimination of the PAB level of appeal would not deny an Appellant a second level of appeal, where warranted.

Recommendation B12 – Oaths/Subpoenas

In the event that appeals to the PAB are abolished, it may be appropriate to enhance the powers of the new Appeal Tribunal to include the power to administer oaths and issue subpoenas.

Though the present informality and uncomplicated nature of Review Tribunal Hearings should be retained, the Task Force felt that these enhanced powers may be appropriate if Review Tribunals became the final stage in the appeal process.

6. ADMINISTRATION OF THE OCRT

The OCRT administers the Review Tribunal appeal process, including the scheduling of Hearings and the preparation of the Hearing File for circulation prior to a Hearing.

Inevitably, the scheduling staff of the OCRT have contact with Appellants and must ascertain whether they are "ready to proceed" with a Hearing. Though the OCRT must remain neutral and not advise an Appellant, its staff has an important role to play in ensuring that medical reports have been obtained and submitted, translation is arranged, financial assistance is provided to obtain existing medical reports, etc. Task Force members appreciate that this counselling effort is very worthwhile and should be strengthened.

The Task Force's Recommendation 4 to the effect that the Commissioner of the OCRT be empowered to seek a "Certificate of Readiness" from the parties is an attempt to provide formal support of the OCRT's role in ensuring that an Appellant is indeed ready and prepared to proceed to a Review Tribunal Hearing. This section focuses on how the OCRT can contribute administratively to this same objective.

Recommendation B13 – Strengthen Counselling

Strengthen the counselling provided by the OCRT staff to ensure that Appellants are aware of basic issues of their case and of the services available to them through the OCRT. These services include providing multilingual services.

While it is important that the OCRT remains impartial, it would be very helpful to improving the process if the counselling provided to Appellants addressed some key issues, such as the importance of the Minimum Qualifying Period ("MQP") date at which it must be determined whether the Appellant was disabled. If an Appellant does not understand this basic but important issue, the Appellant may waste resources acquiring evidence which is not relevant to the case because it relates to conditions arising well after the MQP date.

It would also be useful for the Appellant to be informed that a Review Tribunal must function within the terms of CPP legislation and has no discretion to ignore the legislative requirements for eligibility for disability payments – including, for example, the requirements concerning contributions to the Plan.

It is also important to ensure that the Appellant has access to multilingual services. Currently, it is only at the Review Tribunal Hearing that an Appellant is offered the services of a translator. Thus, there are times when Appellants appears before a Tribunal (at which a translator may be provided) with little understanding of the Hearing File and what information would be useful to support their appeal because they have not had help getting the information translated into their own language. Because counselling is a key area in which the appeal process can be improved for Appellants, the Task Force recommends that multilingual services be increased to ensure that Appellants understand the appeal process and what they must do to support their appeal.

Recommendation B14 – Counselling Checklist

In consultation with Panel Members, create a "checklist" to help Scheduling Officers foster useful consideration by Appellants of the information to be presented at a Hearing.

The suggested checklist would be a broader and more extensive checklist than would be required for the "Certificate of Readiness" called for in Recommendation 4 above. The purpose of this expanded checklist would be to inform Appellants better about the process and to give them the opportunity to gather and develop better information and evidence to support their case.

The Task Force believes that this written checklist should be sent to Appellants and their Representatives at an early stage. The OCRT Scheduling Officer should also review it orally with Appellants to give them a better appreciation of the process and the relevant issues. Review Tribunal Panel Members are interested in assisting with the development of such a checklist based on their experience of aspects of the appeal process that Appellants frequently do not seem to understand.

Recommendation B15 – Enhanced Information for Appellants

Enhance information and tools available to Appellants and their Representatives by creating, distributing and posting on the OCRT Web Site: a Handbook useful for Appellants and their Representatives, and a procedural manual specifically for Representatives.

The OCRT website (www.ocrt-bctr.gc.ca) should include the recommended Checklist and Certificate of Readiness to assist individuals in their appeals. The website might also include an "Appellant's" version of the handbook suggested below for Tribunal Members and a procedural manual specifically for Representatives (See the discussion under Recommendation 17). It is also important that website information be made available in languages other than English and French.

7. TRAINING & TOOLS FOR PANEL MEMBERS

The OCRT is responsible for providing training and tools to Review Tribunal Members so that they can carry out their responsibilities in a fair and effective fashion. It was the Task Force's view that a number of specific improvements could be made in the already extensive training and array of tools now available.

Recommendation B16 – Enhanced Training

The Task Force recommends that the already extensive training of Tribunal Members be enhanced by regularly addressing a number of current legal and procedural issues.

These issues might include, but should not be limited to:

- *res judicata*; new fact evidence; multiple applications; 84(2) applications; definition and application of closed period; the effect of the *Mian* decision; and the test regarding "information available";[14]

- responsibilities of Review Tribunal Members concerning conduct of Hearings;

- procedures (such as a pre-Hearing conference) to handle unusual matters – e.g., videotaped evidence;

- clarification of Review Tribunal Members' liability or immunity from legal action by Appellants;

- how to address the relevance of evidence of separate insurance claims or coverage (private plans, workers compensation etc.);

- updating of information on particular medical areas (as has been done in the case of fibromyalgia and back problems).

