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Commission de réforme du droit du Canada

the pension appeals board

ADMINISTRATIVE LAW SERIES

STUDY PAPER

THE PENSION APPEALS BOARD

A study of administrative procedure in social security matters

Prepared for the
Law Reform Commission of Canada

by
Pierre Issalys

THE PENSION APPEALS BOARD

Administrative Law Series

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Notice

This study describes an important part of the federal administrative process. In the course of this description the author identifies a number of problems and suggests solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the author, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

Comments on these studies are welcome and should be sent to:

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Foreword

By its nature, the subject of the present study has obliged the author to have frequent recourse to a number of administrative bodies for help. His requests for advice and support were invariably met with good will, and he now wishes to make formal acknowledgment of the value of these contributions to his work. The names of several persons in particular need to be mentioned in this regard.

I must, first of all, record my debt of gratitude to Me Jacques Bonneau, Registrar of the Pension Appeals Board, for allowing me to draw on his intimate knowledge of Board jurisprudence and for compiling at my request a summary of the activities of the Board from its origins. With his permission, I was able to examine a number of appeal files in the Board archives.

His colleague in the Office of the Umpires, Me Philippe Maltais, is likewise deserving of my thanks for his effective and valuable help, courteously provided, in giving me access to his archives.

At the Department of National Health and Welfare, I have benefited from the faithful and active support of Mr. Brian Rosenthal, Head of the Appeals Section at the central administration of the Canada Pension Plan. Thanks to him, I could question several officials connected in a variety of ways with the application of this Plan.

At the Department of National Revenue, officials in the Source Deductions Division in general, and Messrs. Thibault and Morgan in particular, have spared no effort to help me gather documentation on the activities of this division.

Various Quebec administrative bodies have likewise made a significant contribution to my research. I wish to convey special thanks for their help to Mr. Justice Poirier, president of the Social Affairs Commission, and Me Pierrette Ricard, legal counsel to the Commission; to Me Raymond Moreault, Secretary of the Quebec

Pension Board; and to Mr. Albert Dupont, from the Quebec Department of Revenue.

For much of this research I am indebted to Me Alain-Claude Desforges in whose person I have found a capable and conscientious assistant. In the final phase of the work, the efficient and painstaking labour of Mme Mariette Asselin-Gaille did much to relieve me of the worrisome business of transcribing the report.

Unless otherwise noted, the statistical documentation used in this study dates from the period prior to December 31, 1976. The report, however, describes the state of the law as of December 31, 1977.

Pierre Issalys

Introduction

The subject of the present study, as its title suggests, is the Pension Appeals Board. The Board is an autonomous administrative agency created in 1965 by the Parliament of Canada to hear appeals against decisions handed down by various administrative authorities in social security matters, particularly in the application of the Canada Pension Plan.

Some of the concepts used in this definition of our subject call for further specification. This is the purpose of the present introduction, at the end of which we shall describe the perspective in which this study was undertaken as well as provide an outline of the developments that will follow.

A. Concept of autonomous agency

This monograph is one of a series devoted to "autonomous agencies" in the federal administration. The term "autonomous agency" is intended to mean an administrative authority constituted to allow the decentralization of certain functions which for various reasons it is considered preferable not to entrust to central agencies of the public administration, that is to say, in essence, to the government ministries. This type of entity in public law is accordingly characterized by its greater or lesser degree of autonomy relative to the central seat of political authority and by a certain specialization of its activities. As we shall see, the Pension Appeals Board is a body with a very high degree of both autonomy and specialization. Within the general category of "autonomous administrative agencies" it belongs more specifically to a group of agencies having essentially judicial functions — in this case, an appeal function — which for this reason are often called administrative tribunals.[1]

B. Concept of administrative procedure

In this series of monographs, autonomous agencies are viewed from the vantage point of "administrative procedure". Unlike the concept of the autonomous agency, this notion has not yet acquired a very precise meaning in Canadian law. Admittedly, the jurisprudence developed by the courts in the exercise of their review powers over the acts of administrative authorities is in large part devoted to the analysis of the procedure implicit in these acts. It is precisely in this jurisprudence that Canadian administrative law was long believed to consist. Only very recently has administrative law begun to move away from an exclusive concern for the judicial review of administrative action.[2] This evolution has paved the way to placing the concept of administrative procedure into a more fitting perspective. At the present time, it is no longer a mere by-product of judicial review of administrative acts, but is on its way to becoming a distinct branch of administrative law, suitably enlarged to include the total juridical context within which are situated and operate the various agencies of public administration.

In this comprehensive and systematic perspective, administrative procedure may be defined as that branch of administrative law whose subject is the body of rules governing the determination of the normative acts of public administration.[3] This operation subsumes all the phases of the process whereby public administrative decisions are taken, from the outset (whether the process begins at the initiative of the administered subject or of the administering authority) to the time when the decision of the administering authority acquires finality. Consequently, administrative procedure includes the rules governing:

- the initiation of the administrative process,
- the gathering of information required for a decision,
- public participation in the decision-making process,
- the mechanisms of consultation, notice and prior rectification,
- the justification, communication and publication of the decision,
- the up-dating of the decision,
- the avenues of recourse against the decision, whether aimed at the author of the decision or at higher authority,
- the execution of the decision by the administrative authority,
- the mechanisms of verification following the decision,
- the sanctions applicable for failure to carry out the decision, and

- the formalities and time-frames that apply to the various phases of this process.

To be sure, the mode of procedure utilized will vary depending upon the nature of the decision to be taken. More specifically, we may distinguish between administrative decisions of a general character, applicable to an indeterminate number of persons (the regulation-making power of administrative authorities is the usual source of this kind of decision), and decisions of a particular character, aimed at a limited number of individuals or, on occasion, even at a single individual (for example, the award or refusal of a grant or benefit).

There are three sources of administrative procedure.

The first of these is legislation and regulations which include more or less elaborate procedural standards applicable to the actions of the administrative authority and are, obviously, enforceable against all affected by such actions. Legislation concerning administrative procedure can take two forms. In the first, procedural standards are dispersed throughout the body of legal texts governing the actions of the various administrative authorities, so that they usually vary from one text to another, and from one administrative authority to another. This is the prevailing situation in Canada at the federal level and in most cases at the provincial level, as well as in numerous other countries, notably Great Britain and France.[4] In the absence of systematic arrangement, any deficiency in the texts gives rise to judicial interpretation, which seeks to supply the lacunae of the legislation and to deduce certain general principles from it. In the second situation, there exists, side by side with specific pieces of legislation, a general code to determine certain standards applicable to a great number of administrative authorities: this is the case in the United States, in some ten European countries[5] and, to some extent, in Ontario and Alberta.[6]

The second main source of administrative procedure is the body of internal rules adopted by administrative authorities: existing in the highly diversified form of minutes, policy statements, circulars, directives, manuals and so forth, these rules in effect provide for the most part the workaday detail of administrative procedure. In theory, internal procedural rules derive from the powers of administrative organization and management that the law confers on authorities charged with applying it; as is the case with regulations, internal rules must be compatible with the legislation. Ordinarily, however, such rules are not brought to the notice of the public.

The third, and least definable, source of procedures is the customs and practices of administrative authorities. Although these may vary from time to time and, occasionally, from place to place, they are not without considerable importance at the practical level.

The present study is devoted essentially to describing and analysing the procedure used by the Pension Appeals Board, an administrative tribunal functioning in the field of social security. The very nature of the PAB, however, compels us to broaden appreciably this definition of our subject.

The PAB, in effect, is an administrative appeal tribunal acting, in all but exceptional cases, as a court of last resort. The procedure according to which it arrives at its decisions is therefore merely the last phase of a larger administrative process which includes also the rendering of the administrative decisions brought for appeal before the tribunal. To achieve an adequate understanding of this last phase, it is therefore essential to appreciate, in its broader outlines at least, the antecedents of the decision-making process. This is the reason why the present study includes a chapter describing the procedure followed by the administrative authorities whose decisions are the subject of appeals heard by the PAB.

These decisions are extremely varied in respect of their subject matter, the manner in which they are made, and the nature of the administrative authority from which they emanate. All, however, share the feature of falling within the domain of social security. What the term "social security" means now remains to be specified.

C. Concept of social security

In Canadian legal and political terminology, unlike that used in the United States or in France, for example, or in the practice of international law, the term "social security" is not strictly or systematically defined.[7] Indeed, there are few legal studies on the subject in Canada.[8] Nevertheless, "social security" as it is used in this country is capable of being fairly precisely defined. The term designates a set of measures whereby society, having levied sufficient financial resources by means of taxes or contributions from its members, redistributes them among individuals in the form of benefits to protect them against certain risks or burdens that might lower their standard of living or threaten their economic security.[9]

Intended initially to promote communal solidarity and to encourage individual foresight, social security has become one of the principal facts of modern economic and political life. Because of the vastness of the financial resources it mobilizes, it has grown into the instrument *par excellence* of a policy of income redistribution.[10]

Logically, every social security system involves two fundamental operations, clearly distinct in its process of application.

The first concerns the levy of the necessary resources. This may be accomplished through the collection of money from certain select categories of persons (e.g., from salaried workers or farmers) or from the entire active population (defined in terms of "workers" or "contributors"). In either event, the resources may be collected in the form of contributions analogous to insurance premiums and generally connected with the exercise of some employment or occupation. In the second case, it can also take the form of a tax, whether integrated with the general taxes or collected separately and set aside for the financing of such or such social security measure. Indeed, a social security system may be financed both by means of contributions and out of fiscal receipts; these two sources may be occasionally supplemented with investment income from collected but as yet undistributed money.

The second operation consists in the payment of benefits as provided under the various plans of the social security system, to persons fulfilling all the conditions laid down for the enjoyment of benefits. Under certain plans of the so-called "contributory" variety, an individual's right to benefit is contingent on his prior contribution to the financing of the plan through the payment either of the dues or of a tax. In other cases, no causal connection exists between contributing to a plan and enjoying benefits under it ("non-contributory" plans). In the latter, a would-be beneficiary need merely furnish proof of occurrence of the event or of the reality of the burden against which the plan is intended to protect him ("universal" plans), or show that the event creates economic hardship for him ("selective" plans).

The risks against which social security systems usually afford protection are those whose occurrence is likely to deprive the individual of the income necessary for his subsistence or at least to reduce his income. A distinction thus arises between physical risks, which directly affect the individual's capacity of earning an income, and economic risks, which affect earning capacity indirectly by

rendering it unproductive. Among physical risks, some are connected with occupational pursuits, as for example those covered by plans for the compensation of work accident victims or the victims of occupational diseases. Other risks, although incapacitating to the wage-earner, are not directly related to his occupational activities: sickness, disability, maternity, old age and death (which threatens the economic security of dependants) are of this kind. Economic risks are essentially those arising out of the economic situation (such as unemployment or the depressed state of the agricultural produce market) or stemming from natural events (such as crop failures).

Apart from mitigating the effect of such risks, social security is generally aimed at protecting individuals against a reduction in their living standards, whether due to exceptional expenses (such as those incurred through sickness) or occasioned by outlays deemed to be of particular usefulness to society (such as those incidental to the maintenance and education of children).[11]

The very multiplicity of the situations that a social security system must be prepared to deal with can become a complicating factor in its own right. This multiplicity expresses itself, at the level of gathering the financial resources necessary to support the system, through a great diversity in the definition of the contributing population, depending upon the nature of the risk in question. At the level of the distribution of benefits, the complexity is further compounded by the existence of even greater variety in conditions of eligibility. To avoid the juridical, administrative and financial complications inherent in this compartmentalization of social security, the proposal has been advanced in a number of countries that the diverse causes of economic insecurity no longer be taken into consideration but rather the fact of such insecurity, however caused, be retained as the sole criterion of a more or less unified social security system. Under such a dispensation, every individual would be guaranteed a minimum income; should his own income fall below the statutory minimum, he would receive financial support in the amount corresponding to the deficit.

D. Study outline and perspective

As in the case of other monographs in this series, the major object of this study will be to describe the process whereby certain types of administrative decisions (in the present instance, those

which the PAB is called upon to review) are formulated, and, incidentally, to make comments on this process in terms of the basic principles of administrative procedure.

A major part of this study is devoted, in essence, to a description of the Pension Appeals Board and its procedure. For the reasons already cited above, we have regarded the PAB's administrative procedure as one phase of a larger decision-making process, which we shall likewise describe. Before dealing with these mechanisms of procedure, we shall briefly outline the principal political, juridical and administrative factors influencing the activity of the PAB. Finally, it has appeared to us worthwhile to examine, from a comparative point of view, the treatment accorded under Quebec law to the organization and procedure of an agency whose functions correspond to those of the PAB.

Accordingly, in the first chapter we shall endeavour to place the PAB within its political context, that is, within one of the spheres of activity of the State: social security. A list of the statutes and regulations applicable to its activity will follow, viewed in their constitutional and historical context. Lastly, we shall identify the main administrative entities that take part in the decision-making process to be described. All these elements — political, juridical and administrative — in effect represent the parameters of the PAB's activity.

Since in the perspective of this study the PAB is the centre of the administrative universe we wish to describe, the second chapter will be entirely devoted to it. Without entering into a detailed description of its functioning, we shall outline the PAB's origins, nature, composition, organization and powers. To complete the reader's emergent idea of it, we shall also present certain statistical data concerning its activity.

The third chapter will review, in the light of the various areas of the PAB's jurisdiction, the processes whereby decisions liable to appeal are formulated. In each case, it will be necessary to describe the decision-making administrative organizations involved, the successive phases of the process and the events that may take place before decisions come before the PAB on appeal.

In the fourth chapter, we shall describe the process of appealing to the PAB against decisions taken by administrative authorities at the first level; how appeal files are constituted; how appeals are

heard by the PAB and what outcome they are likely to have; and, lastly, what control is exercised over the activity of the PAB. The chapter, bearing directly as it does on PAB procedure, represents the climax and end of the descriptive portion of this study.

By way of epilogue, the sixth chapter will contain a comparative analysis of the organization, jurisdiction and functioning of the Quebec Social Affairs Commission. For the last two years, this administrative tribunal has exercised with regard to benefits under the Quebec Pension Plan a jurisdiction identical to that of the PAB with reference to benefits under the Canada Pension Plan. Before embarking upon a critical survey of administrative procedure in areas coming under the PAB's jurisdiction, it will be useful to juxtapose and compare the solutions adopted in federal practice and in Quebec practice, respectively.

The final chapter, critical in orientation, will serve a double purpose. It will describe, on the one hand, the application of certain general principles in this specific field of administrative action. Set forth at the beginning of the chapter, the principles represent the reconciliation, so essential in a democratic system of administration, of the need for efficient administrative action with the safeguarding of the rights of individuals — the reconciliation of the primacy of the public good with a respect for legitimate private interests. The examination will demonstrate that administrative efficiency is the product of three essential conditions: the possession of exact information by the decision-making authority, speed in the formulation of the decision itself, and the existence of guarantees that decisions, once taken, will be executed. Protecting the rights of individuals presupposes, in its turn, three conditions as well: prior knowledge on the part of members of the public of their juridical situation, freedom to take part in the decision-making process, and the existence of avenues of recourse against decisions taken.

On the other hand, the chapter will attempt to shed light on specific aspects of the administrative procedure previously described that are in need of improvement. This practical approach will be subordinate, however, to the larger perspective which our study shares with others in the present series, in that we shall attempt to construct a comprehensive overview of administrative procedure and to promote orderly improvement in this area of federal law.

CHAPTER 1

General data concerning the activity of the PAB

Three fundamental realities underlie the activity of the PAB as an appeal tribunal. The first is political in nature: the existence in Canada of a number of social security measures whose application is furthered by the PAB through the control it exercises over administrative decisions affecting individuals. The second is of a legal nature: the existence, within the limits laid down in the constitution for federal and provincial legislative intervention in matters of social security, of a number of statutes and regulations elucidated in certain respects by the jurisprudence of the courts. The third is of an administrative character: the existence at both levels of government of a number of diverse administrative agencies sharing the various functions connected with the application of social security legislation, the PAB being one of these agencies. It may be noted that in each of the three cases we have spoken of a "number" of things: measures, statutes and regulations, agencies. In fact, the use of the collective term is intentional since each covers a complex reality. The description of the three underlying realities will be the subject of the three sections composing this chapter.

SECTION I

The political dimension: the Canadian social security system

A definition of social security has already been proposed in the introduction to this study. It now remains for us to ascertain what the concept means in the Canadian context (A). We shall then specify which elements of the system are affected by the activity of the PAB (B). Finally, as an index of the social and economic importance of the PAB's activity, we shall present some statistics concerning the various elements of our social security system (C).

A. Social security in Canada

The Canadian social security system compares favourably, from the point of view of the number and variety of the situations that it covers, with that of other industrialized countries. The system consists of several plans, whose manner of financing and conditions for the payment of benefits differ significantly from one another. To this source of complexity must be added the fact that some of the plans are created and administered by the federal authority whereas others are provincial. The constitutional bases of this state of affairs will be further explored in Section II. For the present, suffice it to give the reader an overview — highly simplified — of the Canadian system so that he may better grasp the nature of the role played by the PAB.

In the tangle and confusion of federal and provincial plans whose totality constitutes the Canadian social security system, one may distinguish three successive lines of defence against economic insecurity.[12]

1. Social insurance plans

The first line of defence is provided by social insurance plans. Two of these, unemployment insurance and the Canada Pension Plan, are governed by federal law. In Quebec, by way of exception, the place of the Canada Pension Plan is supplied by the Quebec Pension Plan, under provincial jurisdiction. Throughout the country the compensation of work accident victims falls within the purview of provincial law.

Unemployment insurance, introduced in 1940 and thoroughly restructured in 1971, is a contributory plan financed partly through the obligatory payment of premiums deducted from the wages of salaried employees and partly through contributions from their employers. Since 1971, virtually all salaried manpower has been subject to unemployment insurance. The functioning of the plan is roughly analogous to that of insurance, with some peculiar features of its own. It provides for the payment of benefits to salaried persons who have lost their employment for a maximum period of 52 weeks. Employees discharged from employment by reason of sickness or maternity are also eligible to receive benefit in certain circumstances.[13] Conditions of eligibility to unemployment insurance benefits are extremely complex for all categories of beneficiaries.[14]

The Canada Pension Plan and the Quebec Pension Plan are contributory plans established in 1965. They are financed through compulsory contributions levied from virtually all workers (both salaried and self-employed) and from employers. Wage-earners and employers contribute equal shares under both plans, whereas self-employed workers are expected to bear the full burden of their contribution. The amount contributed is proportional in each case to the income of the contributing worker within a range of income defined by law. The plans are essentially old-age insurance schemes, providing for the payment of a monthly retirement pension to each contributing worker upon reaching the age of 65. Both plans provide equally for the payment of special benefits (called "supplementary benefits") before the age of 65 in the case of particular categories of persons: the disabled, the children of the disabled, widows, widowers and orphans. The amount of the benefits paid to various categories of individuals is similarly related to the contributor's income.