[14] The Task Force discussed whether it should recommend changes to CPP legislation to reflect the current judicial interpretation concerning issues such as *res judicata* and "new facts". The Task Force decided that such amendments would be time-consuming, might require approval of the Provinces, and would then necessarily lead to the need for further judicial interpretation. Task Force Members felt that the better way to handle these thorny issues was in OCRT workshops in which Panel Members could discuss the current judicial interpretations and how to handle cases raising these issues.

Recommendation B17 – Enhanced Tools

The OCRT should continue to enhance the tools available to Tribunal Members

Task Force members applaud the preparation of a comprehensive Procedures Manual now underway and suggest that a Handbook be prepared for Panel Members. This last might include concise statements of the Procedures and other useful reference information, such as an index of the relevant sections of the CPP.

8. TECHNICAL AMENDMENTS TO CPP LEGISLATION AND REGULATIONS

Recommendation B18 – “Common Law Partner”, “Actually Received”

Amend the CPP to be consistent in its use of the term, “common law partner,” and not “spouse,” and to refer consistently to an application being “actually received” (see e.g. Sections 60(9), 42(2)(b) and 54.2(1)(b) of the Canada Pension Plan and Section 43(1) of the Regulations).

The Task Force recommends that CPP legislation and Regulations be amended to remove the inconsistencies noted above, which may on occasion lead to confusion.

9. POLICY QUESTIONS

Two policy important questions were raised by several persons during the course of the Task Force's deliberations. Even though the matters fall outside of the Task Force's terms of reference, it was felt important that they be addressed to ensure that they receive some attention.

Recommendation B19 – Retroactivity

The question whether there should be limits on the period of retroactivity for Disability Payments and Child Benefits Payments should be reviewed; and, if it is decided that there should be limits, the rationale for those limits should be stated.

The justification for any limits on retroactive payments is a matter that has been raised in a number of contexts. In the case of disability payments, a successful Applicant may receive retroactive payment only for a period effectively 11 months prior to the date of application. In the case of a Child Benefit (payable in certain circumstances to children of a disabled contributor), the effective retroactive period is again 11 months.

The Task Force could see no particular rationale for the 11-month period and notes that it imposes considerable hardship on:

- a disabled person (who may have failed to make a timely application for disability benefits because of lack of information or in the hope of "getting better"); and
- children who may be denied years of payments to which they would have otherwise been entitled and which would have assisted in their education (because, for example, a disabled parent has, through oversight or sometimes malice in the situation of a heated divorce) failed to name a child in the application for disability payments.

For these reasons, the Task Force recommends a review of whether there should be any limits on retroactive payments and, if so, what is the rationale.

Recommendation B20 – Cap on Converting Retirement Pension into a Disability Pension

The question of what is the justification for any cap converting a retirement pension where a person has a severe and prolonged disability should be reviewed and, if it is decided that there should be a cap, the rationale should be stated.

There have also been questions raised in many contexts about the justification for any cap converting a retirement pension where a person has a severe and prolonged disability. Regulation 46.2 (2) places a cap of two months on applications to convert a retirement pension into a disability pension. In some instances, this cap may pose a hardship. For example, it often takes considerable time to obtain medical reports and treatments, and people with medical problems and financial difficulties might opt to take a retirement pension due to issues of cash flow.

The Task Force recommends a review of the issue as to whether there should be a cap on converting a retirement pension into a disability pension, and if so, what that cap should be, and what is the rationale.

ANNEX: SUBMISSIONS RECEIVED

In addition to informal communications in person and by telephone, the Task Force received formal submissions from the following Panel Members:

Cynthia D'Cruz
Roger Lewandowski
Norman McLeod
Yvon Vanasse
Gay Wrye

C: REPORT OF

THE PANEL MEMBER TASK FORCE ON

CPPD AND PRIVATE INSURANCE

March 24, 2003

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SUMMARY AND RECOMMENDATIONS

This report focuses on the relationship between the *Canada Pension Plan* (CPP) disability benefit and private disability benefits provided by the insurance industry. This relationship is important because private disability insurance benefits represent the most important additional source of income for recipients of CPP Disability benefits. This report focuses on five aspects of the relationship:

- the notion of CPP as first payor of disability insurance benefits;
- the insurance company practice of offsetting their monthly benefit cheques by the amount of the CPP Disability benefit;
- the practice of assigning retroactive CPP Disability benefit payments to insurance companies;
- the tendency of insurance companies to encourage their disabled beneficiaries to undertake costly appeals of decisions on their eligibility for CPP Disability benefits; and
- group disability insurance policy agreements between employers (and other institutions) and insurance companies.

CPP as "First Payor"

Though CPP legislation and regulations are silent on the subject, most private insurance plans treat the CPP as a "first payor" of disability benefits. This practice has two important implications:

- disability benefits from private insurers are not taken into account when calculating the size of CPP Disability benefits; and
- private insurers may take CPP Disability into account when calculating a claimant's entitlement to private disability benefits (by reducing the latter by an amount corresponding to the CPP Disability benefit).

This situation can work to the disadvantage, both financial and otherwise, of persons with private disability insurance coverage who may also be eligible for CPP Disability benefits. It also raises questions about the effectiveness with which CPP funds are utilized to support people with severe and prolonged disabilities in the meaning of the legislation.

Recommendation C1 – In-depth Study
HRDC should conduct an in-depth study of the appropriateness and application, from a policy and fiscal viewpoint, of the "first-payor" principle to Canada Pension Plan disability benefits.

Recommendation C2 – Short-Term Action
While such a study is being carried out, HRDC should limit the negative impact of the "first-payor" principle upon disabled CPP Contributors by taking action in the short term on the recommendations set out below.

Offsets of Monthly Disability Amounts

Insurance companies tend to offset or reduce disability cheques to their CPP Disability beneficiaries by an amount corresponding to the CPP Disability benefit. However, while the CPP Disability benefit is taxable, many private disability insurance benefits are not.

Recommendation C3 – Tax Implications
The insurance company practice of offsetting its monthly disability cheques to its CPP Disability beneficiaries by an amount corresponding to their CPP benefits can result in the replacement of a non-taxable benefit by a taxable benefit. For this reason, the federal government should examine the tax implications of this practice and ensure that its effect is tax-neutral for those who receive both private insurance and CPP Disability benefits.

Assignment of Retroactive Disability Benefits

Because the eligibility requirements under private plans are usually less stringent than those of CPP Disability, there is often a period when a person is receiving private benefits but not CPP benefits. When the CPP benefits are approved, The CPP administration makes a retroactive payment. But under agreements signed in the early 90s with insurance companies, these retroactive payments are assigned in a lump sum to insurance companies to pay the CPP Disability recipients' "debt" incurred because the carriers had not offset the private benefits by the amount of a CPP Disability benefit that had not then been approved.

Recommendation C4 – Independent Legal Advice
Until a moratorium comes into effect (See Rec. C7 below) or this administrative practice changes, HRDC should consider requiring the private disability insurer to extend, and allocate funds to support, an opportunity for access to independent legal advice by CPP Disability recipients regarding the issue of assignment of their retroactive CPP Disability payments to insurance companies.

Recommendation C5 – Tax Neutrality
The present practice of HRDC is to assign retroactive CPP Disability benefits in a lump sum to private insurance companies. To ensure that no tax disadvantages are experienced by the recipient of the CPP Disability benefit, the federal government should take steps to ensure the tax-neutrality of this practice for CPP Disability beneficiaries. These may include the apportionment of this tax liability over several years or the designation of the insurer as the recipient for tax purposes of the retroactive payment.

Recommendation C6 – Agreements between HRDC and Insurance Companies
At present, there are agreements in place between HRDC and insurance companies which allow a recipient of CPP Disability benefits to assign them to private insurers. In light of potential negative financial and tax implications for recipients of CPP Disability payments, HRDC should review the effects of these agreements and consider amendments to them. This review should include, but not be limited to, an examination of whether these agreements allow genuine informed consent by beneficiaries.

Recommendation C7 – Moratorium
During conduct of the in-depth study of the first-payor principle, HRDC should consider a moratorium on the assignment of retroactive CPP Disability payments.

Costs of Appeal

Because of the significant amounts of money involved in offsets and the assignment of retroactive CPP Disability benefit payments, it is very much in the financial interest of insurance companies that their claimants also receive CPP Disability benefits.

Recommendation C8 – Reimburse Appeal Costs
Insurance companies frequently require their beneficiaries to appeal HRDC denials of CPP Disability benefits. The costs of the appeal can be a financial burden to these individuals. For this reason, HRDC should consider requiring the insurance companies in question to reimburse such Appellants the full costs of their appeal and any representation required for that purpose.

Group Policy Agreements

Much of the disability insurance coverage provided by private insurers is the result of group insurance policy agreements between insurance companies and employers (or some other contract-making institution acting on behalf of a group). All too often individual members of the group have no idea as to the contents of such agreements or their implications if the employee eventually becomes eligible for CPP Disability benefits.

Recommendation C9 – Fair and Full Disclosure
HRDC should study the implications for CPP Disability beneficiaries of group insurance policy agreements between insurance companies and employers, to ensure fair and full disclosure.

PREFACE

In August 2002, the Office of the Commissioner of Review Tribunals (OCRT) established the Panel Task Force on CPP Disability and Private Insurance to examine the implications for disability coverage of the relationship between benefit payments received under the CPP and those received from private group disability insurance carriers. More specifically, in its terms of reference, the Task Force was asked to:

- consider the relationship between Canada Pension Plan Disability coverage and that offered by private group disability insurance carriers;
- analyse and recommend related amendments to relevant legislation and regulations;
- review and make recommendations regarding the agreements between Human Resources Development Canada (HRDC) and the private group disability insurance carriers; and
- review and make recommendations regarding the agreements between the private group disability insurance carriers and subscribers who may at a later date be eligible to receive Canada Pension Plan Disability benefits.

The members of the Task Force were: Lyle M. Smordin (chair), Suzanne Farrell, Dr. Bill Ibbott, Joan MacDonald, Milena Protich and Gay Wrye.