Compensation plans for the victims of work accidents, instituted by the provinces in the 1920's and 1930's, are based on the notion of

the collective responsibility of employers. The indemnity fund of each plan is accordingly supported by means of compulsory contributions levied on the majority of employers. The amount of the contribution is actuarially determined on the basis of the work-accident experience of the class of business to which the employer's own business belongs. The plans provide for the payment in money and in kind of compensation to the victims of accidents suffered in the course of their occupational activities or of diseases contracted as a result of such activities. The amount of the compensation paid is a function of the worker's income. Uniform indemnity in money is also payable to the survivors of work-accident victims.[15]

2. Universal benefit plans

The second line of defence against economic insecurity is provided by universal benefit plans. Plans of this type are mainly governed by federal law. The federal Old Age Security[16] and Family Allowance plans[17] belong to this type, as do provincial Family Allowance plans in effect in the provinces of Quebec[18] and Prince Edward Island.[19] The plans are all of the non-contributory variety, financed entirely out of general fiscal receipts. The Old Age Security plan, established in 1952, provides for the payment of a uniform monthly pension to all persons over the age of 65. The Family Allowance plan, instituted in 1944 and thoroughly revised in 1973, provides for the payment of a monthly allowance, in principle to the mothers of dependent children. Federal law determines the average amount of monthly benefits payable for each dependent child, although the provinces have the option of varying the amount depending upon whether the child on whose account it is paid is the first, second, third, etc., in the family. The overall average amount of allowances paid in each province must, however, conform to the average laid down by federal law. Under the provincial Family Allowance plans, the amount of per capita allowance is established by provincial law.

If the concept of social security is extended to include all measures designed to safeguard the individual's economic security, not only through the payment of monetary benefits but also through the provision of essential services rendered at reduced cost or at no cost to the individual, a number of further schemes may be added to this list of universal benefit plans. Provincial hospitalization insurance and medical care insurance plans are essentially of this type. The introduction of hospitalization insurance plans goes back to the

period from 1934 to 1961 and that of medical care insurance plans to the years 1961 to 1971. Even though they are governed by provincial law, the plans in their present state have been largely normalized by federal legislation enacted at various times: in 1957 for hospitalization insurance and in 1966 for medical care insurance.[20] The federal framework legislation provides for the payment to complying provinces of subsidies amounting to approximately one half the cost of maintaining the plans.

3. Social assistance plans

The third line of defence against economic insecurity is afforded by social assistance plans. These schemes extend protection to those not covered by the various social insurance plans and whose income, even after receiving benefits under the universal plans, is insufficient. It is in this sense that social assistance plans have been described as "selective", "complementary" or "residual". In concrete terms, the plans are chiefly provincial social welfare schemes established gradually in the various provinces since the beginning of the present century. Since 1965, they have been partly normalized as a result of federal framework legislation which provides, as in the case of health insurance plans, for federal-provincial cost-sharing.[21] The financing of these plans is entirely dependent on general fiscal receipts. Restricted at first to certain categories of indigent persons, the benefits of social assistance plans have been progressively extended to all individuals in need, whether owing to their inability to hold down regular employment or to the insufficiency of their income. In fact, the principal social groups benefiting from social welfare programmes are, in decreasing order, persons afflicted with permanent disabilities or chronic illness, single parent families, the unemployed and the aged.[22]

Another important social assistance plan is the Guaranteed Income Supplement (GIS), open to all Old Age Security pension recipients.[23] This non-contributory scheme, established in 1966, provides for the payment of a monthly supplement to beneficiaries of the Old Age Security pension for whom the latter represents the sole or principal source of income. The amount of the supplement is computed in the light of the beneficiary's marital status and his spouse's age; it is reduced in proportion to the income enjoyed by the beneficiary over and above his Old Age Security pension.

4. The system and its users

Such, then, sketched in its broad outlines, is the Canadian social security system. So as not to confuse the picture, we have made no mention of a certain number of programmes created for the benefit of relatively limited socio-economic groups or implying a very extensive definition of social security, such as crop insurance, agricultural price stabilization plans, pensions and allowances to veterans, rental subsidies, etc.[24] Our necessarily brief presentation suffices, however, to reveal the patchwork complexity of our social security system. The picture that emerges into view is one more suggestive of an ill-coordinated array of successive measures than of a coherent and harmonious structure of interlocking components. There is no need to editorialize here on the whys and wherefores, the pros and cons of the situation. A certain number of conclusions must, however, be drawn from the point of view of administrative procedure.

The confusion of responsibilities, shared by numerous administrative agencies belonging to both levels of government (not to mention, in some cases, the municipal authorities); the complexity of conditions of eligibility for certain types of benefits (notably, those of unemployment insurance and social assistance); and the poorly coordinated laws and procedures governing each plan do little to facilitate people's access to social security. In its April 1973 working paper, the federal government itself acknowledged this fact:

> What is even more difficult from the point of view of the people in need, is the maze of authorities with which they must deal. At the federal level there is the Department of National Health and Welfare, the Manpower and Immigration Department and the Unemployment Insurance Commission — and rarely are these agencies located in the same buildings. At the provincial level there is the Provincial Department of Welfare, the Workmen's Compensation Board, and sometimes manpower or training departments. And at the municipal level there are the municipal welfare offices and many voluntary agencies. Somehow the poor citizen is expected to coordinate all of these bureaucracies if he is to resolve the problems with which he is confronted — a degree of coordination which even the governments themselves have been unable to achieve.[25]

We shall have further occasion to speak of the administrative complexity and poor coordination of Canadian social security plans, in the more circumscribed area falling under the PAB's jurisdiction. For the present, let us briefly sketch the scope and nature of this jurisdiction.

B. The PAB's place within the social security system

As the name of the PAB suggests, it stands mainly as the authority of last resort for the review of administrative decisions formulated in connection with the Canada Pension Plan. The decisions themselves fall into two large areas: that of contributions and that of benefits. In both these areas, the competent administrative authorities are called upon to make numerous decisions affecting individuals. These are the decisions that may be the subject of appeals to the PAB.

With regard to contributions, challenged decisions normally deal with various aspects of an employer's or a worker's falling within the scope of the plan: is the person in question an employee or a self-employed worker? If he is an employee, does his employment belong to a category exempt from the application of the plan? If he is subject to the plan, what should be the amount of his contribution? The appellate jurisdiction of the PAB does not, however, cover completely this area of administrative action. In fact, from the moment that a worker is declared self-employed (that is to say, not salaried), his claim concerning the withholding of contributions no longer comes within the PAB's jurisdiction, but within that of the fiscal authorities (the Tax Review Board and the Federal Court).

With regard to benefits, contested decisions concern contributors' rights to one or other of the various types of benefits provided by the plan. The manner in which such rights are established may vary considerably depending upon whether the benefits claimed are a retirement pension, a disability pension or a lump sum benefit following the contributor's death, and whether the claimant is the child of a disabled contributor, his surviving spouse or his orphan. At times, the point at issue may rest on relatively simple questions of fact; at other times, it may depend on complex medical questions; at others still, it may raise questions of law concerning the interpretation of the plan or private law. All decisions in this area may be the subject of appeals to the PAB.

Workers and employers whose sphere of activity is Quebec are altogether outside the ambit of the Canada Pension Plan. As we have noted, in 1965 Quebec instituted its own Pension Plan, a scheme which, though distinct from the federal plan, has many features in common with it. In section III we shall describe the circumstances that led to the creation of the two plans.

The application of the Quebec Pension Plan gives rise to individual decisions of the same nature, with regard to contributions and benefits, as does the federal plan. The similarity of the questions at issue is probably one of the factors that induced the Quebec government, in 1966, to designate the PAB (under the name of Review Commission) as the appeal tribunal to superintend the application of the Quebec Pension Plan, rather than to set up an entirely distinct tribunal. In 1974 and 1975, however, the Quebec National Assembly completely reorganized the treatment of appeals under its social security statutes. In the process, the PAB lost much of the jurisdiction that had been indirectly conferred on it in 1965. At the present, the PAB's jurisdiction with regard to the Quebec Pension Plan is limited to the area of contributions. This is further restricted, as under the federal plan, by the exclusion of appeals by self-employed contributor-litigants, whose claims fall under the jurisdiction of the Quebec fiscal authorities (Provincial Court and Court of Appeal). The fact, however, that between 1966 and 1975, the PAB had jurisdiction over benefits payable under the Quebec Pension Plan has strongly influenced the Board's functioning, procedure and jurisprudence. For this as well as other reasons, we shall describe the manner in which the PAB exercised this jurisdiction, even though this phase of its history has come to an end.

The PAB's jurisdiction is not confined to dealing with administrative action relative to the application of the Canada and Quebec Pension Plans. Since 1971, it has included a second social security programme: unemployment insurance.

As in the matter of pensions, individual administrative decisions arising out of the application of the *Unemployment Insurance Act* fall into two areas: that of contributions and that of benefits. In contrast to the established procedure in Canada Pension Plan cases, however, decisions challenged in these two areas of administrative action do not come before a single supreme appeal tribunal. In questions relating to benefits, in effect, the administrative procedure culminates in a hearing before the unemployment insurance Umpire; an exhaustive description and analysis of this process will be found in another monograph in this series.[26] In matters of contributions, however, the procedure, which likewise includes the Umpire, is extended by one additional step: the possibility of appeal to the PAB. Litigation connected with unemployment insurance contributions raises essentially the same questions as that connected with pension plan contributions. However, there is no litigation in unemployment insurance on the issue of contributions by self-

employed workers, since they do not come within the scope of the plan. The similarity of the questions to be resolved and the desire for consistency in the solutions adopted are no doubt the motives that have prompted the federal legislator to place both classes of litigation before the same appeal tribunal.

To sum up, then: the field of administrative action that we shall survey in this study includes five sectors, each corresponding to one of the PAB's original areas of jurisdiction (four of these only remain at present):

- the payment of benefits under the *Canada Pension Plan*;
- the withholding of contributions under the *Canada Pension Plan* (except contributions paid by self-employed workers);
- the payment of benefits under the *Quebec Pension Plan* (an area over which the PAB lost jurisdiction in 1975);
- the withholding of contributions under the *Quebec Pension Plan* (except contributions paid by self-employed workers);
- the withholding of contributions under the *Unemployment Insurance Act*.

C. Statistical survey of Canadian pension plans

The PAB is one of the least well known of the federal administrative tribunals. But for all that, its activity is no less important, since it is concerned with the application of major elements in the Canadian social security system. To enable the reader to appreciate the role played by the PAB in the social security system as well as the tasks assumed by other administrative authorities (to be examined at length in subsequent parts of this study), it seems useful to present here some figures. We have confined ourselves in the statistical survey that follows to data relating to the Canada Pension Plan and the Quebec Pension Plan; as far as unemployment insurance is concerned, we refer the reader to our monograph on the Unemployment Insurance Commission.[27]

A first indication of the importance of contributory public pension plans for all Canadians is provided by the vast amount of the contributions withheld each year from the incomes of wage-earners, employers and self-employed individuals in order to finance these schemes. During the ten fiscal years from 1965-1966 to 1975-1976, Canada Pension Plan contributions totalled 9 billion 50 million dollars.[28] Contributions to the Quebec Pension Plan for the 1966-1975

period amounted to a further 3 billion 55 million dollars.[29] In 1973, the number of contributors under the Canada Pension Plan was close to 7,350,000 — and this figure, made up for the most part of wage-earners, does not include employer-contributors.[30] Quebec Pension Plan statistics reveal that in the ten year period from 1966 to 1975, self-employed individuals contributed a mere 5% of the funds in the plan, the remainder having come in equal proportions from wage-earners and their employers.[31] The magnitude of the sums collected and the multitude of contributors (to whose numbers must be added the enterprises employing them) are a sufficient indication of the size, weight and complexity of the administrative machinery needed for the work of collection. We shall have further occasion in this study to describe a part of this administrative machine in our analysis of the decision-making process from its initial phase up to the appellate level.

A second index of the economic and social importance of the administrative operations that we are about to describe is provided by the amount of benefits paid and the number of beneficiaries. Tables I and II indicate the amounts disbursed by the Canada Pension Plan and the Quebec Pension Plan respectively under the various categories of benefits, since 1966. The charts reveal a sustained, sometimes almost explosive, growth in every sphere of the operation, even when allowance is made for the effects of inflation. The growth certainly contains food for thought about the future of our social security system and the burdens that it will impose on the active population in the decades to come. But this is surely not the place to consider these problems.[32]

Tables III and IV show, for each of the two Canadian pension plans, the statistical trend of the number of beneficiaries; once again, the figures are broken down according to various categories of benefits. From the administrative point of view, these statistics are of considerable importance. The allocation of certain types of benefits requires a relatively small number of fairly simple operations: such is the case with retirement pensions and death benefits, for example, which call for a single decision to be rendered on each claim. In other categories of benefits, however, continuous checks on the beneficiaries' right to receive them are needed, and these may require a series of operations of considerable complexity: such, to various degrees, is the case with other pensions, especially disability pensions. In June 1976, for example, the authorities responsible for administering the Canada Pension Plan had to exert more or less strict control over the situation of some 290,000 beneficiaries receiv-

ing pensions as surviving spouses, orphans, disabled contributors or the children of disabled contributors.

A further indication of the extent and complexity of the administrative operations over which the PAB exercises its appeal jurisdiction is provided by the number of applications for benefits filed each year with the authorities charged with administering the two Canadian pension plans. Table V presents a statistical summary of the federal plan's experience in this regard. Apart from the steady growth in administrative workload, a notable feature of the chart is the comparatively stable number of applications for disability pensions (a particularly difficult area): these represent somewhat less than 15% of applications submitted for benefits. Nevertheless, as we shall have occasion to see later, this category of applications accounts for approximately 80% of the litigation brought before the appellate bodies. By contrast, roughly two-thirds of the applications concern retirement pensions and death benefits; yet these are usually settled without difficulty and give rise very seldom to litigation.

To be sure, even in the most problematical areas, such as that of disability pensions, the PAB, in its role of appeal tribunal, is seldom called upon to intervene in deciding the ultimate fate of applications for benefits. But its jurisprudence has, as we shall show, considerable impact on the development of the law in a large sector of our social security system. It is, moreover, to be expected that in the decades to come the pension plans will become the target of an ever-increasing number of litigations. The PAB, as the best safeguard that the public has of the fair implementation of its contributory pension and unemployment insurance plans, must remain therefore a dynamic element in our social security system.

TABLE I

CANADA PENSION PLAN – TOTAL AMOUNT OF BENEFITS (in millions $)

		SURVIVORS			DISABILITY		
Year	Retirement	Death benefits	Surviving spouses	Orphans	Disabled persons	Children of disabled contributors	Total
1966/67	0,05						0,05
1967/68	1	0,2	0,01				1
1968/69	5	4	4	2			15
1969/70	17	8	14	7	0,01		47
1970/71	40	9	24	11	3	0,7	89
1971/72	62	11	35	16	16	3	144
1972/73	89	12	48	20	30	6	206
1973/74	127	13	62	25	42	7	278
1974/75	193	16	86	33	59	10	399
1975/76	313	19	117	41	82	14	588
1966-1976	848	95	393	156	234	42	1769

Source: CPP Statistical Bulletin

TABLE II

QUEBEC PENSION PLAN – TOTAL AMOUNT OF BENEFITS (in millions $)

		SURVIVORS			DISABILITY		
Year	Retirement	Death benefits	Surviving spouses	Orphans	Disabled persons	Children of disabled contributors	Total
1967	0,2						0,2
1968	1	1	0,8	0,5			3
1969	4	2	4	2			12
1970	10	3	8	4	0,3	0,1	26
1971	17	4	12	6	2	0,7	43
1972	24	4	16	8	5	1	58
1973	33	5	37	10	12	2	100
1974	49	5	49	12	18	2	136
1975	69	7	66	13	25	3	184
1976	115	9	87	13	36	3	266
1977	166	10	106	15	48	4	351
Total 1967-1977	490	52	387	88	149	16	1182

Source: Annual Reports, Quebec Pension Plan

TABLE III

CANADA PENSION PLAN – NUMBER OF BENEFICIARIES (in thousands) (in June each year)

		SURVIVORS			DISABILITY	
Year	Retirement	Death benefits	Surviving spouses	Orphans	Disabled persons	Children of disabled contributors
1967	6					
1968	26	0,6	1	1		
1969	70	1	10	12		
1970	133	1	25	28	0,55	0,3
1971	183	1	39	41	4	3
1972	229	2	55	51	15	9
1973	279	1	72	63	25	15
1974	333	2	89	71	33	18
1975	412	3	106	78	44	23
1976	506	4	126	90	55	28

Source: CPP Statistical Bulletin

TABLE IV

QUEBEC PENSION PLAN – NUMBER OF BENEFICIARIES (in thousands) (in December each year)

		SURVIVORS			DISABILITY	
Year	Retirement	Death benefits	Surviving spouses	Orphans	Disabled persons	Children of disabled contributors
1967	3					
1968	10	2	2	2		
1969	24	5	6	8		
1970	45	7	11	14	0,4	0,4
1971	60	8	18	20	2	2
1972	70	8	24	24	3	2
1973	86	11	31	29	6	4
1974	100	11	38	32	8	5
1975	115	12	48	36	10	6
1976	145	14	57	39	13	7
1977	177	14	66	42	16	8

Source: Annual Reports, Quebec Pension Plan

TABLE V

CANADA PENSION PLAN – APPLICATIONS FOR BENEFITS (in thousands)

		SURVIVORS			DISABILITY		
Year	Retirement	Death benefits	Surviving spouses	Orphans	Disabled persons	Children of disabled contributors	Total
1969/70	69	19	15	3	1	0,6	109
1970/71	63	23	18	4	11	5	125
1971/72	55	26	19	5	17	8	130
1972/73	60	29	21	5	19	9	144
1973/74	67	31	23	6	22	8	158
1974/75	94	35	26	6	24	9	195
1975/76	113	37	31	6	28	12	228

Source: Department of National Health and Welfare, 1976.

SECTION II

The legal context of the PAB's activity

Three factors determine and influence the PAB's activity in the strictly legal sense: the Constitution, which divides legislative power over the various components of the social security system (A); legislation, which, together with its accompanying regulations, contains virtually all the law governing the social security schemes over which the PAB exercises jurisdiction (B); and the jurisprudence of the regular courts, which has in some respects specified the nature of the institutions created by these laws (C).[33]

A. The Constitution

The authors of the 1867 Constitution were, needless to say, ignorant of the concept of social security. Indeed, as we have noted in section I, it was not until the beginning of the twentieth century that the first social security measures appeared in Canada. The very gradual expansion of the Canadian social security system precluded any serious constitutional problem before the 1930's. It was only then that the 1867 constitutional framework began to be perceived as an impediment to further expansion and progress. It consequently became necessary for the constituent authority to intervene repeatedly so as to enable the social security system to proceed unhampered in its development.