The Task Force met in person and by teleconference on a number of occasions and sought input from a wide range of other Panel Members in order to strengthen our conclusions and recommendations. The Task Force was joined in its deliberations by Review Tribunal Member Christopher S. Spiteri. A key resource for the Task Force was *Background on CPP and Private Disability Insurance* prepared by Sue Lott for the OCRT in April 2002.

1. INTRODUCTION

There can be little doubt about the importance of private disability insurance to many recipients of CPP Disability benefits.

According to Sue Lott, private disability insurance is the most likely additional source of disability income received by CPP Disability recipients. She cites a 1995 Statistics Canada survey conducted for HRDC that found 25 per cent of CPP Disability beneficiaries received benefits from private insurers.[15] If anything, the number has increased. A 2002 survey of some 1,408 Review Tribunal Appellants and 202 non-appellants revealed that half or more of both groups reported qualifying for private or group disability insurance benefits – a far larger number than were getting worker's compensation and a range of other kinds of social benefits.[16]

There is a reason for these growing numbers. Simply put, CPP Disability benefits by themselves do not provide enough income support or earnings replacement for beneficiaries. The Canada Pension Plan is designed to replace about 25 per cent of one's yearly maximum pensionable earnings, which in turn is equal to the average industrial age. In 2001, the highest amount a person could receive in CPP Disability benefits was $11,221. As Sue Lott emphasizes, "The assumption is that CPP benefits will be supported by other forms of earning replacement."[17]

In such circumstances, it is hardly surprising that private and group disability insurance is a fundamentally important source of additional income for many CPP Disability benefit recipients. It is regrettable, therefore, that the relationship between CPP Disability and private and group disability insurance does not always work to the advantage, financial or otherwise, of people with severe and prolonged disabilities.

Section 2 examines the notion that now seems to lie at the foundation of this relationship – the principle that CPP Disability should be the "first payor" of benefits to people with severe and prolonged disabilities. ***Section 3*** focuses on one significant effect of the first-payor principle – the reduction or offsetting of monthly private or group insurance cheques by an amount corresponding to the size of the CPP Disability benefit. ***Section 4*** looks at one important consequence of the present application of the first-payor principle – the assignment of retroactive CPP Disability benefits in a lump sum to the insurance companies on behalf of CPP benefit recipients with private or group disability insurance. ***Section 5*** examines a third consequence of the first-payor principle – the tendency on the part of insurance companies to encourage their beneficiaries to appeal denials of applications for CPP Disability benefits. ***Section 6*** addresses the group disability insurance policy agreements between employers and insurance companies that are often little understood by employees.

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[15] Sue Lott (2002), *Background on CPP and Private Disability Insurance* (Office of the Commissioner of Review Tribunals), p. 1.
[16] Environics Research Group (2002), *Office of the Commissioner of Review Tribunals Client Satisfaction Surveys* (Office of the Commissioner of Review Tribunals), pp. 133, 134.
[17] Lott (2002), p. 1.

2. CPP AS "FIRST PAYOR"

At present, it is the "first-payor" principle that governs the relationship between CPP Disability and private and group disability insurance. This principle has important implications for people who may be eligible for CPP Disability benefits and also in receipt of private or group disability insurance coverage.

Recommendation C1 – In-depth Study

HRDC should conduct an in-depth study of the appropriateness and application, from a policy and fiscal viewpoint, of the "first-payor" principle to Canada Pension Plan disability benefits.

What does it mean that the CPP administration is the first payor of disability insurance and private insurance plans and others are second payors? The answer to this question has two dimensions, both relating to what is taken into account when the amounts of the different disability insurance benefits are calculated. More specifically,

- disability benefits from private insurers are not taken into account when calculating the size of CPP Disability benefits; and
- private insurers may take CPP Disability benefits into account when calculating a claimant's entitlement to private disability benefits (by reducing the latter by an amount corresponding to the CPP Disability benefit).

Most private insurance plans and a growing number of provincial workers' compensation programs now view CPP Disability as the first payor with respect to disability insurance. According to Sue Lott,

> Most private long-term disability replacement plans are integrated with CPP benefits by providing that private benefits, in addition to any other benefits received, must not exceed a stated percentage of a beneficiary's normal earnings. This integration occurs regardless of whether the total income that the beneficiary would receive from private disability insurance derives entirely from the insurance company or a combination of CPP and private insurance top-up. Private insurance companies have also stated that premiums are actuarially adjusted to take into account the fact that it acts as second payer and that premiums would be higher in the absence of CPP.[18]

The integration also means, of course, that private disability insurance monthly benefits will be lowered by an amount corresponding to the size of the CPP Disability benefit.

Canada Pension Plan legislation does not, however, explicitly support the view that CPP administration should be the first payor. As Sue Lott emphasizes, "It is important to note that there is no express statutory basis for this view, merely a presumption resulting from how CPP is calculated."[19] In 1996, the Auditor General of Canada saw the legislative basis for the first-payor principle in similar terms:

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[18] Lott (2002), p. 2.
[19] Lott (2002), p. 2.