1. The original division of legislative power

The only element inherent in the concept of social security that was familiar to the drafters of the 1867 Constitution was that of providing help for the economically disadvantaged. At the time of

the *British North America Act*, such assistance was still almost exclusively the concern of religious groups or individual benefactors, operating on a local or regional scale and occasionally subsidized out of the public purse. It is thus somewhat anachronistic to speak of "social aid" or "social welfare", in the modern sense of the terms, within the nineteenth-century context. Not unexpectedly, the text of the Constitution reflects this state of affairs. It grants to the parliament of each province exclusive power to legislate with regard to

> The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.[34]

This provision is still in force today: in fact, it serves as the constitutional basis for the division of legislative authority in the field of social security. The manifestly limited and obsolete nature of the reference to "charities" has not prevented the use of this text as the foundation of provincial jurisdiction in principle over all providential measures and forms of assistance provided by the collective for the benefit of its less fortunate members or of all its members indiscriminately. The entire Canadian system of social security rests ostensibly on this slender provision — a little like Combray which, in the novel by Proust, emerges complete, town, gardens and all, from a teacup.

The only practical means that the BNA Act in its original form afforded the provinces to buttress this jurisdiction in principle over the field of social security was subsections (13) and (16) of section 92. Subsection (16) assigns to the parliament of each province jurisdiction "generally (over) all matters of a merely local or private nature in the province". The import of subsection (13) will be considered somewhat later.

2. Legislative development and jurisprudence

The introduction in the various provinces of plans for the compensation of work-accident victims, from the 1910's onward, raised no difficulties of a constitutional nature. On the one hand, these schemes were originally regarded merely as reformulations of the common law concerning contractual relations between employers and employees, rather than as actual social security measures. This view made it possible to consider the schemes as falling within the provinces' jurisdiction over "property and civil rights in the province" (BNA Act, subsec. 92(13)). On the other hand, since the plans

were maintained entirely at employers' expense, their financing cost the provincial treasury nothing; there was, accordingly, no incentive for the provinces to wish the federal government to take them in charge.

Allowances to needy mothers, instituted in the same period in various provinces, provoked likewise no constitutional controversy. No doubt these embryonic social aid programmes seemed sufficiently close in spirit to the kind of assistance that had hitherto been furnished by private initiative not to exceed the bounds of provincial jurisdiction. Besides, the schemes were inexpensive to operate and did not overstrain the treasury of most of the provinces.

In fact, the constitutional aspects of social security did not come into prominence until the years 1927-1930, when the first old-age pension was instituted.[35] Even then, the question of legislative authority was neither clearly raised nor authoritatively answered. Provincial jurisdiction in the domain was presumed. Either because they lacked the necessary resources or for other, politico-philosophical reasons, several of the provinces were unwilling, however, to involve themselves in establishing such a programme. They turned to the federal government to ensure the uniformity of the scheme throughout the country and to assume a large part of its cost. This manner of proceeding by means of federal framework law and "primary" provincial legislation appeared to provide an acceptable balance between constitutional orthodoxy (and provincial legislative authority) and the imperatives of the moment (and federal initiative). As we have noted in section I, the formula was to be much resorted to between 1950 and 1960 in establishing hospitalization insurance, medical care insurance and social assistance plans.

The constitutional equivocation that resulted from agreement on the old-age pension issue was not, however, to last. The advent of the great depression in 1929 abruptly changed the magnitude of the question. The sudden increase in unemployment, accompanied by an equally drastic reduction in the income of broad segments of the population, gave the problem of poverty and social security new and unprecedented urgency. Assistance afforded by private benefactors and by local or provincial initiatives was clearly unequal to the demands of the situation. As in the United States, the federal power was asked to step in. Consequently, in 1935, the Canadian government took the initiative of establishing an unemployment insurance scheme.[36] A few months later, on being consulted upon the constitutionality of the law creating this plan, the Supreme Court of Canada

found that the Parliament of Canada had no legislative authority in the question; inasmuch as the unemployment insurance law regulated the contractual relations of master and servant in each province, it lay within the jurisdictional authority of the provinces.[37] Upon further appeal, the opinion of the Supreme Court was confirmed the following year by the Judicial Committee of the Privy Council.[38] At the same time, the Judicial Committee declared three federal statutes on the regulation of work unconstitutional, again invoking the authority of the provinces in matters of "property and civil rights".[39] Subsection 92(13) of the BNA Act was thus recognized, in however negative a sense, as a foundation of provincial authority in social security matters.

In the light of the two initiatives of the 1927 to 1935 period, it became evident that the development of social security throughout Canada required either amendment to the Constitution or the conclusion of federal-provincial agreements enabling the provinces to benefit from federal financial resources.[40]

3. Amendments and arrangements

Following the invalidation of the 1935 statute creating unemployment insurance, the federal government undertook to obtain the consent of the nine provincial governments to the principle of amending the Constitution so as to give the federal Parliament jurisdiction in the matter of unemployment insurance. The last obstacle to a consensus by the nine provinces (which was considered highly desirable, if indeed not indispensable) fell with the defeat of the first Duplessis government in the 1940 Quebec elections. Soon afterwards, the Parliament at Westminster, acting upon the recommendation of the federal government, inserted under section 91 of the *British North America Act* a new subsection (2A) giving the federal Parliament legislative authority in unemployment insurance.[41] With the constitutional question cleared up, the federal Parliament was now free to enact an *Unemployment Insurance Act*, the direct ancestor of the present Act, in the same year.[42]

The device of constitutional amendment was once again resorted to to clear the way for the establishment of the universal old-age pension plan in 1951. The scheme, once more, was a federal initiative. With the exception of Quebec, the provinces hardly took issue with this further encroachment upon their constitutional privilege to legislate in the field of social security. Indeed, the pressure of public

opinion no longer would have allowed a province, as it had done in 1935, to incur the odium of obstructing so popular an initiative, unless it had an alternative solution to offer in its place (which was not the case with any of the provinces). To forestall any challenge as to the constitutionality of this federal intervention, the Canadian government with the consent of the provinces requested the British Parliament to add a new section, 94A, to the text of the Constitution. While the amendment authorized the federal Parliament to establish an old-age pension scheme, it reserved the right for the provinces to exercise their own legislative authority in the field in the future.[43]

The 1940 and 1951 constitutional amendments accordingly confirmed, by implication at least, the principle of provincial jurisdiction over all social security measures not expressly abdicated by the provinces in favour of the federal Parliament. Consequently, when in 1963 serious discussion began about the federal Parliament instituting a contributory social insurance scheme against old age, disability and death, it was necessary to envisage a new constitutional amendment. In fact, a federal retirement scheme disguised as a "contributory old-age pension plan" might, if necessary, have claimed constitutional sanction from section 94A of the BNA Act, as a means of circumventing the 1935 Privy Council decision regarding unemployment insurance; but no such claim could justify intervention by the federal government in the area of death and disability insurance.

Furthermore, the principle of provincial jurisdiction over social security — explicitly sanctioned by the reservation contained in the 1951 amendment — was now being defended far less platonically than it had been in earlier phases of the debate. Several of the provinces had substantially different concepts of what the programme should be from that of the federal government. Quebec, in particular, was to propose for the benefit of its residents, in 1964, a more far-reaching and better designed contributory pension plan than had been envisaged at the federal level. The spirit in which the Quebec project had been conceived also differed somewhat from that of the federal government, in that it intended not only to broaden the scope of the social security system but also to raise through contributions the short-term financial resources indispensable for the social, economic and administrative modernization of Quebec.[44]

In the face of Quebec's determination not only to defend, but also to apply, the principle of provincial jurisdiction, and in view of

the other provinces' willingness to accept a federal plan, it was agreed that the British Parliament would be requested to amend section 94A of the BNA Act, so as to extend the concurrent jurisdiction of the federal and provincial legislative authority not only to "old-age pensions", as in 1951, but also to "additional benefits, including benefits to survivors and to disabled persons without regard to their age".[45]

Thus, by a process of progressive constitutional amendment, the division of legislative jurisdiction in the field of social security had at long last been achieved. In a nutshell, the division is based on the recognition of the primary jurisdiction of provincial legislative authority, and the limited jurisdiction of the federal Parliament over certain areas that have been assigned to it, either without restriction (unemployment insurance) or subject to the primacy of provincial legislative authority (old-age pensions and additional benefits, whether contributory or not).

This division of powers is made considerably more flexible, however, through the residual jurisdiction and "spending power" vested in the federal Parliament. The effect of these constitutional features, combined with the growing disparity between the sharing of fiscal receipts and the division of financial burdens arising out of the exercise of legislative authority, has been to create a very broad combined federal-provincial sector in our social security system. In section I we have already described the type of legislative and financial arrangements entered into with regard to hospitalization insurance, medical care insurance, social welfare assistance and family allowances.

In the light of the facts, one is forced to conclude that the constitutional principle that has been derived from the terms, at once partial and vague, of section 92 is at considerable variance with contemporary realities. In the case of one of the major components of our social security system, provincial jurisdiction has been expressly eliminated. In several others, provincial authority is more or less theoretical (except with reference to Quebec). It is nevertheless to be noted that any change in an essential feature of the law governing the Canada Pension Plan must be ratified by the governments of at least six out of the nine remaining provinces representing at least two-thirds of the total population of these. As for other components of the social security system, although these may in effect largely fall within the legislative authority of the provinces, their financing requirements have often led the federal government

to play a determining role in their conception and practical realization.

4. The PAB in the constitutional context

Constitutional evolution has placed the PAB in an extremely complex situation whose dominant trait seems to be the existence of complementary legislative and administrative machinery at each of the two levels of government. In a sense, the PAB illustrates perfectly this two-fold phenomenon of duality and integration. Although created by federal law, the PAB exercises additional jurisdiction by special mandate of a provincial legislature. It applies both federal and provincial law. Depending upon the matter before it, its procedure is governed by federal or provincial regulations. It works in cooperation with administrative authorities belonging to either level of government.

In terms of some of its characteristics, the PAB is a case apart, however. First of all, to the best of our knowledge, it is the only example of a federal administrative body to exercise jurisdiction by mandate of a provincial legislature. The converse situation is far more usual. The validity of such "delegations" of administrative responsibilities has been explicitly recognized by jurisprudence.[46] Such delegations have the effect of bestowing upon the recipient agency a "double personality": it acts as a federal administrative authority on some occasions and as a provincial administrative authority on others. Since the adoption of the *Federal Court Act*, in 1971, it has been necessary to establish the particular jurisdiction under which such an agency has made a decision, if the legality of the decision is to be tested before the courts: depending upon the circumstances of the case, the review tribunal will be either the Federal Court or the Superior Court of the province.[47]

Secondly, it is evident that the PAB does not apply provincial law to the same degree for each and every province. Whereas in terms of its Quebec jurisdiction the PAB is expressly empowered to apply provincial legislation (related in certain respects to the common law of the province), with reference to the other provinces it is merely expected to conform to certain elements of provincial common law in applying federal legislation. It is nonetheless true that the members of the PAB must be familiar with certain aspects of the common law of the provinces (particularly, as we shall see, with the law of work contracts and the law of marriage).

B. The legislative context

What are the statutes and regulations that the PAB is charged with applying or that must be taken into account, in one way or another, in the course of this study?

Before undertaking to enumerate these, one preliminary observation may be in order. Federal legislative authority has been anything but consistent in its choice of the appropriate means of creating autonomous administrative agencies. In some cases it has done so by means of legislation devoted exclusively to defining the organization, jurisdiction and procedure of such agencies: such, for example, has been the purport of the *National Energy Board Act*, the *Immigration Appeal Board Act*, and the *Canadian Radio-Television and Telecommunications Commission Act*. In other cases, the creation of an autonomous agency is merely the more or less secondary outcome of legislation principally devoted to substantive provisions of law: such is the situation of the Canadian Transport Commission, established under Part I of the *National Transport Act*, and of the PAB, itself the creation of a few sections in the *Canada Pension Plan*.

It is hard to perceive in these variations in legislative practice anything more significant than the random effects of chance. In any event, no discernible connection exists between the essential characteristics of a given autonomous administrative agency and the form of the legislative text that created it.

It would not be unreasonable to assume the existence of some such connection. A highly specialized agency, for example, might be expected to have been brought into being by the piece of legislation it had been especially created to apply. By the same token, it would be logical to enact a particular statute to establish an agency called upon to ensure the application of various distinct pieces of legislation. Such, however, is by no means the case. The legal form utilized to create administrative agencies with comparable degrees of specialization varies greatly from one case to another (see, for example, the National Energy Board and the Canadian Transport Commission, or the Immigration Appeal Board and the Pension Appeals Board).

The hypothesis of some measure of correspondence between the form of constitutive law utilized and the degree of autonomy that an administrative agency enjoys does not stand up under the test of

analysis. By whatever criteria one attempts to assess the extent of autonomy that an agency wields, there appears to be no warrant for asserting that the NEB and the IAB, both constituted by particular pieces of legislation, are more autonomous than the CTC and the PAB, both of which were created by certain provisions contained in more comprehensive acts of Parliament.

In the case of the PAB, then, the constitutive text of the Board is the *Canada Pension Plan*.[48] So far from being exhaustive in treatment, however, the Plan itself spells out merely a small part of the legal rules that apply to the PAB's functioning as an appeal tribunal in matters relating to the CPP. To complete this partial enumeration of rules, one must refer to the regulations. Even so, the Plan does not govern the PAB's other appeal jurisdictions, which it exercises under the *Quebec Pension Plan* and in the matter of unemployment insurance contributions. The list of the statutes (and regulations) under which the PAB operates must begin with the distinction of these three large areas of litigation.

1. Legislation on the Canada Pension Plan

Within the broader context of the *Canada Pension Plan*, the place occupied by provisions relating specifically to the PAB, its organization, jurisdiction and procedure is altogether marginal. The Act itself is divided into three parts, the first of which deals with contributions, the second (entitled "Pensions and supplementary benefits", by way of implicit reference to section 94A of the BNA Act) with benefits, and the third with various technical and administrative questions (under the misleadingly general title of "Application").

The first two parts of the Plan are rather similar in the rationale of their organization. First, the legislating authority describes the obligations (in the case of contributions) and the rights (in the case of benefits) of individuals under the Plan. It then specifies the extent of these obligations and rights, through a series of provisions outlining the method of calculating the amounts payable in every particular situation. A third set of provisions in each of the two parts defines the conditions governing the implementation of the rights and obligations previously created. Needless to say, these have the greatest practical interest and give rise to the most frequent litigation. Finally, at the end of the first two parts of the Plan there follow a series of general provisions relating notably to delegations of regulation-making power and to criminal sanctions.

In the Part I of the CPP, dealing with the subject of contributions, only two sections, 29 and 30, have any direct bearing upon the PAB. The former establishes the right of appeal to the PAB, lays down the mode of introducing the appeal, specifies the scope of the PAB's decision-making power, and refers for the rest to section 85 governing appeals in the matter of benefits. Section 30 enumerates the issues over which the PAB has jurisdiction as well as describes the authoritativeness of its decisions, provides for the right to appeal the PAB's decisions to the Supreme Court of Canada, and lays down the mode of introducing such appeals. A third section of the CPP, section 37, has a negative bearing on the PAB: it removes from the PAB's jurisdiction appeals concerning contributions "in respect... of self-employed earnings" (in other words, contributions by self-employed persons). Appeals of this sort, as we have said, come within the jurisdiction of the income tax appeal authorities. Several other sections in Part I of the CPP, dealing with successive phases of the decision-making process prior to the lodging of an appeal to the PAB, will be discussed in chapter 3 of this study.

In Part II of the Plan, devoted to the subject of benefits, appeals are the topic of a division apart, Division F (composed of sections 83 to 88). Of these, the last four make specific reference to the PAB. Section 85, the most important of all, establishes the right of appeal to the PAB and outlines the manner in which appeals shall be introduced; it constitutes the PAB and defines its composition and powers; and it puts forward a number of procedural rules applicable to the PAB's activity. Section 86 specifies the areas over which the PAB exercises review jurisdiction and defines the authoritativeness of its decisions; it allows the PAB to modify its own decisions and denies the right of appeal in the case of certain decisions. Section 87 provides for the possible attribution of appeal jurisdiction to the PAB by the Legislature of any province that has instituted a general pension plan. Section 88 deals with the compensation of persons required to attend PAB hearings and provides for the reimbursement of legal costs incurred as a result of appearing before the PAB. The only other provision dealing directly with the PAB is section 91, whose subsection (1) *c*) empowers the Governor General in Council to regulate its procedure.

A number of other provisions concerning the various phases of the decision-making process with regard to contributions and benefits may be found in the regulations adopted under sections 41 and 91 of the CPP.

In this respect we may first cite two short provisions of a technical nature specifying which of the officials attached to the administrative authorities in question have decision-making powers vested in them.[49]

The principal body of regulatory provisions is the *Canada Pension Plan Regulations*.[50] Apart from specifying numerous points of the substantive content of the CPP, it contains also several rules of administrative procedure concerning the initial phases of the decision-making process. Rules on procedure in the matter of contributions are the subject of Part I ("Collection and payment of employees' and employers' contributions") and Part II ("Information Returns") of the Regulation. Those dealing with procedure in the matter of benefits are set out under Part V ("Pensions and supplementary benefits").

Finally, three statutory instruments of great consequence to our subject are presented expressly as rules of procedure. The first of these, on the subject of contributions, adopted under section 41 of the CPP, governs appeals lodged with the PAB under section 29.[51] As regards benefits, three successive levels of appeal are available, two of which are the subject of procedural regulations: the second level, provided by the Review Committee,[52] and the third level, provided by the PAB.[53] Needless to say, these procedural regulations will be the subject of detailed analysis in chapters 2, 3 and 4 of this study.

2. Legislation on the Quebec Pension Plan

As pieces of legislation, the two pension plans are largely similar in conception. In each case, the parent legislation contains the essential substantive provisions of the plan as well as a description of the decision-making process both in its initial phase and at the level of appeals against initial decisions. A general regulation further specifies some of the substantive provisions and details the non-contentious aspects of procedure. Distinct regulations lay down the appeal procedure applicable to questions of contributions and of benefits under the plans.

The basic text of the Quebec legislation is the *Quebec Pension Plan*.[54] Although the law is virtually identical in substance with the CPP, its organization and, above all, its presentation are quite different from it.

The QPP contains seven titles.

Title One ("Definitions and application") includes the definitions necessary to understanding the Plan and certain other interpretative provisions; it declares the principle of universal applicability to all working residents of the province and provides for exceptions to the principle.

Title Two ("Quebec Pension Board") establishes the Board, assigns certain powers to it, and gives some indications of a procedural nature with regard to the exercise of these powers.