> The Canada Pension Plan contains no provision concerning the treatment of disability benefits from other sources, other than provisions allowing for reimbursement of advances paid by other plans. As other programs' benefits are not taken into account, this makes the Plan a first payer.[20]

There are significant questions that can be raised about the role of the CPP administration as first payor of disability benefits, especially in the absence of any express authority for the assumption of that role. Is it, for example, in the best interests of CPP Disability recipients who also have private or group disability insurance?

In answering this question, it is important to keep in mind that CPP Disability recipients have passed a stringent eligibility test. Their disabilities are prolonged and severe enough to make them "incapable regularly of pursuing any substantially gainful occupation." Many are under financial pressure because they cannot work and are usually faced with additional medical and other expenses related to their disability.

Is it in the interest of this group to have its monthly private insurance cheques offset (or reduced) by the amount of its CPP Disability benefits? Whose interest does it serve when, as described in Section 3, these recipients' retroactive cheques from CPP Disability are sent directly to their insurance companies as a form of reimbursement for so-called "overpayments"? In many cases, both of these effects of the first-payor principle can constitute an unpleasant surprise to CPP Disability recipients, as shall be seen below.

There is also an important fiscal question that can be raised about the impact of the first-payor principle. Is CPP administration exercising fiscal prudence when its disability benefits for recipients result in a corresponding reduction in private disability insurance payments to the same recipients?

Sue Lott raises other questions:

> 1) What is the effect of integration or harmonization of benefits on the total level of benefits available to the disabled?
>
> 2) What is the effect of increasing integration of benefits on the nature of the disability insurance contract itself?
>
> 3) Is there a philosophical distinction between harmonization of two public programs versus harmonization of a public program and a private program?[21]

These are all excellent questions. It is in hopes of finding answers to such questions that we are recommending that HRDC conduct an in-depth study of the appropriateness and application, from a policy and fiscal viewpoint, of the "first-payor" principle to Canada Pension Plan disability benefits.

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[20] *1996 Report of the Auditor General of Canada* (Ottawa: Queen's Printer, 1996), p. 17.132.
[21] Lott (2002), p. 5.

Recommendation C2 – Short-Term Action

While such a study is being carried out, HRDC should limit the negative impact of the "first-payor" principle upon disabled CPP Contributors by taking action in the short term on the recommendations set out below.

An in-depth study of the appropriateness and application of the first-payor principle will take time, and in the meantime the negative impact of the first-payor principle upon CPP Disability recipients will continue. For this reason, we urge HRDC to take action in the short term on the recommendations set out in the rest of this report.

3. OFFSETS OF MONTHLY DISABILITY CHEQUES

Many insurance companies and private group insurance plans offset or reduce disability cheques to their CPP Disability beneficiaries by an amount corresponding to the CPP Disability benefit. As noted in the previous section, this offset occurs because CPP is viewed as the first payor and the private disability insurance carrier as the second payor. The two kinds of insurance benefits are, if you will, integrated, though in a manner which is very much to the advantage of the insurance company.

It is useful to grasp how this integration works in practice. Most disability insurance contracts require that, in case of disability, a person should receive from all program sources only a percentage – say, 70 per cent – of pre-disability salary. Since the companies and plans regard CPP Disability as first payor, their contracts with a disabled person allow them to offset or reduce their own disability insurance benefits by an amount corresponding to the CPP Disability benefit, so that overall only 70 per cent of pre-disability income is replaced.

As shall be seen below, these offsets can have significant tax implications which may work to the disadvantage of people with disabilities.

Recommendation C3 – Tax Implications

The insurance company practice of offsetting its monthly disability cheques to its CPP Disability beneficiaries by an amount corresponding to their CPP benefits can result in the replacement of a non-taxable benefit by a taxable benefit. For this reason, the federal government should examine the tax implications of this practice and ensure that its effect is tax-neutral for those who receive both private insurance and CPP Disability benefits.

The difficulty arises because the CPP Disability benefit is taxable, but private disability insurance benefits are generally not taxable.

More specifically, if the subscriber to private disability insurance paid all the premiums, then the benefit paid in case of disability would be non-taxable. In such circumstances, the effect of the offset and the first-payor principle may well be to replace, at least in part, a non-taxable benefit with a taxable benefit – to the clear tax disadvantage of the CPP Disability benefit recipient, though not to that of the insurance company.

For these reasons, the federal government should examine the tax implications of "offsets" and ensure that its effect is tax neutral for those who receive both private insurance and CPP Disability benefits.

4. ASSIGNMENT OF RETROACTIVE DISABILITY BENEFITS

Because the eligibility requirements under private plans are usually less stringent than those of CPP Disability, there is often a period when people are receiving private disability insurance benefits but not CPP benefits. This period can be fairly lengthy, sometimes two to three years from the date of initial application, especially if the disability pension is only won through appeals to a Review Tribunal or the Pension Appeals Board. During this period, no offsets are deducted from private monthly cheques because the person in question is not receiving CPP Disability benefits. Thus, when the CPP benefits are finally approved, a quite sizeable retroactive payment can be owed.

Since the early 90s, there have been agreements in place between HRDC and insurance companies that require recipients to assign their retroactive CPP Disability payments to their private insurers. Pursuant to these agreements, it is the practice of CPP administration to have people with private disability insurance coverage assign their retroactive CPP payment in a lump sum to the insurance company to cover the offsets that had not been deducted from their private benefit cheques. This practice clearly has important implications for the affected CPP Disability benefit recipients.