Title Three ("Contributions") determines the principles of accounting in terms of which the employment income of workers is to be analyzed, describes the mode of calculating contributions in conformity with these principles, sets up procedure for the collection and reimbursement of contributions, delegates certain regulation-making powers, and creates certain offences relative to the withholding of contributions.

Title Four ("Benefits") declares the general principles of eligibility to various types of pensions, after providing a definition of the legal criteria according to which such eligibility is established; it indicates the mode of calculating each type of benefit, and above all fixes conditions for the payment of benefits. Some of these conditions apply to all types of pensions indiscriminately while others have particular application.

Title Five ("Review") is devoted in its entirety to the question of recourse against initial administrative decisions concerning both contributions and benefits. Clearly, the provisions of this Title concern us directly, and we shall accordingly give a detailed commentary on them, chiefly in chapter 4. Not only shall we analyze the present formulation of the law but also its tenor prior to the 1974 changes, which gave the Social Affairs Commission its jurisdiction. For the present, suffice it to say that the QPP envisages two distinct avenues of recourse, one in matters of contributions and the other in matters of benefits. Whereas in the former case, appeals are lodged directly with the Review Commission (the PAB's designation for QPP purposes), in the latter case there exist two levels of review: first before the Quebec Pension Board itself (what might be called hierarchical review) and the second before the Review Commission (the SAC since 1975). In the matter of contributions, section 193 — like its counterpart in the CPP, section 37 — removes from the

jurisdiction of the Review Commission litigation connected with contributions by self-employed individuals, and assigns it to that of the fiscal authorities.

Title Six ("Administration") sets up the various technical support mechanisms required for purposes of applying the plan, prescribes measures to safeguard the confidentiality of information obtained by administrative authorities in the course of their duties, delegates certain regulation-making powers to the Pension Board, and enumerates a number of offences related to the application of the plan. This Title, furthermore, contains a provision — section 229 — that has direct relevance to our subject. The section empowers the provincial Cabinet to designate by regulation the tribunal that is to assume the role of the QPP Review Commission. It is this section, in conjunction with section 87 of the CPP, that has enabled the PAB to receive jurisdiction in matters relating to the QPP.

Title Seven ("Final provisions") coordinates the pension plan with the social aid plan.

In many respects, a comparison of the structure and formulation of the *Quebec Pension Plan* with those of the *Canada Pension Plan* is worthwhile and instructive. It is hard to say which of the two plans predates the other, and may therefore have served as its model. Viewed from the vantage point of its total conception, the QPP would seem to be the earlier of the two and to have exercised considerable influence on the CPP.[55] Yet, it appears that the federal Bill was drafted before its Quebec counterpart, for which it provided a precedent at the level of form. If the authors of the QPP were indeed inspired by the federal Bill in the choice of a form, they must have been so in a negative sense. In contrast to the 119 sections of the federal statute — for the most part, over-long, prolix, confused and interminably subdivided — the provincial legislation contains 234 sections of generally brief and concise writing, relatively clear in meaning and seldom subdivided. To appreciate the great difference in effect that the two legislative texts have on the reader one need only compare the basic provisions of each on the right to benefits: section 44 of the CPP and sections 119 to 121 of the QPP. All in all, if for no other than stylistic reasons, the federal plan seems to be far less accessible and intelligible than its provincial counterpart. In one respect alone can the CPP claim a degree of superiority over the QPP, namely, in its fundamental division of the law into two parts, a division corresponding to the two basic elements involved: that of contributions and that of benefits. The Quebec plan, though some-

what more complex in its organization, is nonetheless logical: no small achievement, especially when one takes into account the additional complication which the establishment of the Pension Board must have represented for its drafters. The Quebec statute, moreover, has particular interest from the point of view of administrative procedure: appeals against administrative decisions are the subject of a distinct title, an indication of the legislative authority's recognition of its importance from the point of view of those administered.

Like the CPP, the QPP is completed by a regulation of extensive scope, the *Regulation respecting benefits*.[56] It is almost entirely devoted to the procedure to be followed in treating applications for benefits prior to the first decision. A detailed analysis of the regulation will be found in chapter 3 of this study.

With reference to the first level of appeal against administrative decisions concerning benefits, one further document must be taken into account. It is an unpublished instrument entitled *Règlement de régie interne de la Régie des rentes du Québec*,[57] one portion of which deals with the review of decisions before the Board. We shall examine this document in chapter 2 of our study.

As in federal practice, the procedure used in Quebec before the Review Commission is the subject of two distinct regulations, depending upon whether the litigation concerns contributions or benefits.[58] A detailed examination of this procedure will follow in chapters 2 and 4.

Finally, two Orders-in-Council by the Quebec Cabinet must be mentioned as having particular bearing on the jurisdiction and organization of the PAB. The first, made under section 229 of the QPP, designates the PAB as the Review Commission of the Quebec plan.[59] The second, dealing with the financing of the PAB, determines the mode of cost-sharing between the federal and the Quebec governments.[60] Both Orders-in-Council will be treated in greater detail in chapter 2 of this study.

3. Legislation on unemployment insurance

The legislative apparatus directing the activity of the PAB in the field of unemployment insurance is less cumbersome, and, in fact, incomplete.

The basic legislation in this case is the *Unemployment Insurance Act*.[61] Only one part of the statute has any direct bearing on our subject, the PAB having no jurisdiction over litigation in the field of unemployment insurance benefits. The question of contributions is governed by Part III ("Contributions") and Part IV ("Collection of contributions") of the Act. The former describes the method of calculating the amounts of contribution payable by employers or employees. The latter lays down administrative procedure leading to initial decisions regarding the inclusion of particular types of employment within the scope of unemployment insurance and the amount of contributions due, as well as the appeal process against such decisions. Two levels of appeal are available: the first to the unemployment insurance Umpire, and the second to the PAB. Two brief sections, 86 and 87, have indirect relevance to the latter. Part IV concludes with the creation of certain criminal sanctions and with the delegation of regulation-making powers concerning especially procedure before the two appeal tribunals. Needless to say, all these elements of the Act will be examined in detail in chapters 2, 3 and 4.

A statutory instrument completes the provisions of Part IV, by specifying certain aspects of initial administrative procedure.[62] It, too, will be the subject of commentary in chapter 3.

The principal regulations under the *Unemployment Insurance Act*, the *Unemployment Insurance Regulations*,[63] treat the subject of contributions and related administrative procedure in Part I ("General"), Part III ("Insurable and excepted employment"), and Part IV ("Reduction of employer's premium"). The few provisions of this regulation that are directly relevant to our subject and still in effect will be mentioned in chapter 3 of our study.

The procedure applicable to the first level of contentious review, that is, to appeals to the Umpire, is the subject of a particular regulation.[64] We shall comment on it in chapter 3 of this study. By contrast to the first level of appeal, no procedure has been laid down for second-level appeals to the PAB.

By way of a postscript to this enumeration of legislation bearing on the activity of the PAB, we must remark that the lack of a statute devoted exclusively to the constitution of this administrative tribunal and to a definition of its various powers has brought about a dispersal of its rules of procedure. The jurisdiction presently exercised by the PAB clearly shows trace of its historical evolution. It is the result of successive additions to, and subtractions from, the Board's

original jurisdiction over the Canada Pension Plan. The absence of a single comprehensive text on the PAB, its inconspicuous place in the arrangement of the CPP, and the dispersal of the legal texts that govern its operations are already enough to create an impression of legislative make-shift and improvisation, further evidence of which will be pointed out later in this study. For the moment, we shall conclude our summary presentation of the legal framework within which the PAB functions with an examination of the nature of the substantive rights over which it has jurisdiction.

C. The legal nature of pensions

The very existence of social security almost inevitably gives rise to the problems of delimiting the respective domains of public and private law. These problems are of course particularly acute in legal systems wherein the dividing line between public and private law is critical and decisive.[65] But even in Canada, where the legal climate on either side of the boundary is not radically different from the other, such difficulties are far from unknown.

Social security, in effect, makes simultaneous use of concepts borrowed from private law (notably, insurance contracts) and of means of action (compulsory contributions, discretionary powers) characteristic of public law. Hence the hesitancy observable among legal writers and the courts as to the exact character of the benefits provided by various social insurance plans.[66]

In Canada, with reference to public contributory pension plans, the problem has arisen in the context of compensating the victim of a tort. The question at issue was to what extent the social security benefits payable to the victim were to be taken into account in estimating the loss of income he suffered as the consequence of the tortious act. If the benefits were regarded as essentially similar to indemnity paid to the victim under a private insurance contract, there would be no grounds for deducting their amount from the damages payable to the victim by the party at fault by reason of the latter's civil liability.[67] If on the contrary the benefits paid to the victim by social insurance, rather than being equated to indemnity paid under a private insurance contract, are considered as the partial assumption by society of the victim's personal damages, they would consequently reduce the indemnity payable by the liable party. Behind this narrow formulation of the question lies a problem that goes to the very heart of social insurance plans: are they merely one more

element in the individual's legal situation, existing side by side with his obligations and rights under private law? Or are they a "public service" whose very existence can modify the relation in which the individual stands to other individuals?

After some vacillation between these alternative possibilities, the courts have come increasingly to regard social insurance benefits as private. Thus, in a ruling handed down in 1971, the Supreme Court of Canada declared as a matter of principle that it was improper to take into account benefits received under a contributory pension plan in the assessment of damages resulting from a work accident.[68] The Court seemed to base its conclusion upon "the analogy between the nature of the right to the pension and of the right to the benefits of insurance". In support of its judgment, the Court invoked a somewhat inexplicit decision by the Judicial Committee of the Privy Council,[69] and a recent British ruling involving a contributory pension plan maintained by a group of policemen.[70] Within a few months, a similar case came before the Court, this time in connection with the Canada Pension Plan.[71] On re-examining the conclusions of the *Lachance* decision and the precedents cited in that case,[72] the Supreme Court unequivocally assimilated the CPP to a private insurance contract. Accordingly, it refused to deduct from the indemnity payable to the family of a traffic-accident victim the amount of the pensions provided by the CPP. It has been claimed that the Court might adopt a different attitude in the case of disability pensions provided by the CPP;[73] but such an eventuality seems improbable. Barring the unlikely event of legislative intervention to the contrary, one may therefore assume that the victims of torts will continue to have the right to full compensation at the hands of the party liable for their damage, even though they benefit as a result of such torts from pensions derived from a public contributory plan.[74] Within the limited but significant context of this problem, the Supreme Court has thus opted for a "private" conception of social security.

SECTION III

The administrative context of the PAB's activity

Our purpose in this last section will be to describe the administrative system of which the PAB is part. It is a complex system of administrative bodies highly diversified as to both their structure and functions. From the functional point of view, the system is dominated by the idea of *specialization*; from the structural point of view, its organization reflects *centralization* or *decentralization*, as the case may be. Our examination will involve the successive application of these concepts to each of the three social security plans over which the PAB exercises appeal jurisdiction.

A. Functional specialization

It is by no means inconceivable that the performance of all the operations necessitated by a social security scheme might be entrusted to one and the same administrative authority, which might be charged with the collection of contributions, the distribution of benefits and all intermediate operations including the investment of surplus financial resources. Neither the federal nor the Quebec legislator has opted, however, for this model of organization. In each of the three social security schemes that concern us here, the performance of each of these functions has been entrusted to an administrative authority specialized in operations of this type.

1. The Canada Pension Plan

The application of the CPP resolves itself into four principal operations: the collection of contributions, the allocation and payment of benefits, the investment of surplus funds and the settlement of litigation connected with contributions and benefits. Each one of these operations falls within the province of a distinct administrative authority.

The *Department of National Revenue (Taxation)* is charged with the task of collecting contributions.[75] The operation is thus integrated into that of income tax collection. It is precisely because the administrative machinery needed for the task already existed at the time of the CPP's establishment that the duplication of this service was considered to be superfluous.[76] A detailed description of this administrative machinery will be provided in chapter 3 of our study. The *Department of Supply and Services* plays a supporting technical role in the calculation of contributory earnings and contributions.[77]

The task of allocating and paying benefits has been entrusted to the *Department of National Health and Welfare*.[78] Here, once again, it was a matter of assigning the work to services already in existence and responsible for the application of the Old Age Security pension, family allowance and youth allowance plans.[79] In fact, the differences between these plans and the CPP and the increased burden of administration resulting from the latter have necessitated the creation of distinct services. In chapter 3 of this study we shall provide a more detailed description of the internal structures of this Department of government insofar as the application of the CPP is concerned.

The *Department of Employment and Immigration* plays an incidental role in the matter of benefits, being as it is responsible for assigning social insurance numbers to CPP and unemployment insurance contributors.[80]

The sum of the contributions collected by the Department of National Revenue is paid into a special account, the Canada Pension Plan Account, a part of the Consolidated Revenue Fund. Any surplus of contributions over benefits and other charges incidental to the Plan is transferred to another account known as the CPP Investment Fund. This Fund is used for the purchase of bonds issued by the provincial governments, provincial Crown Corporations or the federal government.[81] The management of these accounts has been entrusted to the *Department of Finance*. Since this aspect of CPP operations has no bearing upon the PAB's activity, it will not be dealt with at greater length in this study.

Finally, the settlement of litigation arising out of the application of the CPP has been assigned to the *Pension Appeals Board*. All in all, the administrative operations connected with the CPP have thus been divided among six government entities (five departments and one autonomous agency), with each entity specializing in one type of

operation. From the vantage point of the PAB, however, only the two entities in charge of the most important operations (the *Department of National Revenue* and the *Department of National Health and Welfare*) are of any immediate interest.

2. The Quebec Pension Plan

Administrative activity arising out of the application of the QPP has likewise been consigned to several administrative authorities.

The determination and collection of contributions devolve upon the Quebec *Department of Revenue*.[82] As is the case at the federal level, these operations have been made an integral part of the functioning of the Quebec fiscal administration. The fact that Quebec possesses an autonomous fiscal organization of its own has clearly facilitated the establishment of a provincial contributory pension plan.

The tasks of allocating and paying benefits have been entrusted to the *Quebec Pension Board*, an autonomous agency created, as we have seen, by Title II of the QPP. It is interesting to note that the Board's mandate with regard to social security benefits includes, apart from the QPP, also the Quebec family allowance plan.[83] In the context of recent discussions concerning the possible institution of a guaranteed minimum income, there has even been question of entrusting the Board with the task of allocating social aid benefits. Such a mandate would make the QPB the paymaster for virtually the entire provincial social security sector in Quebec.[84] Like its federal counterpart, the Department of National Health and Welfare, the Board cooperates with the federal *Department of Employment and Immigration* in assigning social insurance numbers to QPP contributors.[85]

The financial management of the sums collected by the Quebec Department of Revenue as QPP contributions has been entrusted to another autonomous agency, the *Quebec Deposit and Investment Fund*, by its founding statute.[86] The Fund, set up at about the same time as the Quebec Pension Plan, was expressly created to manage the funds accumulated as a result of the operation of the plan and not utilized either for its administration or for the payment of benefits. In fact, the reserves built up by the Fund for the QPP's account are still the principal source of the former's investments; the rest of its capital is chiefly derived from employers' contributions to

the workmen's compensation plan, from contributions to the provincial public servants' and public sector employees' retirement pension fund, as well as from contributions to the complementary social benefits plan of construction workers. The Fund is thus an agency specializing in the investment of public funds derived from various social security programmes. As a rule, its policy for the investment of funds gives preference to securities issued by the Quebec public sector.

As we have already noted, litigation relative to the QPP was originally entrusted entirely to the PAB, operating (in Quebec) under the name of *Review Commission*. Since 1974, this jurisdiction has been shared by the PAB (which still retains authority in matters of contributions) and the new *Social Affairs Commission* (which deals with all questions of benefits).

In Quebec, then, as indeed at the federal level, administrative activity arising out of the public contributory pension plan is divided among various administrative bodies, each of them specializing in one type of operation. Again, as at the federal level, it is the administrative bodies in charge of the principal operations — the Department of Revenue and the Pension Board — that are of the greatest relevance to our study. These will be the subject of a more highly detailed description in chapter 3.

3. The unemployment insurance plan

The administrative organization of unemployment insurance reflects, with minor exceptions, a similar sharing of functions as do the public contributory pension plans.

The withholding of unemployment insurance contributions from employers and wage-earners has been entrusted to the *Department of National Revenue*.[87] As we shall have occasion to see in chapter 3, this operation bears a close resemblance, in terms of internal administrative organization and procedure, to the collection of contributions to the CPP.

The allocation of unemployment insurance benefits devolves upon the Canada Employment and Immigration Commission, a component of the *Department of Employment and Immigration*. This operation holds little more than casual interest for our subject, as do the operations whereby the CEIC and the *Department of Finance* jointly manage the Unemployment Insurance Account.[88]

By contrast, operations connected with the settlement of litigation concerning unemployment insurance contributions will claim our close attention. As we have already observed, the settlement of such litigation has been entrusted to two administrative tribunals, representing successive levels of appeal: the unemployment insurance *Umpire* (whose jurisdiction in questions of benefits need not concern us here) and the *Pension Appeals Board.*

B. Centralization and decentralization

While the federal and the Quebec legislative authorities have both adopted the same principle of functional specialization in organizing the three social security schemes under the PAB's review, they have given widely divergent answers to the question of whether to centralize or to decentralize their administration. Whenever new legislation requires the establishment of a novel administrative mechanism, the question arises whether the function should be centralized in an existing or new government department, or, conversely, removed from the centre of political power and vested in an autonomous administrative agency. In the evolution of the public service in Canada, both at the federal and at the provincial level, it appears that this question has never been consistently answered. Faced with the proliferation of autonomous administrative agencies, we have just begun to question the reasons for such a dismemberment of our public administration.[89] An attempt has been made, through the historical study of our institutions, to identify the conditions that have habitually led governments to assign various functions to autonomous agencies.[90] But this history is itself so much the outcome of political and administrative contingencies as to make the inference of useful generalized conclusion well-nigh impossible.

Thus, at the time of the simultaneous creation of the CPP and the QPP, in 1965, the federal and the Quebec legislative authorities were to opt for diametrically opposed forms of administrative organization in establishing virtually identical schemes.

In the case of the CPP, the federal government was to choose an administrative model of almost complete centralization: all important operations, with the exception of the adjudication of appeals, were entrusted to existing government departments. The exception made in favour of an administrative appeal tribunal was motivated by one of the classic arguments for the establishment of autonomous administrative bodies: the need for submitting administrative decisions to the quasi-judicial control of an independent authority.

By contrast, in the case of the QPP the constituting legislative authority opted for almost total decentralization: with the sole exception of the collection of contributions, all operations incidental to the Quebec plan were to be entrusted to autonomous administrative agencies. The exception in favour of the Department of Revenue appears to be justified by the prior existence of an administrative organization within the department perfectly adapted to the operation in question. As we have noted, at the federal level this was the reason urged in support of the centralization of all operations. The same solution might have been adopted in Quebec as well; why the Quebec government chose not to do so remains unclear. Perhaps the Quebec legislator was less conscious of the need to exercise ministerial, and therefore parliamentary, control over the application of the QPP, and was at the same time eager to remove these various administrative activities from the direct influence of political power.

A quarter of a century earlier, at the time of the institution of unemployment insurance, perhaps the federal legislator himself was conscious of the merits of this argument, for he entrusted the application of this scheme altogether to autonomous administrative authorities (the Unemployment Insurance Commission and the Umpire). Since 1971, a major part of these operations has been centralized: on the occasion of the legislative reform enacted that year, the UIC lost its jurisdiction over contributions, the responsibility being transferred to the Department of National Revenue. Parliament completed the work begun in that year in 1977 when it integrated the UIC (under a new name) into the new Department of Employment and Immigration.[91] The administrative organization of the unemployment insurance plan has thus passed, within a few short years, from complete decentralization to almost complete centralization, with the adjudication of appeals alone remaining beyond the purview of the central administration. The administrative structure imposed on unemployment insurance has thus come to correspond to that adopted in the case of the CPP.

This is hardly the place to address ourselves to the mooted question of centralization versus decentralization either as a general organizational concept or in the particular context of social security. We shall limit ourselves in subsequent chapters of this study to pointing to some of the incidental results of the choice between these two forms of organization upon the climate of administrative procedure.

CHAPTER 2

The PAB: structure, jurisdiction and activity

Of all autonomous agencies within the federal administration — and their number has never been determined exactly for want of agreement on what constitutes their essential characteristics — the PAB is one of the least well known.

There are several reasons for this circumstance. First, the PAB carries on its activity in a deliberately low-key and discreet manner. It is immune to the glare of publicity, untouched by *causes célèbres*, free of the controversies that from time to time expose to unwanted notoriety such bodies as the National Parole Board, the National Energy Board or the Canadian Labour Relations Commission. Its hearings only attract those directly concerned, whether on their own account or as representatives of various administrative authorities.

Secondly, the PAB's role is rendered the more inconspicuous by the sporadic character of its activity. As we shall see, the PAB sits at irregular intervals and fairly infrequently at that. What is more, its members are not permanently on duty and do not reside in proximity to its seat of operation. In this respect once again the PAB differs from the majority of autonomous agencies within the federal administration.

Thirdly, the PAB is often confused with two other federal administrative tribunals whose designation is virtually identical to its own: the Canadian Pension Commission (CPC) and the Pension Review Board (PRB). The jurisdiction of these two bodies extends

to the allocation of pensions and allowances to veterans, the PRB being charged with hearing appeals against decisions rendered by the CPC.[92] The latter, incidentally, is relatively better known than the PAB, thanks in part to the existence of fairly vocal pressure groups active on behalf of veterans.

Lastly, the comparatively low profile of the PAB may be a consequence of its recent institution. Created, as we have seen, only in 1965, the Board is certainly a junior in the ranks of autonomous administrative agencies established so prolifically since the turn of the century and especially in the last thirty years.[93] Besides, the PAB's initial activity was very limited in scope, and it was not until the early 1970's that it attained something of its current tempo of operation. All things considered, it is hardly surprising that the PAB still cuts a modest figure within the context of agencies dealing with the administration of social security.

All these circumstances make it all the more necessary for us to provide a brief sketch of the tribunal that is to be the subject of our study, before involving ourselves in the intricacies of administrative procedure. The present chapter, devoted to this purpose, will describe the PAB's composition and internal organization, its origins and nature, and the various types of actions that can come before it. In conclusion, we shall present a summary of its activity both from the quantitative point of view and as a source of legal precedent.

SECTION I

Composition and organization

Following a description of the PAB's membership and an analysis of the difficulties inherent in the composition of the tribunal, we shall present an overview in this first section of the PAB's staff and the material elements of its functioning.

A. Composition of the PAB

The composition of the PAB is summarily defined by a very short text, subsection 85(2) of the CPP. According to the original drafting of this text, the membership of the PAB could vary between three and six persons. Of these the Chairman was to be appointed by the Governor in Council from among the judges of the Exchequer Court (since 1971, the Federal Court) or of the superior courts of the provinces. The other members of the PAB might be likewise appointed from among the judges of the district or county courts. An amendment passed in 1974 created the post of Vice-Chairman of the PAB and increased the membership to a maximum of ten persons.[94] The Vice-Chairman must also be chosen from among the judges of the Federal Court or of the superior courts of the provinces.

At the end of 1977, the PAB consisted of eight members. The Chairman is a judge of the trial division of the Supreme Court of Alberta. The post of Vice-Chairman had not yet been filled. The seven remaining members of the PAB were two judges from the Quebec Superior Court, one judge from the Supreme Court and one judge from a county court of Ontario, one judge from the appeal division of the Supreme Court of New Brunswick, one supernumerary judge from the appeal division of the Supreme Court of Alberta, and one judge from a county court of British Columbia.

It will be noted that no judge from the Federal Court is at present a member of the PAB. This has in fact been the case ever

since the creation of the PAB. Since unemployment insurance Umpires are drawn from judges in the Trial Division of the Federal Court and since among other cases reviewed by the PAB are appeals against decisions by Umpires in the field of unemployment insurance contributions, the presence of judges from the Federal Court could become a source of acute embarrassment.[95] Hence, if Federal Court judges are to be members of the PAB, they would have to be drawn from the Federal Court of Appeal.

The language requirements that apply to the PAB by virtue of the *Offical Languages Act* further restrict the possibilities of recruitment.[96] It is clear that an administrative tribunal which frequently hears appeals by ordinary citizens not assisted by counsel and possessing sometimes limited ability to express themselves must attach special importance to the linguistic aptitudes of its members. At the present time, almost all the members of the PAB are bilingual or have at any rate attained a sufficient level of competence in both official languages since their appointment to the PAB. These linguistic requirements, combined with the need to make collegial administrative bodies representative of the various geographical regions, have led the Governor in Council to appoint a high proportion of judges belonging to the French-speaking minorities of English-speaking provinces.

Needless to say, the members of the PAB receive no emoluments by reason of their office. Their only remuneration is that attached to their usual duties under the *Judges Act*.[97]

When, in the course of negotiations between the federal and the Quebec governments, it was decided that the PAB would serve as QPP Review Commission, the two parties agreed that Quebec would be consulted on the choice of one of the three members first appointed by the federal Cabinet, as well as on the choice of the fourth member.[98] Following the 1974 changes in the PAB's jurisdiction over the Quebec plan, there is reason to believe that this agreement will no longer apply in the choice of PAB members.

The fact that the PAB consists of judges from the ordinary courts has significant practical consequences for the Board's administrative procedure, as we shall see in chapter 4 of this study. Evidently, the members of the PAB devote only part of their time to PAB functions; apparently, each of them spends a maximum of 8 weeks per annum at sittings. As members of the ordinary civil and criminal courts, the judges are specialists neither in administrative

law nor in social security. Attached first and foremost to the judicial tribunals of which they are members, they are subject to the division of work and sessions calendar of their courts. Their availability for PAB hearings necessarily takes second place in the use they make of their time. Finally, since they maintain their usual residence in the various provinces, they are often obliged to undertake time-consuming trips in order to take part in PAB hearings.

Ever since the enactment of the CPP, certain observers have drawn attention to the inconvenience inherent in this constitution of the PAB.[99] It was reasonably feared that, even if the volume of litigation did not exceed predictions, the excessive demands made on the time of regular judges would in the long run slow down the process of justice appreciably. As we shall have occasion to see, the commentators' anxiety in this regard was only too justified.

B. The organization of the PAB

The internal organization of the PAB is quite simple. A reading of the pertinent provisions reveals that two officers hold pre-eminent positions in it: the Chairman and the Registrar. After describing the role of each, we shall give a brief account of the physical facilities used for hearings, the hearings themselves, and the financing of the PAB.

1. The Chairman

The principal powers of the Chairman are those detailed under section 85 of the CPP.

Although the section deals specifically with appeals relating to CPP benefits, its content applies by and large to other types of litigation coming under the PAB's jurisdiction as well. Thus section 29(3) of the CPP expressly provides for its application to questions of contributions to the plan. The *Unemployment Insurance Act*, for its part, limits itself to designating the PAB as the appeal tribunal having authority in matters of contributions, and for additional details of its internal organization refers to the CPP.[100] With regard to the PAB's appeal jurisdiction over QPP cases, the Order in Council designating the PAB as the Review Commission gives no specification as to how it shall be organized for the purpose,[101] even though

the regulation governing this activity of the PAB makes explicit reference to the Chairman and Registrar.[102] The rules laid down in section 85 of the CPP govern accordingly all the activities of the PAB. Such, however, is not the case of the provisions of this section concerning leave to appeal, a matter to be discussed at greater length in section III of the present chapter. Suffice it to say for the moment that the requirements of leave vary from one area of jurisdiction to another.

The responsibilities of the Chairman with regard to organization are the subject of subsections (3) and (4) of section 85. He is charged with making the necessary arrangements for the "sittings" and "hearings" of the PAB. He must, either personally or through the agency of a member designated by himself, discharge the office of presiding over the "sittings" of the PAB (according to the French text, the "meetings" — *réunions* — of the PAB). The reader may well wonder as to the validity of the implied distinction between "sittings" and "hearings": can the PAB sit except for a hearing? No doubt it would need to do so, if it had the power to adopt its own procedural rules, but such is not the case: the power of defining these rules is vested in the Governor in Council.[103] The only possibility — altogether theoretical, as we shall see further on — for the PAB to sit except for a hearing arises when it rules collectively either on an application for leave to appeal in matters of unemployment insurance contributions or on an application to extend the time for appealing in matters concerning the CPP.

Since 1975, the Chairman may be replaced in his office of directing the activities of the PAB, in the event of vacancy, absence or hindrance, by the Vice-Chairman.[104] Until such time as a Vice-Chairman will have been appointed, however, this provision will evidently remain inoperative.

The Chairman and Vice-Chairman, furthermore, have the power of giving or refusing leave to appeal in matters of benefits.[105] This power, highly important from the point of view of the parties, entails a number of incidental powers determined by the PAB's rules of procedure.[106] A detailed examination of this phase of procedure will be provided in chapter 4 of our study.

The Chairman has also the power of granting applications to extend the time for appealing. The normal period within which appeals have to be lodged is 90 days from the date on which the impugned decision was communicated to the party concerned[107] or

transmitted to him by mail,[108] except in matters of unemployment insurance where the law provides for no time-limit.[109] In the case of the CPP, in fact, the power to extend the time for appealing pertains both to the Board as a whole and to each of its members severally. By contrast, under the QPP, the power is the exclusive prerogative of the Chairman. Since applications to extend the time for appealing are an incident of procedure closely linked with applications for leave to appeal, these particular powers of the Chairman will be treated in greater detail in chapter 4 of our study, devoted to PAB procedure.

Finally, various other powers assigned to the Chairman under the rules of procedure governing each of the PAB's jurisdictions may be briefly noted here. Thus, anyone wishing to intervene in an action concerning benefits must obtain leave from the Chairman to do so.[110] The Chairman, as indeed any other member of the PAB, and the Registrar, has also the power to require the production of certain documents or to order the preliminary examination of certain witnesses.[111] By the same token, the Chairman (or any other member of the PAB) can delegate the power of cross-examining witnesses who have made a deposition by means of an affidavit.[112] Lastly, in matters relating to contributions, the Chairman can rule on applications and motions incidental to appeal procedure.[113] In chapter 4 of this study, we shall place all these powers within the general context of PAB procedure.

Subsection (4) of section 85 of the CPP entrusts the responsibility of coordinating the work of the PAB to the Chairman. It goes without saying that one could hardly expect a judge, already overburdened with his regular judicial responsibilities, to acquit himself efficiently of this additional task, without the benefit of assistance. Hence the need for and importance of the Registrar.

2. The Registrar

The duties of the PAB Registrar are nowhere expressly defined. The CPP is altogether silent on the subject, as are the various instruments establishing the PAB's rules of procedure, where the Registrar's existence is treated as a matter of administrative fact. The status of the PAB Registrar is not consequently similar to that of other officials performing analogous functions in other federal administrative tribunals. The constitutive legislation of these tribunals provides for the appointment of administrative or technical staff;

occasionally, it even singles out among these an officer with duties analogous to those of the PAB Registrar. The CPP, unfortunately, does nothing of the kind; indeed, it barely sketches the composition of the PAB and the essential powers of those associated with it. The administrative structure of the PAB seems, in effect, to become submerged in the broader context of all that is needed to put the CPP into operation. In practical terms, the Registrar and the two supporting employees that assist him in the performance of his duties are paid out of the budget of the Department of National Health and Welfare, the official administrator of benefits under the CPP. Despite this arrangement, they are assigned to work exclusively for the PAB.

As the rules of procedure make it abundantly clear, the Registrar is the chief auxiliary officer of the PAB. He plays a crucial role of coordination in preparing the case-files and in following the appeal process throughout its sequence of phases.

The Registrar, in effect, is charged with collecting all documents transmitted to the PAB from the time that an appeal is lodged,[114] with notifying the parties of decisions taken by the Board, with informing the Chairman of applications to extend the time for appealing and of applications for leave to appeal,[115] with transmitting notices of appeal and replies to notices of appeal,[116] with informing the parties of the time and place fixed for hearings,[117] and with notifying all concerned of the withdrawal of an appeal, interventions, incidental applications and the decision of the PAB.[118]

The Registrar may, in the exercise of powers which he shares with members of the PAB, order the production of documents or the preliminary examination of witnesses for purposes of discovery.[119] He has authority to issue *subpoenas* and to summon witnesses to appear.[120]

He is responsible for recording and registering the decisions of the PAB, and may take steps with a view to their publication.[121]

Finally, in actions relating to CPP benefits, he has custody of the records of hearings held before the Review Committees, which are appeal tribunals with a jurisdiction inferior to that of the PAB. All records of such proceedings are transmitted to the Registrar, who preserves them for the eventuality of a second appeal to the PAB.[122] This phase of procedure will be examined in greater detail in chapter 4.

To these responsibilities of a technical order, corresponding more or less to those of the clerk of a regular court, must be added the difficult administrative task of organizing the hearings of the PAB. It is, in fact, to the Registrar that the Chairman's responsibility for "arranging" the PAB's activities falls, so as to enable it to "sit and hear appeals at any place or places in Canada", as section 85(4) of the CPP specifies. To make up a calendar of hearings, the Registrar must take into account the number of appeals emanating from a particular region, the date on which they were lodged and the state of the files, the availability of a sufficient number of PAB members to participate in the hearings, their freedom to travel to the proposed site of proceedings, the means of travel to, and type of accommodation in, the place chosen for the hearings, the availability of the parties, their counsel, witnesses, etc. One may well imagine that the work is one of tremendous complexity, since the PAB has neither premises of its own nor full-time members, in spite of which it is called upon to hold hearings in all parts of Canada. We shall have frequent occasion to return to this difficulty of the PAB's situation in the course of our study.

There is one more task that the Registrar has, of which no text makes even passing mention: the task of informing the public. In addition to carrying on a voluminous correspondence in connection with appeals pending before the PAB, the Registrar has the responsibility of replying to the unceasing flow of enquiries addressed to the Board concerning questions of procedure, the progress and status of cases, etc. It is inevitable that, in the PAB's present state of organization, the Registrar should be regarded by appellants as the only readily accessible, reliable and impartial source of information and advice. Yet, these numerous consultations — in the form of telephone conversations, for the most part — pose a delicate problem: how is the Registrar to acquit himself of the task of informing the public without compromising his duty of professional impartiality as an officer of the tribunal, without, in other words, allowing himself to become legal advisor to one of the parties?

3. Physical facilities

The headquarters of the PAB are in Ottawa,[123] though as the administrative tribunal of the QPP it maintains a mailing address also in Montreal.[124] The Board's permanent offices are at the Department of National Health and Welfare, under the same roof as those of the services charged with administering the CPP. The facilities of the

PAB consist of the Registrar's office and a certain amount of additional office space. Technical support services, including mail, telephone, telex, supplies and photocopy, are provided by the Department. The PAB has no other premises reserved for its use elsewhere in Canada.

4. The hearings

The PAB may hear appeals anywhere in Canada.[125] As the QPP's Review Commission, it holds sittings throughout Quebec, even though no explicit provision directs it to do so. The PAB's choice of a location for holding a particular hearing is guided by the unwritten, but generally observed principle of Canadian administrative practice according to which in litigation between a member of the public and an administrative authority the adjudicating tribunal must hold its hearing as close as possible to the residence of the former. The CPP, in fact, goes so far as to recognize the corollary of this principle as well: any person summoned to appear before the tribunal has the right to be compensated both for his expenses and for any loss of earnings due to his appearance.[126] No such provision exists, however, in the QPP; hence the PAB's special effort to locate its hearings as near as practicable to the appellant's residence.

Needless to say, the PAB's mobility is severely hampered by such circumstances as the inavailability of its members, their dispersion throughout the country, difficulties of travel at certain seasons of the year, and the remoteness of the residence of some of the parties. Unavoidably, the effect of all these factors, combined with the greater concentration of business in more highly-populated regions, is to favour the city-dwelling appellant, since the PAB conducts hearings in his proximity more often than in remote areas. In certain cases requiring the attendance of members of the public from scattered regions, the Registrar will seek to share the inconvenience and expense of travel among them by arranging the hearing midway between their places of residence.

Within the limits of Board members' availability for travel, the Registrar will also attempt to organize "circuits" of PAB hearings, with each such circuit enabling him to liquidate within a week or two of carefully-scheduled sittings the accumulated business of a particular region.

By preference, the PAB holds its sittings in court houses, using the facilities of the Federal Court (wherever available), the provincial courts or the municipal governments.

As a general rule, the PAB hearings are public, at least in matters relating to benefits; under exceptional circumstances, the Board may decide to sit *in camera*.[127] In litigation arising out of questions of contributions, the publicity of hearings is also the rule, even though it is not expressly required by any procedural provision. In point of fact, it is difficult to justify a distinction in this regard between proceedings for benefits and for contributions; in either, information of a private nature is likely to be divulged by the parties in the course of a hearing. Thus, for example, in appeals under the heading of contributions, information may be required on the income earned by private individuals or on the finances of a business, whereas in appeals concerning benefits, the PAB may need to know details of an individual's state of health or marital relations.

The quorum of the PAB is set at three members.[128] This quorum requirement may well be largely responsible for the difficulty of organizing hearings: it is certainly anything but easy to ensure the attendance, for several days at a time, of three judges already heavily burdened with work and residing, as is so often the case, provinces apart. Indeed, for purely practical reasons, the PAB has very seldom in its history held sittings with more than three members present.

Such, in fact, are the difficulties of constituting a bench of only three members that it would be altogether chimerical to count on being able to reconstitute it of the same members upon short notice. This makes for severe practical inconvenience in the event of adjournment in the course of a hearing: the parties may well have to wait for a long time before the same judges can be reassembled. For this reason, when the Registrar finds, before the opening of a hearing, that the state of a case is such as to make a final decision upon it unlikely before the end of the hearing, it will be usually put off to a subsequent hearing.