In considering this practice, we will look briefly at:

- its legislative and regulatory authority,
- its consistency with the notion of informed consent,
- its tax implications for CPP Disability benefit recipients,
- the agreements between HRDC and insurance companies governing the practice, and
- the question of whether there should be a moratorium on this practice.

Legislative and Regulatory Authority

There is clearly both legislative and regulatory authority for the assignment of retroactive CPP Disability benefits, despite the fact that Section 65(1) of the *Canada Pension Plan* states:

> A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit, is void.

The reason is, of course, the exception to this general rule set out in Section 65(3) which provides clear authority for the present practice of assigning CPP Disability benefit payments to insurance companies:

> Notwithstanding subsections (1) and (1.1), where an administrator of a disability income program who is approved by the Minister makes a payment under that program to a person for a month or any portion of a month that would not have been made if a benefit under paragraph 44(1)(b) had been paid to that person for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister ***may***, in accordance with any terms and conditions that may be prescribed, deduct from

> that benefit and pay to the administrator an amount not exceeding the amount of the payment made under that program.

Regulation 76.1 sets out the terms and conditions under which such assignments can be made:

> For the purposes of subsection 65(3) of the Act, the Minister ***may*** deduct an amount as described in that subsection from a benefit payable to a person under paragraph 44(1)(b) of the Act and pay that amount to an administrator approved by the Minister where the following terms and conditions are met:
>
> (a) the administrator submits to the Minister a record of the payment made under the disability income program, together with the person's irrevocable written consent to the deduction and payment;
> (b) the documents referred to in paragraph (a) are received by the Minister within one year after the date on which the consent is signed; and
> (c) the amount exceeds $50.

Interestingly, Regulation 76(2) makes it very clear that, when less is paid than might have been paid, the Minister is under no obligation to authorize any payment to make up the difference:

> For the purpose of subsection 65(3) of the Act, if for any reason a deduction or payment has been made by the Minister for an amount that is less than the amount that might have been paid under the subsection, if any, the Minister is under no obligation to authorize any further deduction or payment.

The flexibility bestowed on the Minister by Regulation 76(2) is in keeping with the language in Regulation 76(1) and the Act itself. It is the language of "may" rather than "must"; it is permissive rather than mandatory. Without changing the legislation or regulations, the Minister and the Department can choose to modify the practice of assigning retroactive CPP Disability payments to private insurers, or eliminate it altogether.

Recommendation C4 – Independent Legal Advice

Until a moratorium comes into effect (see Rec. C7 below) or this administrative practice changes, HRDC should consider requiring the private disability insurer to extend, and allocate funds to support, an opportunity for access to independent legal advice by CPP Disability recipients regarding the issue of assignment of their retroactive CPP Disability payments to insurance companies.

Because recipients of a CPP Disability benefit often express and surprise when their retroactive CPP Disability payment are paid in a lump sum to their private insurer, it is important to consider how the practice of reimbursing insurance companies appears from the perspective of a person with a severe and prolonged disability.

For the insured, one result of the growing integration of insurance programs has been "the proliferation of 'coordination of benefits' clauses in disability policies which list the specific income replacement payments that are to be deducted from the benefit payable and (describe) the common practice of calculating benefits as a portion of earnings."[22] These are often difficult for even the most literate people to understand.

[22] Lott (2002), p. 6.

As Section 6 points out, many people acquire their disability insurance through group insurance plans provided by their employers, financial institutions, unions or professional associations. Many people insured in this way only receive certificates summarizing the policies, as opposed to the policies themselves. Even these certificates are far from an easy read.

Thus, given the complexity and technical language of many insurance contracts, it is hardly surprising that highly educated people, let alone less educated Canadians or those for whom English or French is a second language, do not fully understand the implications of the 'coordination of benefits' clauses in their insurance policies even when they are healthy.

They are no longer healthy but suffering from a severe and prolonged disability at the time when they are expected to sign an HRDC form authorizing the assignment of their retroactive CPP Disability benefits in a lump sum to the insurance company to reimburse it for not deducting the offset. They are also often under financial pressure at this time, having had to give up work. Certainly, there is no provision for them to receive, prior to signing the assignment, any independent legal advice, assuming that they could afford it. In the circumstances, it is worth asking whether signing the HRDC consent to the assignment represents informed consent.

HRDC should, therefore, consider requiring the private disability insurer to extend, and allocate funds to support, an opportunity for access to independent legal advice by CPP Disability recipients regarding the issue of assignment of their retroactive CPP Disability payments to insurance companies.

Recommendation C5 – Tax Neutrality

The present practice of HRDC is to assign retroactive CPP Disability benefits in a lump sum to private insurance companies. To ensure that no tax disadvantages are experienced by the recipient of the CPP Disability benefit, the federal government should take steps to ensure the tax-neutrality of this practice for CPP Disability beneficiaries. These may include the apportionment of this tax liability over several years or the designation of the insurer as the recipient for tax purposes of the retroactive payment.