A source of administrative complication and, above all, of delays in the settlement of litigation, the quorum requirement of the PAB is not ultimately the root of the problem. The difficulty is due, rather, to the fact that the members of the PAB exercise their function only part time. The recent experience of another administrative tribunal, that of the unemployment insurance Umpire, con-

firms this: even though Umpires may hear appeals individually, they also, as practising judges working part time in unemployment insurance, constantly face constraints and delays of the same order.[129]

5. Financing of the PAB

By the very fact that the PAB is, administratively speaking, a mere appendage of the Department of National Health and Welfare, it can economize considerable amounts on facilities which it would otherwise have to provide for itself (offices, supplies, etc.). One must remember, at the same time, that the members of the PAB are not remunerated as such. Ultimately, the lion's share of the Board's expenditure consists of the salary of the Registrar and his staff and, above all, of the expenses of organizing hearings, including especially members' travel expenses. These costs are assumed by the Department of National Health and Welfare in their entirety, even though some of the PAB's activity does not concern that Department: appeals in matters of unemployment insurance, falling as they do under the aegis of the Department of Manpower and Immigration,[130] and appeals under the QPP clearly should not be financed out of National Health and Welfare budgets. When the PAB was established, in 1965-1966, it appeared that the Quebec government decision to entrust review jurisdiction to the newly-formed Board should normally entail the province's financial participation in its costs. The question of cost-sharing was not settled at the time of the federal-provincial negotiations on the general coordination of the two pension plans. Perhaps the matter was left in abeyance pending the development of the PAB's full work-load and the assessment of the proportional share of the Board's time that the administration of each plan laid claim to. In fact, an agreement as to the criteria of cost-sharing was not worked out until June 1974 between the federal Department and the Quebec Pension Board.[131] The agreement called for the *pro rata* apportionment of costs calculated on the basis of the number of beneficiaries *per annum* under each plan. In terms of the average experience of the years between April 1, 1968 and March 31, 1973, the ratio of CPP to QPP beneficiaries was found to be 77 to 23. It was, accordingly, at the latter figure that Quebec's percentage share of the PAB's operating costs was fixed for the period in question. As for the period subsequent to the settlement, Quebec undertook to reimburse the federal government for its share of the costs incurred each year, the proportion due being computed annually according to the same method. Possibly, Quebec will wish to re-negotiate its agreement with the federal government in the wake

of the establishment by the province of its Social Affairs Commission, in 1975, and the transfer to it of the PAB's jurisdiction in matters of benefits. Since this transfer of powers has come into effect, business arising out of the administration of the QPP has considerably diminished, to represent nowadays only a small portion of the PAB's work-load. Admittedly, during the 1970-1975 period, QPP litigation accounted for a very substantial 60% of the PAB's business. What effect this will have on the future apportionment of operating costs remains, however, to be seen. The most likely event is that Quebec will withdraw altogether the jurisdiction it had entrusted to the PAB and thus terminate once and for all its obligation to participate in the financing of the Board.

SECTION II

Origins and nature of the PAB

From the little that we know of the historical development of the phenomenon of functional decentralization within the federal administration, one conclusion may be drawn with assurance: the extreme diversity of structures and forms among autonomous agencies make it exceedingly difficult to come up with a consistent view of these institutions. As we have already noted in chapter 1, section II, the legislator's choice of legislative forms in creating independent government agencies has been characteristically random. This randomness is only one aspect, and a superficial one at that, of the complete lack of legislative policy prevailing in this sector of administrative law. Generally speaking, despite occasional affinities and similarities between them, each of these autonomous agencies must be considered as a unique institution, an entity *sui generis*. This is especially true of the PAB, in many respects an innovation upon the multiple forms of autonomous agencies previously adopted by Parliament. Such, at any rate, is the inference we are left with as we seek to identify the sources that may have inspired the draughtsmen of the *Canada Pension Plan* and to summarize the characteristics of the PAB among other autonomous federal administrative agencies.

A. Antecedents of the PAB

At the time of its institution, in 1965, the CPP represented the most ambitious initiative ever taken by the federal legislator in the field of social security. The complexity of the legislation gave some hint of the vast administrative organization that would be needed to ensure the application of the scheme. The only federal plan of comparable proportions was unemployment insurance. Originally, the possibility must have occurred to the designers of the CPP to entrust its application to the Unemployment Insurance Commission and the unemployment insurance appeal tribunals (the Board of referees and the Umpire), which already had the accumulated experience of a quarter of a century to their credit. As we have noted

in chapter 1, section III, however, the legislator's choice fell not on the UIC but on the Department of National Health and Welfare and the Department of National Revenue. As for litigation, the government decided to entrust its settlement to a new body especially created for that purpose. Although in defining the appeal mechanism of the CPP other social security schemes were considered or models (particularly, the Old Age Security pension and the family allowance plan), and although some of its aspects were assigned to an already existing jurisdiction (the unemployment insurance Umpire), on the whole the government opted for a new and hitherto untried formula.

By its own authors' admission, the CPP drew much of its inspiration from the corresponding American scheme, on whose mechanisms and administrative structure it presumably patterned its own.[132] Unfortunately, despite the admiration professed by several Canadian parliamentarians for the American system, it is obvious at a glance that they were content to admire their model at a distance.[133] It is difficult to see how the PAB represents a Canadian version of the American Appeals Council. The parliamentary debates that preceded the enactment of the CPP do little to enlighten us on that score and to point to the sources of the legislator's inspiration. They hardly explain, for example, why the PAB was to be constituted of judges and, what is more, of provincial judges. Admittedly, the presence of members of the bench was to give the newly-created tribunal prestige and credibility, while the appointment of judges as unemployment insurance Umpires could be cited as a valid and satisfactory precedent.[134] In the case of the PAB, however, the precedent was not to be faithfully followed: the appointment of provincial, rather than of federal, judges (except for the Chairman who might be chosen from among the judges of the then Exchequer Court — today's Federal Court) marked a significant departure from it.[135]

In a word, the PAB is based on no identifiable model, either Canadian or American, and there is nothing to suggest that more exotic precedents from other countries were consulted. Like the majority of federal autonomous agencies, and perhaps to an even greater extent, it is an original creation evolved in a spirit of pragmatism — though not necessarily, of good practical sense.

B. Characteristics of the PAB

A brief summary of the chief characteristics of the PAB in the broader context of the legal system may be in order at this point. It

is an autonomous administrative agency — in other words, an agent of executive power exhibiting the double characteristics of independence in its relations to the centre of political authority and of specialization in the nature of its task. The autonomy of the PAB is convincingly illustrated by the fact of its being constituted of judges of the regular courts, traditionally independent of executive power. Both in its composition and in its function, the PAB resembles a court of justice.[136] It is, in fact, an administrative tribunal in the precise sense which that term has in our system of justice: that of an autonomous body interpreting the law in the manner of a court, in the exercise of a limited jurisdiction derived from statute in the domain of administrative law.[137] As we shall see in chapter 4, the PAB is in effect entirely specialized in the exercise of this adjudicative function.

It is surprising to find that the PAB itself does not subscribe to this analysis of its own nature, at least judging from a ruling handed down in 1971 and remaining unqualified to this day:

> Parliament, in creating this Board and providing that it be composed of judges, clearly intended to create a judicial, rather than an administrative tribunal. We have hitherto always acted upon this opinion, and intend to continue to do so, so that citizens may be assured of such fair and impartial hearings as they would receive in the ordinary courts in which we are accustomed to sit. While jurisdiction is conferred by the Statute, it is conferred in terms which we consider sufficiently wide to enable us to act judicially and proceed, as we are accustomed to do, in the normal unfettered and independent manner of judges.[138]

The passage seems to contain (to speak with all due respect for the members of the PAB) a seriously mistaken assessment of the nature of the tribunal. That the PAB's function is a judicial one, that is to say, one consisting of applying a statute to the facts, is indisputable. It is equally certain that it was the legislator's intention to give the Board's proceedings a judicial character: the rules of procedure adopted by the Governor in Council for the use of the PAB fully substantiate on this point the spirit of sections 29, 85 and 86 of the CPP. Nor can there be doubt that it was to guarantee the judicial character of the PAB's procedure that its members were to be drawn from the ranks of judges of ordinary court. Nevertheless, it remains true that the PAB is an administrative tribunal, and an administrative tribunal in the strictest and most exact sense of the term, inasmuch as its sole function is one of adjudication. The adjudicative function is equally characteristic of courts and administrative tribunals; the former have no monopoly over it any more than they do or can have monopoly over justice itself. It is normal that in the discharge of this

function administrative tribunals should use a procedure resembling that of the courts — making allowance for adjustments required by the fact that litigation before administrative tribunals opposes, not individuals to one another, but the individual and the public authority.[139] In such circumstances, the legislator may deem it useful to call upon members of the courts to constitute an administrative tribunal; but in doing so, he calls upon them not as institutions but as persons chosen for their particular aptitude in the rendering of justice. They are *personae designatae* within an institution which remains nevertheless an administrative tribunal.

The fact that the PAB has defined itself as a "judicial tribunal" has not been without influence on the manner in which it has exercised its authority. The validity of this observation will be confirmed in section III.

An administrative tribunal as such is always subject to review by the courts. The purpose of this review is two-fold: on the one hand, to ensure that the administrative tribunal does not exceed its jurisdiction, and on the other, to examine the regularity (that is, at once the legality and the fairness) of the procedure it follows. The power to exercise such judicial review has by tradition been part of the authority of the superior court of each province (the court of first resort under the common law). It has been reduced to codified form in only one province, Quebec;[140] elsewhere it takes its roots in the common law. In 1971, the power to review decisions by the federal administrative tribunals was removed from the purview of the superior courts of the provinces and transferred to the Federal Court.[141] Sections 18 and 28 of the *Federal Court Act* specifically indicate the circumstances in which this power can be put into operation. As one of a small number of administrative authorities, the PAB was, however, expressly excluded from the principal recourse provided by the Act, the "application to review and set aside".[142] The PAB is, accordingly, subject only to the recourses set forth under section 18 of the *Federal Court Act*; in chapter 4 of this study, its status with regard to judicial review will be examined in detail. Suffice it to say for the present that a special exception has been created in the PAB's favour with regard to the principle that administrative tribunals fall under the review powers of superior courts.

SECTION III

The PAB's areas of jurisdiction

Because of its somewhat unusual character, the PAB's jurisdiction can only be described as a composite of specific powers to deal with various types of appeal. In the pages that follow we shall describe each of these areas of jurisdiction in turn, indicating the nature and purpose of the appeals that can be taken within them and the extent of the PAB's power to intervene as an appeal tribunal.

A. Matters relating to CPP contributions

Remedies in this field, provided for under sections 29 and 30 of the CPP, are regarded as "appeals", in the sense that the PAB's jurisdiction allows it to review challenged decisions in their entirety and to substitute for them its own decisions, at its discretion, either in whole or in part.[143] The powers are expressly conferred under sections 30(1) and 29(2), which authorize the PAB "to decide any question of fact or law necessary to be decided", to determine "whether an employee or employer may be or is affected thereby", and to "reverse, affirm or vary" the challenged decision. The scope of questions with which the PAB is competent to deal is exceedingly broad: it includes all questions of fact or law whose solution may be required to affirm or reverse the decision under examination by the PAB.

The appellant's right to have a decision reviewed is absolute, in that he is not required to obtain the leave of the PAB, its Chairman or any one of its members to lodge an appeal. Undoubtedly, it was thought that the assessment of contributions due presented a sufficiently close analogy to the imposition of a fiscal levy on a taxpayer to justify guaranteeing the contributor's right to challenge it. Furthermore, appeal to the PAB is the first and only opportunity that a contributor has to obtain impartial review of a decision; it must have appeared to the legislator inequitable to deprive him of that re-

course. The right of appeal is subject, however, to a time limit of 90 days from the date of the transmission of the challenged decision, unless an extension of this deadline has been granted by the PAB (or, since 1975, by one of its members) upon application submitted within the stipulated time limit.

Two types of decisions are most likely to be the subject of appeals, both of them emanating from the Department of National Revenue. (The Department of National Health and Welfare, having nothing to do with the levy of contributions, takes no part in these.) This means, in effect, that in matters relating to CPP contributions all appeals are initiated by members of the public. The two types of appealable decisions are defined under section 28 of the CPP. The challenged decision may be in the form of a "determination" by the Minister "as to whether any amount should be assessed as payable" by an employee or employer to the CPP, or in the form of a decision by the Minister "as to the amount so assessed".

The Minister's decision whether an employee or employer is subject to the CPP generally depends upon both or the second of the following questions: (1) does the occupation exercised by the worker in question constitute employment remunerated by the employer in question? and (2) assuming that the occupation is salaried employment, does it entitle the employee to a pension under the CPP? To answer the first question, the contractual relations between the worker and those for whose account he works (if indeed he does work for the account of others) must be examined. The concept of employment is defined in section 2(1) of the CPP; but this definition itself makes implicit reference to the common law of work contracts (both in private and public law). The second question, more limited in scope, depends essentially on the interpretation of section 6 of the CPP and secondarily on the regulations adopted under section 7, modifying the list of excepted employment (that is, of employment to which the provisions of the CPP do not apply) by the addition or deletion of certain occupations. As we shall see in chapter 3, the procedure leading to a determination by the Minister as to whether an employee or employer is subject to the CPP can take various forms; invariably, however, the decision is made in the Department of National Revenue.

It is worthwhile recalling that a negative answer to the first question (is the worker's occupation employment within the meaning of the CPP?) does not exempt the individual in question from contributing to the plan. If he is not a salaried employee, in all likelihood he is what the CPP describes as a "self-employed" person and

by that very fact falls within the scope of section 10. Since independent workers assume the full cost of contributing to the CPP, the rates which apply to them are double those applying to employees and employers. In doubtful cases, it is therefore clearly in the interest of workers to be recognized as salaried employees, and of the employers to have them recognized as self-employed workers. Needless to say, an individual dissatisfied with the classification of his occupation as that of a self-employed worker is free to contest the Minister's decision by appealing to the PAB. If the decision is upheld, the Department of National Revenue will transmit to the individual a notice of assessment demanding payment of the contribution due of him as a self-employed worker (CPP, section 33). To challenge this assessment, the contributor must appeal to the fiscal review authorities (the Tax Review Board and the Federal Court, section 37 of the CPP making particular reference to sections 169 to 180 of the *Income Tax Act*). It is quite conceivable that these authorities may decide that, contrary to the PAB's judgment, the appellant is an employee. Theoretically at least, then, the possibility of a disagreement between the PAB, on the one hand, and the TRB and the Federal Court, on the other, cannot be discounted. Although thus far no such situation has as yet been reported, a disagreement of this sort could only be resolved by an appeal to the Supreme Court of Canada, the only court with a jurisdiction superior to those of both the PAB and the Federal Court.[144]

Consequently, from the moment that a particular occupation has been characterized as self-employment, appeals contesting the application of the CPP to the occupation in question fall outside the jurisdiction of the PAB. It is interesting to note, however, that the legislator has provided for the possibility of amending *by regulation* section 37, which subjects the whole administrative procedure in matters of contributions by self-employed workers to the *Income Tax Act*. It would thus be possible, without modifying the text of the CPP, to assign jurisdiction in such appeals to the PAB. The solution would have two conspicuous advantages: first, it would remove the danger of disagreement between the PAB and the fiscal authorities; and secondly, it would place all litigation relative to the CPP under the jurisdiction of a single specialized tribunal. By contrast, the present arrangement has the advantage of enabling the system to draw upon the experience of the TRB in determining the earnings of self-employed workers.

As for the second type of decision that may be appealed to the PAB by virtue of section 29 of the CPP — the Minister's "decision"

on an appeal against an assessment —, the question at issue here is "whether any amount should be assessed as payable" or what "the amount so assessed" ought to be.[145] Appeals of this type are concerned with the application of sections 11 to 19 of the CPP, involving predominantly questions of fact. Despite their identical designation, appeals to the Minister and appeals to the PAB are in reality quite different processes. The appeal to the Minister is, in fact, a hierarchical remedy within the first-level administrative authority; it marks the culmination of non-contentious procedure, whose progress we shall trace in chapter 3. Appeal to the PAB, by contrast, represents contentious review in the true sense of the term.

B. Matters relating to CPP benefits

Covered under sections 85, 86 and 98 of the CPP, this type of recourse is described, once again, as an "appeal", a designation which appears in effect to correspond to its true nature. The PAB, as an autonomous agency external to the Department, has authority to determine "any question of law or fact as to whether any benefit is payable to a person or the amount of any such benefit", the accuracy of the amounts registered in the Record of Earnings to a contributor's credit, and, since 1977, the division between the partners of a dissolved marriage of pensionable earnings accumulated by either during the period of the marriage.[146] The PAB is empowered to "affirm or vary" the challenged decision and to "take any action in relation thereto that might have been taken by the Review Committee" (the lower appeal authority whose decisions are subject to appeal to the PAB).[147] These last words refer to section 84(6) (powers of the Review Committee), which in turn make reference to section 83(2) (reconsideration by Minister, the last phase of the non-contentious review procedure). The PAB may, therefore, approve the payment of benefits to an individual, determine the amount of benefits to be paid, or decide that no benefits are payable, just as the Minister and the Review Committee may do.[148] In other words, the PAB has full authority to decide upon the entitlement of an individual to benefits by virtue of the CPP.

In a 1971 decision, the PAB itself declared the extent of its appellate jurisdiction.[149] In that decision, it rejected a series of arguments tending to restrict the control that it exercised over the decisions of the Review Committees and, indirectly, the Minister of National Health and Welfare and the services of that Department charged with applying the CPP. The PAB at that time rejected the

claim that its appeal jurisdiction by virtue of section 86(1) was limited to situations envisaged in section 86(2), in which the discovery of new facts justified a review of the initial decision. According to the PAB, the phrasing of section 86 does not lend itself to such an interpretation: appeal and review upon new evidence are, in its view, two distinct procedures and jurisdictions. The PAB subsequently rejected the argument that its appeal jurisdiction was limited to the correction of errors in the impugned decision, claiming that the intent of section 86(1) was manifestly to confer far more extensive powers upon it. The Board furthermore argued that the appeal files were as a rule not sufficiently detailed to enable it to identify all the errors the lower tribunal may have committed, particularly because they do not contain a transcript of the proceedings. Finally, the PAB made a very clear declaration of what it believed to be its jurisdiction, at least in questions of CPP benefits:

> In our view our statutory duty is to hear all issues before us in the widest and most ample way; welcoming, if it be tendered, all new evidence, and proceeding, in general, *de novo*; so that individual cases receive the fullest consideration.[150]

The essential feature of this view is that the PAB considers the hearing of every appeal in the matter of CPP benefits as a "new trial", that is, as a new and in-depth examination of the case from beginning to end. It must be pointed out that such an interpretation of the PAB's powers was by no means inevitable; sections 85 and 86 of the CPP would have lent themselves equally well to the theory that while the PAB had the power of substituting its own judgment for that of the lower administrative authorities, it would only do so on the basis of the case-file transmitted to it by the last authority to have examined the case, in the manner of an ordinary court of appeal.[151] In practice, however, so restrictive an approach would have been unacceptable for two reasons that we shall treat in greater detail in chapters 3 and 4: on the one hand, the exceedingly summary nature of the decisions rendered and the minutes of hearings kept by the Review Committees (a circumstance alluded to by the PAB in its *Jaeger* decision), and, on the other, the slowness of procedure at the level of the PAB, which compels it to take into account changes in the factual situation and the obsolescence of the data on which the Committee's decision was based. In these circumstances, it was certainly preferable for the PAB to lay claim to broad powers of re-examining cases *de novo* and of discovering for itself all the facts needed for their settlement.

At the same time, the PAB has set certain limits to its examination of cases. It has refused to substitute its own judgment for that

of the Minister in situations where the latter has discretionary powers by virtue of the Act.[152] Such is the case in section 63 of the CPP, which gives the Minister the right to recognize, at his discretion and in certain circumstances, the surviving common-law wife of a deceased contributor as entitled to the benefits of a surviving spouse under section 44(1)*d*). The mechanism for creating this legal fiction was considerably simplified in the wake of the amendments effected in the CPP in 1974.[153] The discretionary power of the Minister was more extensive under the former version of section 63. This provision had accordingly given rise to a voluminous jurisprudence by the PAB, which on numerous occasions refused to include in its appeal jurisdiction review of the Minister's exercise of the two discretionary powers he possessed under this section: (1) the right to consider in certain cases the surviving legal spouse as having pre-deceased the contributor, and (2) the right to consider in certain cases the contributor's common-law wife as his surviving spouse. Invoking the jurisprudence of the ordinary courts,[154] the PAB held that in the absence of express provisions to the contrary, it could not substitute its own discretionary power for that of the Minister, unless the claimant could show that the Minister had exercised his power in an unreasonable, unjust or arbitrary manner.[155] In other words, the appellate control exercised by the PAB in the case of discretionary powers bears only upon the manner in which such powers are used and not on the substantive results of their use.[156] Clearly, insofar as the first version of section 63(2) obliged the Minister, before considering the contributor's legal spouse as pre-deceased, to take into account "circumstances" and, especially, the "welfare of the children", his discretionary power was not absolute; accordingly, the PAB considered to be within its authority to refer certain cases back to the Minister so as to enable him to take into account information not available to him at the time of his initial decision.[157] Above all, the PAB claimed the power to invalidate the Minister's decision when, in its opinion, he had misjudged questions of fact or law prior to the exercise of his discretionary power.[158]

The PAB has likewise refused to review the Minister's exercise of the power conferred on him by section 84(1) of the CPP, to extend the time available to a claimant to appeal a decision taken by the Minister on an application for benefits, to a Review Committee.[159] We shall have further occasion to treat this point in describing the appeal procedure, in chapter 3.

Clearly, the PAB has chosen to put itself, in relation to the administrative authorities whose decisions it is called upon to con-

trol, in a position habitually occupied by a regular court. With regard to discretionary powers, it has claimed for itself only those grounds for review that are normally claimed by the courts.[160] It has drawn on the jurisprudence of the ordinary courts to interpret sections 85 and 86 of the CPP. In doing so, it has remained faithful to its perception of itself and of its own powers, as declared in the *Jaeger* decision (see section II of the present chapter). As we shall see in chapter 5, these provisions could certainly have been differently interpreted.

Unlike in the case of actions relating to contributions, the claimant's right of appeal to the PAB in matters of benefits is not absolute. It is subject to leave by the Chairman or Vice-Chairman. This filtering mechanism is no doubt designed to enable the PAB to exert some control over its own work-load, by turning down pointless and obvious ill-founded appeals. Since the PAB is the second level of appeal authority, the legislator probably felt justified in restricting the access of claimants to it, since all would have automatic recourse to the Review Committee, to challenge decisions at the first level. The procedure governing the application for leave and the criteria according to which it is granted will be discussed at some length in chapter 4.

The time limit within which appeals must be lodged is the same in the case of benefits as in the case of contributions, that is to say, 90 days from the date on which the decision was transmitted to the appellant, unless an extension has been granted by the PAB or one of its members. This aspect of procedure is intimately linked to the question of leave to appeal, and will be examined likewise in chapter 4.

Decisions appealable to the PAB in matters of benefits are those handed down by the Review Committees. The nature and functioning of these committees will be the subject of detailed study in chapter 3. Suffice it for the moment to remark that no decision of the Minister of National Health and Welfare may be directly challenged in an appeal before the PAB under section 83. The appeal tribunal of first resort — the Review Committee — must have ruled on a case as a prerequisite for its being appealed to the PAB.

As in appeals relating to contributions, so in those dealing with benefits the fundamental difference between the so-called "appeals" to the Minister (section 83) and "appeals" either to the Review Committee (section 84) or to the PAB (section 85) must not be

forgotten. The first is a mere hierarchical recourse within the context of the administrative authority itself, whereas the other two are really of the nature of appeals: processes of contentious review conducted before bodies altogether distinct from the authority responsible for making the challenged decision.

C. Matters relating to unemployment insurance contributions

The statutory grounds for this PAB jurisdiction are laid down in section 86 of the *Unemployment Insurance Act*. Cases relative to unemployment insurance contributions can in fact take two forms. The first consists of an "appeal" against a decision rendered by the Umpire, the first-level review authority in this field. The second involves the referral of a case to the PAB by the Umpire, himself being appealed to under section 84 of the Act.

Each of the two forms of contentious review is limited as to its object. Section 86 confers jurisdiction on the PAB only on questions of law connected with the interpretation or the application of section 3. This section governs what employers and employees shall be subject to the payment of contributions; it enumerates both classes of insurable employment and classes of employment excluded from the scope of the unemployment insurance plan. Either of these lists may be completed by regulations established under section 4, to which section 3 makes reference. The PAB's jurisdiction with regard to the latter assumes by implication its authority to interpret section 4 and the regulations pertaining to it as well. Although restricted to questions of law, the PAB's jurisdiction in matters concerning unemployment insurance contributions is, thus, quite broad and covers, more or less, the entire field.

The designation of appeals to the PAB as such under section 86(1) seems quite justified, since under section 87, the Board possesses full review powers. The laconic but broad terms in which this jurisdiction is conferred leave no doubt that the PAB has the authority to substitute its own judgment for the challenged decision, at least with regard to questions of law connected with the interpretation or the application of section 3.

The right of appeal is subject to the leave of the PAB, collectively given. As in the case of CPP benefits, the insistence upon this

condition can be justified by the existence of a first level of contentious review for which no leave to appeal need be obtained. Conversely, it is hard to see why in this particular jurisdiction the legislator should have required an authorization given by at least three members of the PAB (three constituting a quorum for the rendering of a decision), whereas in other analogous jurisdictions it is sufficient to obtain leave to appeal from the Chairman or the Vice-Chairman. As we shall note in chapter 4, practical circumstances have made this requirement inoperative.

Curiously enough, the Act provides for no time limit for lodging an appeal.

Decisions subject to challenge under section 86(1) are those handed down by the Umpire, the first level of contentious review as provided by section 84. In turn, the Umpire has jurisdiction over appeals against a decision made by the Minister of National Revenue according to the provisions of section 75. The latter provision bears considerable resemblance to section 28 of the CPP. It provides for three types of decisions by the Minister: (1) the determination of a question concerning the obligation to pay contributions — a type of decision corresponding to determinations by the Minister under section 28(1) of the CPP; (2) decision on an application for reconsidering an assessment — a procedure analogous to appeals to the Minister for reconsideration, as provided for under section 28(2) of the CPP; and (3) the determination of a question concerning the inclusion of an employment within the scope of the Act, raised on the occasion of an application for unemployment insurance benefits. This procedure, without equivalent in the CPP, brings another administrative authority into play, the Canada Employment and Immigration Commission, and will be examined in greater detail in chapter 3.

Referral to the PAB under section 86(2) appears to be less of the nature of an appeal to the PAB than an incident of an appeal to the Umpire. On reading section 86, one would be led to believe that the referral process is resorted to primarily when the Umpire, whose jurisdiction extends over the entire field of litigation on contributions, prefers to leave to the PAB the determination of a particular question bearing specifically on section 3 and raised in an appeal pending before him. In reality, however, subsection (2) is applied in somewhat different circumstances. It must be remembered here that the criteria for the inclusion of employees and employers in the CPP and in the unemployment insurance plan are the same, and that the Minister of National Revenue rules, often simultaneously, on the

question of inclusion in both plans. A member of the public dissatisfied with the decisions of the Minister will probably initiate appeal proceedings against each, before the Umpire and the PAB respectively. To abbreviate the appeal process and to avoid conflict between the two tribunals, the Umpire will frequently under these circumstances refer the matter (insofar as it concerns section 3 of the *Unemployment Insurance Act*, which is most often the case) to the PAB, which in any case would have to rule on the Umpire's decision in the event of a further appeal. The Umpire may decide to refer a case to the PAB either on his own initiative or at the request of a party. In practice, then, the referral procedure serves to accelerate and to consolidate appeals, and to promote consistency in the answers provided to questions relating to the inclusion of employees and employers as contributors to the two plans.

Even though section 87 does not specify the powers of the PAB when faced with a case referred to it by the Umpire, there is no reason to suppose that they differ from its powers in the settlement of ordinary appeals. The PAB may thus substitute its own judgment for that of the Minister in all questions of law connected with the interpretation and application of section 3.

D. Matters relating to QPP contributions

Section 190 of the QPP lays down procedure for the review of decisions. "Review", in effect, is the general heading of Title V of the QPP, devoted to appeals in connection both with contributions and with benefits. The marginal note to section 190, however, identifies it as treating the subject of "Appeal to Review Commission". This is an instance of regrettable looseness in the use of terminology, for in fact internal review should be clearly differentiated from contentious review. In the latter, the appeal is addressed to a distinct, or at least a higher, authority than that whose decision is being challenged and for whose decision the appellate authority is asked to substitute its own. By contrast, in internal review the author of the initial decision is himself requested to modify his decision.[161] Manifestly, within the meaning of section 190 of the QPP, the review of decisions by the Review Commission (that is, by the PAB) corresponds to the definition of an appeal, in the strict sense of the term. Moreover, sections 191 and 192 are quite explicit concerning the powers of the Commission: it may "reverse, affirm or vary" a challenged decision and, to this end, "has authority to decide any question of fact or of law".

As in the case of CPP contributions, the right to appeal is not subject to leave, no doubt for the same reasons as in the federal plan. The time limit within which appeals must be lodged is likewise 90 days, a period which may be extended by the Commission Chairman upon application by the parties within the statutory time limit.

Decisions subject to appeal under section 190 of the QPP are those made by the Minister of Revenue of Quebec. As in federal law, two types of decisions may be distinguished.

The decision may be one taken in consequence of a request for a ruling by the Minister on an individual's obligation to pay contributions either as an employee or employer (sec. 62 of the QPP, corresponding to sec. 28(1) of the CPP). The questions raised by such requests are dealt with essentially by sections 1 to 7 of the QPP. They are fundamentally the same as in federal law. In chapter 3, we shall analyze the treatment accorded to such requests by the Minister of Revenue. As in federal law, a final decision (whether by the Minister or the Commission) qualifying the occupation of a worker as self-employed automatically terminates the jurisdiction of the Commission in the matter and transfers the case to the fiscal authorities' jurisdiction.[162] This creates the risk of conflict between the Review Commission and the Provincial Court or Court of Appeal. Unlike the CPP, the QPP contains no provision for removing, by means of a regulation, litigation connected with contributions paid by self-employed individuals from the jurisdiction of the fiscal tribunals.

The second type of appealable decision arises in consequence of an objection raised by an individual to a notice of assessment (sections 65 and 66). This hierarchical review procedure is analogous to that called "appeal to the Minister" against an assessment, provided for under section 28(2) of the CPP. It will be the subject of more detailed discussion in chapter 3 of our study. The questions raised by these objections concern, generally, either sections 1 to 7 or sections 36 to 52 of the QPP.

E. Matters relating to QPP benefits

The statutory groundwork for this type of recourse was provided by the original version of section 196 of the QPP. Effective from August 1, 1975, this version was replaced by a new section

assigning jurisdiction over litigation connected with QPP benefits to the Social Affairs Commission.[163] The proceeding envisaged in the original section was designated as "review", as was that created by section 190 in connection with contributions. Needless to say, the designation is no less inaccurate in one case than it is in the other. Indeed, the Quebec legislator seems to have tacitly recognized this, by giving the more correct designation of "appeal" to actions brought before the Social Affairs Commission by virtue of the new section 196.

The powers of the Review Commission under section 196 were very extensive. It could "affirm or vary" a disputed decision, authorize the payment of benefits and determine their amount, or decide that no benefits were payable. To this end, the Review Commission was empowered to "decide any question of fact or of law".[164] In brief, the jurisdiction it held was an appeal jurisdiction in the full sense of the term.

Possessing as it did powers similar in kind and extent under the CPP and the QPP to adjudicate appeals in the area of benefits, the PAB naturally conceived its role along similar lines with regard both to the federal and the Quebec plans. The principles declared in the *Jaeger* decision, already examined in this study, were to be applied also to the Board's Quebec jurisdiction. This means, in effect, that the PAB considered its hearings as *de novo* examinations of the cases brought before it. No doubt, the Board felt the more justified in doing so since under the QPP, unlike under the CPP, it was the first appeal tribunal, and could not consequently rely on the findings of any prior or inferior appellate body.

Conversely, the PAB also applied to Quebec litigation the same reservations as it had expressed as to the extent of its powers within the federal context. Thus, in the *Resnick v. Quebec Pension Board* decision,[165] handed down on the same day as the *Minister of Health v. Storry* decision,[166] the PAB disclaimed the right to substitute its own judgment for that of the Pension Board in the exercise of its discretionary powers — powers conferred upon the latter by sections 105 and 107 of the QPP (the equivalent of the original text of section 63 of the CPP). As we shall observe in chapter 5, the replacement of the Review Commission by the Social Affairs Commission has brought about a complete reversal in caselaw on this point.

As in federal law, the exercise of the right to appeal by virtue of the former section 196 of the QPP was subject to leave from the

Commission Chairman and observance of the 90-day time limit for filing, extendible at the Chairman's discretion.

To be subject to appeal, a decision had to be one handed down by the Pension Board following a request to re-examine its initial decision.[167] A detailed analysis of the procedure governing this hierarchical review will be found in chapter 3. Suffice it to say for the moment that it was not possible to challenge an initial unfavourable decision by the Pension Board by appeal to the Review Commission. All available means of internal review within the decision-making administrative authority had to be exhausted as a condition of lodging an appeal and of proceeding to contentious review of the case.

SECTION IV

PAB caselaw

Neither the CPP nor the QPP contains provisions concerning the publication of the PAB's decisions. The only texts on the subject are to be found in the rules of procedure, whose scope and content has already been indicated in our description of the Registrar's tasks.[168] The texts are all identical and read as follows:

> The Registrar may arrange for the publication of the decisions of the Board, or a digest thereof in such form and manner as the Board deems proper.

The publication of a digest of the PAB's decisions is thus no more than a mere possibility; its realization is left to the Registrar's initiative and the Board's discretion.

Before outlining the measures that have been taken in this regard, a few observations may be in order concerning the problem of the language of publication. The PAB formulates its decisions in one or other of the two official languages, depending upon the language used by the appellant. This solution to the problem appears satisfactory to the parties involved in the appeal process. It is far less so, however, for eventual users of the PAB caselaw, some of whom may be unilingual. Furthermore, the *Official Languages Act*[169] specifically obliges federal administrative tribunals to deliver, or at least to publish, in both official languages those of their decisions which resolve questions of law of interest or importance to the public at large. It appears that in respect of this obligation the PAB falls short of its statutory duty.

The Registrar forwards the text of decisions as soon as they are drafted to a Toronto publisher who produces a constantly updated practical guide to pension plans and social benefits. The guide is intended primarily for the use of lawyers and business leaders. Its cost is $85, which includes a two-year subscription with updating

service. The work is published in English only, though it evidently includes PAB decisions delivered in French; all the decisions reprinted, whether English or French, are preceded by a synopsis in English produced by the publisher. Apart from affording a digest of PAB jurisprudence, the two large volumes of the guide contain all legislation and regulations relating to the CPP and the QPP, together with an explanatory commentary, the PAB's rules of procedure and an appendix of official forms used, a directory of administrative authorities charged with applying the plans (including the names of the principal officials, office addresses, etc.), the text of an agreement between Canada and the Federal Republic of Germany bringing the social security laws of each country in accord with those of the other, instructions given by administrative authorities to employers on the steps that need to be taken in the event of a position being covered by the CPP, ample information for the use of employers on the introduction of social benefit plans — and above all supplementary retirement pension plans — into their businesses, and a general index of the contents (which does not, however, contain references to caselaw).

Among items excluded from the Digest are decisions in which the PAB limits itself to stating the terms of a settlement effected between the parties before the hearing. The judgments of the tribunal are collected in the chronological order in which they were handed down, without distinction as to whether the decisions concern the CPP or the QPP, contributions or benefits. The publisher assigns a serial number to each, distinct from the official case number assigned to it by the PAB Registrar (the latter not being indicated in the Digest). This number is used for reference purposes in the table of contents at the head of the guide, where listed decisions are identified by the names of the parties and the publisher's case number. The Digest is brought up to date every month, as is the entire guide, with the result that the PAB's decisions are assured of prompt publication. This feature, indeed, may be the principal merit of the present format of publication.

SECTION V

Statistics of PAB activity

Compiling a statistical analysis of the PAB's work is by no means an easy task. The most obvious sources of information in this regard are the Canada Pension Plan Annual Report, published yearly by the federal Department of National Health and Welfare, and the Quebec Pension Plan Annual Report. Both documents, unfortunately, contain only very much abbreviated synopses of data concerning the volume of business transacted at the various levels of administrative procedure. With reference to the PAB, the annual reports often do little more than indicate the number of appeals brought during the period covered (whether calendar year or fiscal year) and the number of appeals still pending at the end of the period. Occasionally, the annual reports also present information as to the number of appeals heard and the parties who won them (whether the contributor or beneficiary or the administrative authority). The CPP Annual Reports are especially disappointing: in addition to being exceedingly scanty in the information they provide, the data is often differently presented from one year to the next; the amount of the statistics provided may differ from year to year, and the figures themselves may not always agree as between reports or even within a single report. Consequently, the reader has considerable difficulty in retrieving from these official documents an accurate historical perspective of the PAB and other administrative authorities and a reliable view of their respective work-loads.