Some CPP Disability recipients have expressed surprise and indignation that their only contact with their retroactive CPP Disability payment is the taxes they have to pay on it. The CPP Disability benefit is, of course, taxable; and even though beneficiaries never see the retroactive payment that goes to the insurance company, they still have to pay taxes on it. Indeed, the Canada Customs and Revenue Agency issues a T4 statement to beneficiaries for the retroactive payment assigned to insurance companies.

These beneficiaries' tax situation may well be worsened by the fact that the retroactive payment in made in the form of a lump sum, often of considerable size, concentrating the tax liability in a single year.

In cases where the private disability insurance benefit is taxable, the disabled person is provided enough information to support a deduction for prior years in the amount of the retroactive payment. However, the burden falls on the disabled person to claim that deduction. If he or she fails to claim the deduction, then there is a risk of double taxation.

In cases where the private disability insurance benefit is not taxable, reimbursing the insurance company for the offset with the retroactive CPP Disability payment means replacing a non-taxable benefit with a taxable benefit, as far as the recipient is concerned. This situation poses a tax-planning challenge for Disabled Contributors. Ideally, they should set aside a portion of their non-taxable benefit to pay taxes on a taxable retroactive CPP Disability benefit that they have no guarantee of winning and, if they do win it, have no idea when it might materialize – a taxable benefit that moreover they will never receive because it will go to their insurance companies. In such circumstances, it is hardly surprising that many people with disabilities do not plan for such a hypothetical tax liability, especially when they have had to give up work and may be financially pressed.

For these reasons, it is the Task Force's recommendation that the federal government should take steps to ensure the tax-neutrality of this practice for CPP Disability beneficiaries. These may include the apportionment of this tax liability over several years or the designation of the insurer as the recipient for tax purposes of the retroactive payment.

Recommendation C6 – Agreements between HRDC and Insurance Companies

At present, there are agreements in place between HRDC and insurance companies which require a recipient of CPP Disability benefits to assign them to private insurers. In light of potential negative financial and tax implications for recipients of CPP Disability payments, HRDC should review the effects of these agreements and consider amendments to them. This review should include, but not be limited to, an examination of whether these agreements allow genuine informed consent by beneficiaries.

The practice of using retroactive CPP Disability payments to "reimburse" insurance companies is governed by agreements that Human Resources Development Canada (HRDC) signed between 1993 and 1995 with 36 private insurance companies and plans. In addition to the potential negative tax and financial implications associated with the regime created by these agreements, it is worth asking how meaningful is the consent by the CPP Disability recipient to this assignment of retroactive payments.

In considering the financial impact of these assignments of retroactive payments to "reimburse" insurance companies for not deducting offsets from their own cheques, it is important to keep in mind that these assignments are made in a lump sum. Even if we accept the view that these assignments represent reimbursements to pay "debts", it is difficult to argue that paying debts in a lump sum is always in a person's best financial interest.

Finally, as noted in the discussion following Recommendation C4, questions can be raised about the genuineness of the consent by CPP Disability beneficiaries to the assignment of their retroactive payments in a lump sum to insurance companies. Though they sign a consent form authorizing the assignment, they do so, often at a time of illness and financial emergency, in the context of an insurance company and CPP administrative regime intended to encourage or enforce this kind of "reimbursement." It is also worth asking how meaningful such consent can be when no reasonable alternative to the lump-sum payment – such as paying off the "reimbursement" over time – is available.

For these reasons, HRDC should review the effects of these agreements with insurance companies and consider amendments to them. This review should include, but not be limited to, an examination of whether these agreements allow genuine informed consent by beneficiaries.

Recommendation C7 – Moratorium

During the conduct of the in-depth study of the first-payor principle, HRDC should consider a moratorium on the assignment of retroactive CPP Disability payments.

As has been seen in the discussions of Recommendations C4 to C6, the assignment of retroactive CPP Disability payments in a lump sum to insurance companies has, at least potentially, negative financial and tax implications for the large numbers of CPP Disability benefit recipients who are also receiving private disability benefits. Questions can also be raised about how informed or meaningful is recipients' consent to this assignment of retroactive payments.

What is most striking about this administrative practice is the lack of reasonable alternatives with which it presents people with severe and prolonged disabilities. They can either agree to have HRDC transfer their retroactive payments in a lump sum to the insurance company; or they can keep the money and do it themselves immediately in the form of a lump sum or likely face sharp reductions in their private benefits. In the communications with Disabled Contributors by HRDC and the insurance company, there is no mention of, for example, arrangements for reimbursing the company in modest installments over time.

Such an alternative is incompatible with the present practice. However, it is by having the freedom to choose between reasonable alternatives that people are empowered to live independently and engage with their communities – objectives which everyone, including HRDC, enunciates as central to effective policies and programs for people with disabilities. Why should we deprive people with disabilities of a freedom that most Canadians enjoy?

For all these reasons, the Task Force recommends that HRDC should consider a moratorium on the assignment of retroactive CPP Disability payments during the conduct of the in-depth study of the first-payor principle.

5. COSTS OF APPEAL

Because of the significant amounts of money involved in offsets and the assignment of retroactive CPP Disability benefit payments, it is very much in the financial interest of insurance companies that their claimants also receive CPP Disability benefits. As a consequence, the companies often encourage and even require their claimants to apply for CPP Disability benefits and appeal any denials of such benefits. However, the appeal process can be quite costly to Appellants.

Recommendation C8 – Reimburse Appeal Costs

Insurance companies frequently require their beneficiaries to appeal HRDC denials of CPP Disability benefits. The costs of the appeal can be a financial burden to these individuals. For this reason, HRDC should consider requiring the insurance companies in question to reimburse such Appellants the full costs of their appeal and any representation required for that purpose.

Of the 1,400 Review Tribunal Appellants surveyed in spring 2002, one quarter reported that their private or group insurance company recommended that they appeal.[23] Roughly, the same proportion of applicants who decided not to appeal said their insurance company encouraged them to appeal.[24]

Sample letters provided to the Task Force have indicated that in the event a recipient of private disability insurance either refuses or does not carry through with an application or an appeal for a CPP Disability pension, some private group disability insurance carriers will calculate the amount of the CPP Disability benefit and automatically deduct that amount from its future payments.

It is important to understand that there can be costs associated with an appeal. These costs must be borne by people who can no longer work and are often facing additional costs due to their medical condition.

In order to build a case, it is often necessary to see health professionals whose services may or may not be covered by Medicare. If the Appellants live in a rural or remote area but need evidence from a specialist to support their evidence, they must pay travel and accommodation costs to visit the specialist in a distant urban centre. Appellants must frequently pay fees for the writing and/or photocopying of medical reports to support their case.

Appellants with Representatives are generally somewhat more successful than those without. However, there can be significant costs associated with the hiring of a lawyer or a pension consultant to help make one's case.

For these reasons, HRDC should consider requiring the insurance companies forcing such appeals to reimburse the affected Appellants the full costs of their appeal and any representation required for that purpose.

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[23] Environics (2002), p. 39.
[24] Environics (2002), p. 138.

6. GROUP POLICY AGREEMENTS

Much of the disability insurance coverage provided by private insurers is the result of group insurance policy agreements between insurance companies and employers (or some other contract-making institution acting on behalf of a group). All too often individual members of the group have no idea as to the contents of such agreements or their implications if the employee eventually becomes eligible for CPP Disability benefits.

Recommendation C9 – Fair and Full Disclosure

HRDC should study the implications for CPP Disability beneficiaries of group insurance policy agreements between insurance companies and employers, to ensure fair and full disclosure.

Many Canadians acquire disability insurance coverage through private group insurance plans. The resulting policies are negotiated with an insurance company by way of an employer for his employees.

The employee is not an active participant in the negotiation of the master policy, which describes the coverage, sets out applicable terms and conditions and may contain a formula for calculating premiums paid by group members. Instead, the parties to the agreement are the employer and the insurance company. According to Sue Lott, the individual employee "is usually given a certificate without a copy of the master policy. The certificate is usually just a summary of terms rather than the complete certificate itself."[25]

It is far from clear from the legislation and jurisprudence that either the employer or the insurance company has a duty to provide full and fair disclosure of the nature of the agreement to employees. According to Sue Lott,

> There is also the question whether the policyholder (the employer in this instance) has a duty of care toward the group person insured, for example, with respect to negligent statements regarding the extent of coverage. There does not appear to be a consensus as to whether a duty of care exists on the part of the policyholder and whether such a duty includes a duty to prove a complete explanation of the insurance.[26]

Given the surprise and confusion experienced by Disabled Contributors upon learning of offsets and the assignment of retroactive CPP Disability payments, it is the Task Force's belief that HRDC should study the implications for CPP Disability beneficiaries of group insurance policy agreements between insurance companies and employers, to ensure fair and full disclosure.

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[25] Lott (2002), pp. 12, 13.
[26] Lott (2002) pp. 13, 14.

ANNEX: LEGISLATIVE AND REGULATORY AUTHORITIES

The legislative and regulatory authorities for the assignment of reactive CPP Disability payments are:

Section 65(1) of the *Canada Pension Plan*

A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit, is void.

Section 65(3) of the *Canada Pension Plan*

Notwithstanding subsections (1) and (1.1), where an administrator of a disability income program who is approved by the Minister makes a payment under that program to a person for a month or any portion of a month that would not have been made if a benefit under paragraph 44(1)(b) had been paid to that person for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister ***may***, in accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the administrator an amount not exceeding the amount of the payment made under that program.

Regulation 76(1)

For the purposes of subsection 65(3) of the Act, the Minister ***may*** deduct an amount as described in that subsection from a benefit payable to a person under paragraph 44(1)(b) of the Act and pay that amount to an administrator approved by the Minister where the following terms and conditions are met:

(a) the administrator submits to the Minister a record of the payment made under the disability income program, together with the person's irrevocable written consent to the deduction and payment;
(b) the documents referred to in paragraph (a) are received by the Minister within one year after the date on which the consent is signed; and
(c) the amount exceeds $50.

Regulation 76(2)

For the purpose of subsection 65(3) of the Act, if for any reason a deduction or payment has been made by the Minister for an amount that is less than the amount that might have been paid under the subsection, if any, the Minister is under no obligation to authorize any further deduction or payment.