With regard to the PAB, this defect is no doubt due largely to the fact that the Board itself keeps no statistical record of its own activity. Indeed, it was only in June 1975 that the Registrar's office began to keep a roll of hearings indicating the essential elements of each appeal. Even so, the record includes only cases that are ready for hearing, and appeals may not get to this stage until months after they have been lodged with the PAB.[170] The Registrar's roll has nevertheless been useful to us in affording material for a more

detailed analysis of the PAB's activities during an eighteen-month period from July 1, 1975 to December 31, 1976.[171] The data gleaned from this analysis will be presented later on in this section, as well as in chapter 4 of our study.

As for the period running from the establishment of the PAB, in 1966, until June 30, 1975, there are two, somewhat less detailed, sources of information at our disposal. The first is a compilation prepared at our request by the Registrar of the Board from the appeal files themselves. The second is a management study carried out near the end of 1974 and dealing with the functioning of the Registrar's office.[172] It is from these two sources and above all from the Registrar's roll that the statistics that follow have been derived.

A. The PAB's work-load

Table VI gives a rough outline of the PAB's work-load. It indicates the number of cases brought before the Board, broken down according to its diverse areas of jurisdiction. It must be remembered that the PAB has not necessarily ruled on each one of these cases: indeed, in some instances, where leave to appeal was required to initiate proceedings, the Chairman declined to grant it. In a number of other cases, the appeal was either withdrawn voluntarily by the parties or settled by the litigants before the hearing itself. Cases involving QPP benefits, presented before the PAB between January 1 and August 1, 1975, were all automatically transmitted to the Quebec Social Affairs Commission without a hearing; the same treatment was given to close to 60% of the appeals emanating from this jurisdiction in the course of the preceding years. In all cases, however, the Registrar's office had to open and manage an appeal file for at least some length of time.

Even a cursory glance at the Table will reveal a very rapid growth in the number of appeals in benefits cases from 1970 up to the peak periods of 1973 and 1974. This is followed by an abrupt decline in case numbers, the consequence of the PAB's relinquishment of the QPP benefits jurisdiction — a decline made even more dramatic when allowance is made for the 114 case-files opened by the PAB in 1975 but transmitted, without action, to the Social Affairs Commission. Throughout the period covered by these statistics, the number of cases involving CPP benefits underwent considerable fluctuations; accurate predictions about the future based on such evidence appear problematical. In the field of CPP contribu-

TABLE VI

CASES BROUGHT BEFORE THE PENSION APPEALS BOARD (1967-1976)

	CPP		QPP		UNEMPLOYMENT INSURANCE	
Year	Contributions	Benefits	Contributions	Benefits	Contributions	Total
1967	9		3			12
1968	12		5			17
1969	1		4	8		13
1970	7	1		22*		30
1971	9	9		30*		48
1972	5	27		85*		117
1973	4	97	1	134	1	237
1974	15	74		152	2	243
1975	14	31		114*(1)	4	163
1976	12	42	3		3	60

*Estimate

(1) For the first seven months of the year.

Sources: 1. Registrar's compilation
2. Department of Supply and Services

tions, the number of cases registered was rather slight but steady.[173] Much the same could be said, though on a smaller scale, of cases involving unemployment insurance contributions. As for appeals relative to QPP contributions, their numbers (statistically speaking) are tno longer very significant.

Tables VII to XI present a synopsis of the status of cases appealed to the PAB in each of its five distinct jurisdictions, as of December 31, 1976. As for cases concerning QPP benefits, the statistical summary describes the situation of these as of December 31, 1974; after this date, the PAB, in effect, devoted no hearings to appeals of this category, managing the files in the mere capacity of a caretaker prior to their transfer to the Social Affairs Commission on August 1, 1975.

The Tables here reproduced present, each with reference to one category of actions, the number of cases brought year by year before the PAB, as well as the number of cases which, by the end of each yearly interval, were:

- filed away following the Chairman's refusal to give leave to appeal,
- filed away following withdrawal of the appeal,
- settled by a decision given by the PAB (a distinction has been made here between substantive decisions by the PAB and decisions merely recording that an agreement had been reached by the litigants prior to the hearing), or
- still pending (either because the hearing had not yet taken place or because decision had not yet been rendered).

Table VII deals specifically with appeals in the field of *CPP contributions*. It will be observed that the relative growth in the volume of business since 1974 has not added substantially to the PAB's work-load, owing to a concurrent increase in the number of cases withdrawn before the hearing. If we apply to cases still pending the withdrawal rate extrapolated from the post-1974 experience of the PAB, we are led to conclude that only one-half of the appeals lodged with the PAB in the matter of CPP contributions normally reach the hearing stage. One might be tempted to ascribe this state of affairs to the inherent slowness of the appeal procedure; but the existence of an appreciably lower rate of withdrawal in other areas of the PAB's jurisdiction, where procedure is no less slow, forces us to qualify this hypothesis. To form a more exact estimate of the effective work-load of PAB members, one must also take into

TABLE VII

STATUS OF CASES BROUGHT BEFORE THE PAB, AS OF DECEMBER 31, 1976 (CPP CONTRIBUTIONS)

Year	Number of cases	Status as of 31.12.1976		
		Appeal withdrawn	Has been subject of a decision	Case pending
1967	9	3	6	-
1968	12	8	4	-
1969	1	1	-	-
1970	7	1	6	-
1971	9	3	6	-
1972	5	-	5	-
1973	4	2	2	-
1974	15	9	4	2
1975	14	6	3	5
1976	12	-	1	11
Total 1967-1976	88 (100%)	33 (37%)	37* (42%)	18 (21%)

*Of these, 8 decisions record prior out-of court settlements.

Sources: 1. Registrar's compilation
2. CCH Digest

account the extreme brevity of some of the Board's hearings — those in particular where the PAB merely takes notice of prior out-of-court settlements between the litigants. Appeals of this sort obviously do not call for elaborate and lengthy judgments. In cases concerned with CPP contributions, we may estimate that approximately one-fifth of the PAB's hearings are thus reduced to a mere summary procedure.

Table VIII presents along similar principles as the preceding table, the statistical experience of the PAB in appeals regarding *CPP benefits*. The Table does not include the years 1967 to 1969 since no appeal in the area of the federal pension plan benefits came before the PAB before 1970. Attention may be drawn to the presence of a category of cases classified under the heading "Leave to appeal denied". The category represents a substantial reduction in the work-load of PAB members, as do voluntary withdrawals, though the latter are not as significant a group in appeals for benefits as they are in appeals for contributions. Lastly, the proportion of business in which the PAB is merely called upon to record out-of-court settlements reached before hearings accounts for approximately one-quarter of all decisions, a rather remarkable part of the Board's work-load. If the rate of withdrawal experienced in previous years is applied to cases still pending, one may estimate that from 20% to 25% of appeals authorized by the Chairman in the field of CPP benefits will be withdrawn before the date of the hearing.

Table IX summarizes the PAB's work-load in the field of *QPP contributions*; it is identical in its form of presentation to Table VII. Given the small number and unequal distribution in time of these cases, we can draw few significant conclusions from the statistical indications of Table IX.

The data presented in Table X, relative to the PAB's case experience in the area of *QPP benefits*, are far more abbreviated and less certain. No compilation of PAB activity in this field exists, even though in the period from 1970 to 1974 it accounted on the average for 65% of the PAB's business (see Table VI). The sheer volume of this litigation may come as something of a surprise, especially when it is compared with the corresponding volume of appeals in benefits cases under the CPP. Socio-cultural factors may undoubtedly be adduced to account in part for the marked difference between the intensities of contentious activity under the two plans: the behaviour of Canadians with regard to their administrative authorities is certainly not uniform throughout the country.[174] At the same time,

TABLE VIII

STATUS OF CASES BROUGHT BEFORE THE PAB, AS OF DECEMBER 31, 1976 (CPP BENEFITS)

Year	Number of cases	Status as of 31.12.1976			
		Leave to appeal denied	Appeal withdrawn	Has been subject of a decision	Case pending
1970	1	-	-	1	1
1971	9	-	1	8	-
1972	27	4	2	20	1
1973	97	8	14	75	-
1974	74	9	25	38	2
1975	32	3	3	19	7
1976	42	7	2	8	25
Total 1970-76	282 (100%)	31 (11%)	47 (17%)	169* (60%)	35 (12%)

*Of these, 48 decisions record prior out-of-court settlements.

Sources: 1. Registrar's compilation
2. CCH Digest

TABLE IX

STATUS OF CASES BROUGHT BEFORE THE PAB, AS OF DECEMBER 31, 1976
(QPP CONTRIBUTIONS)

Year	Number of cases	Status as of 31.12.1976		
		Appeal withdrawn	Has been subject of a decision	Case pending
1967	3	1	2	-
1968	5	-	5	-
1969	4	-	4	-
1970	-			
1971	-			
1972	-			
1973	1	-	1	-
1974	-			
1975	-			
1976	3	1	-	2
Total 1967-1976	16	2	12*	2

*Of these, 2 decisions record prior out-of-court settlements.

Sources: 1. Registrar's compilation
2. Department of Supply and Services Report

TABLE X

STATUS OF CASES BROUGHT BEFORE THE PAB, AS OF DECEMBER 31, 1974 (QPP BENEFITS)

(Estimates based on Department of Supply and Services Report)

Period	Number of cases	Status as of 31.12.1974			
		Leave to appeal denied	Appeal withdrawn	Has been subject of a decision	Case pending
From 1.01.69 to 31.12.1974	432 (100%)	68 (16%)	17 (4%)	85* (20%)	262 (60%)

*Of these, about 11 decisions record prior out-of-court settlements.

Sources: 1. Department of Supply and Services Report
2. CCH Digest

certain factors inherent in procedure cannot be discounted as a contributory cause of the greater readiness of Quebec residents to avail themselves of the right of appeal. The pre-litigation stage is more quickly passed in Quebec than elsewhere; for QPP claimants the PAB represented the first level of appeal, whereas for CPP claimants it was the second; and, lastly, the right of appealing to the PAB was more clearly notified to beneficiaries in Quebec than in the other provinces. These various aspects of procedure will be more thoroughly examined in chapter 3. Whatever the causes of the phenomenon might be, the analysis of the 432 case-files connected with this jurisdiction of the PAB would have represented considerable work and was primarily of historical interest. We had to content ourselves with estimates based on the few data furnished by the management study that has already been mentioned (the DSS Report). Our method was essentially to apply to the 170 cases enumerated in this report[175] the results of an in-depth analysis based on a sampling of 30 cases selected from among them.[176] Needless to say, the relatively scant size of the sample dictates the use of caution in interpreting Table X.[177] Be this as it may, it would seem that the rate of refusal to grant leave to appeal is substantially higher in this area (16%) than it is in the area of CPP benefits (11%). Conversely, the rate of withdrawal (4%) and the incidence of out-of-court settlements (about 3%) appear to be unusually low, in the light of the PAB's heavy work-load in this particular jurisdiction and the consequently slow progress of procedure.[178] We shall have further occasion to speak of this heavy work-load and slowness in chapter 4, where various reasons for them will be pointed out. Let it suffice for the present to draw attention to their main consequences, as revealed in the right-hand column of Table X: at the end of the survey period, 60% of the cases appealed to the PAB in the matter of QPP benefits were still outstanding, some of them for more than two years.[179]

The form of presentation utilized in Table XI, concerning appeals in the area of *unemployment insurance contributions*, is identical with that used in Tables VII and IX. As with QPP contributions, however, the low numerical incidence of cases in this category makes significant and reliable inferences somewhat difficult to draw. It will be remarked that in principle this table should have taken into account the possibility of the leave to appeal not being granted. In practice, however, the Board has never declined the leave to appeal. It may be, moreover, noted that no decision by the PAB in the field of unemployment insurance has been the outcome of out-of-court settlement by the parties. Finally, three of the ten appellants also lodged appeals with regard to their being subject to the CPP; in all three cases, the PAB consolidated the appeals.

TABLE XI

STATUS OF CASES BROUGHT BEFORE THE PAB, AS OF DECEMBER 31, 1976
(UNEMPLOYMENT INSURANCE CONTRIBUTIONS)

Year	Number of cases	Status as of 31.12.1976		
		Appeal withdrawn	Has been subject of a decision	Case pending
1973	1	-	1	-
1974	2	-	2	-
1975	4	1	1	2
1976	3	-	-	3
Total 1973-1976	10	1	4	5

Source: Registrar's compilation

TABLE XII

SUMMARY OF STATUS OF CASES BROUGHT BEFORE THE PAB, FROM JANUARY 1, 1967 TO DECEMBER 31, 1976

	CPP Contributions (1967-1976)	*CPP Benefits* (1970-1976)	*QPP Contributions* (1967-1976)	*QPP Benefits* (1970-1974)	*Unemployment Insurance Contributions* (1973-1976)	Total
Cases brought before PAB	88 (100%)	282 (100%)	16 (100%)	432 (100%)	10 (100%)	828 (100%)
Leave to appeal denied	No leave required	31 (11%)	No leave required	68* (16%)	0	99 (12%)
Appeal withdrawn	33 (37%)	47 (16%)	2 (12%)	17* (4%)	1 (10%)	100 (12%)
Decision recording out-of-court settlement	8* (9%)	48 (16%)	2 (12%)	11* (3%)	0	58 (7%)
Decision following hearing	29 (33%)	121 (44%)	10 (63%)	74* (17%)	4 (40%)	249 (30%)
Case pending at end of period	18 (20%)	35 (12%)	2 (12%)	262 (60%)	5 (50%)	322 (39%)

*Estimate

By combining the total figures included in Tables VII to XI, a global picture of the PAB's activities during the first ten years of its existence emerges into view. This is the object of Table XII where the synthesis of statistics derived from the preceding tables displays at a glance the effective work-load of Board members and staff. The magnitude of this work-load would be grossly distorted if one referred simply to the number of cases brought before the PAB or to the number of decisions that it has handed down.

B. Features of the cases brought before the PAB

We have endeavoured to specify some of the characteristics of the cases brought before the PAB, particularly from the point of view of their nature and of their geographical distribution. Our source for this data being the PAB's roll of hearings, the statistics reflect only the Board's experience during the eighteen-month period running from July 1, 1975 to December 31, 1976. The sample afforded by the roll was only valid, however, for appeals in the field of CPP benefits; even in respect of these, it seemed wise to adjust our statistical findings in the light of data obtained from an examination of decisions published in the CCH Digest. We have also derived from this source a number of statistics dealing with appeals in the areas of CPP contributions and QPP benefits.

Classified in terms of the *object of litigation*, the 121 decisions of the PAB published in the CCH Digest and dealing with CPP benefits up to the end of 1976 reveal the following distribution:

Disability pension	101	(83%)
Surviving spouse's pension	13	(12%)
Retirement pension	5	(4%)
Orphan's pension	2	(1%)
	121	(100%)

It is evident that appeals connected with disability pensions preponderate decisively over all other kinds within what, since 1975, has been the PAB's busiest area of jurisdiction (see Table VI). It may not be amiss, however, to expect the number of appeals concerning disability pensions to moderate somewhat in the future. Such, at any rate, is the indication afforded by our sample of 65

appeals entered on the rolls of the PAB between July 1, 1975 and December 31, 1976. The statistical distribution of these appeals in terms of subject matter is as follows:

Disability pension	42	(65%)
Surviving spouse's pension	13	(20%)
Retirement pension	6	(9%)
Orphan's pension	3	(5%)
Death benefits	1	(1%)
	65	(100%)

A certain diversification in the PAB's work-load is also becoming obvious. Appeals in claims relating to disability pensions, where questions of fact of a medical nature are of primal importance, are gradually declining in number, while those relating to surviving spouses' pensions, usually involving strictly legal problems, and retirement and orphans' pensions, raising questions of administrative procedure, are progressively moving into prominence. With particular regard to surviving spouses' pensions, it might be worthwhile to point out, however, that the former version of section 63 of the CPP may have contributed to swelling the number of appeals in this area. Certainly, the new formulation of this section could well have the effect of reducing litigation of this type, without of course eliminating it altogether.

It may not be without interest to remark that litigation on QPP benefits, at the time that it still fell within the PAB's jurisdiction, was already showing a subject matter distribution not unlike that characteristic of cases within the Board's CPP jurisdiction in more recent times (i.e., since July 1, 1975). The 74 decisions handed down by the PAB in the domain of QPP benefits broke down along the following lines, to judge from the cases reported in the CCH Digest:

Disability pension (or contributor's child's pension)	43	(58%)
Surviving spouse's pension (or disabled widow's or widower's pension)	17	(23%)
Retirement pension	11	(15%)
Orphan's pension	2	(3%)
Death benefits	1	(1%)
	74	(100%)

Data concerning the *geographical distribution* of litigation on CPP benefits also affords a number of revealing concentrations. Table XIII presents the results of a survey based on a sample of 65 appeals from the PAB's roll of hearings. For the purposes of the present analysis, Quebec has been excluded since the CPP does not apply to its residents.[180] The remainder of the country has been divided into fifteen regions, each province constituting a region except Ontario and British Columbia, which has been divided into four[181] and three[182] regions, respectively. For each one of these regions, we have indicated the percentage that its population represents of the total population of the nine provinces. A comparison of this percentage with the proportion of cases emanating from each region allows some striking observations to be made. Three regions — Nova Scotia, Northern Ontario and, to a lesser extent, the British Columbia interior — are the source of far more appeals than their proportion of the population would seem to warrant. From the point of view of the PAB, these relatively thinly-populated regions account for as much work as the two most densely-populated regions: central Ontario and greater Vancouver. The number of disability-related appeals is particularly high within the three regions. There may be a connection between this state of affairs and the presence within the regions of industries presenting particularly high risks to the health of workers: coal mines in Cape Breton, mines of various sorts in northern Ontario, and logging in the Rocky Mountains.

C. Decisions of the PAB

As the concluding part of our statistical survey, we have sought to measure the effectiveness of appealing to the PAB, from the point of view of litigants. The question specifically to be determined was: what are the statistical chances of appellants to have the PAB reverse challenged decisions? To discover the answer, we undertook an analysis of the decisions published in the CCH Digest prior to the end of 1976. In an effort to refine our analysis further, we made use of our sample of cases entered on the PAB roll between July 1, 1975 and December 31, 1976.

In the area of *CPP contributions*, the CCH Digest records twenty-nine PAB decisions between 1968 and 1976. In 23 out of 29 cases, the PAB upheld the decision of the Minister of National Revenue, giving appellants a success rate of approximately 20%.

TABLE XIII

CASES ENTERED ON THE ROLL OF THE PAB BETWEEN JULY 1, 1975 AND DECEMBER 31, 1976: GEOGRAPHICAL DISTRIBUTION AND SUBJECT MATTER OF LITIGATION (CPP BENEFITS)

						Ontario							B.C.			
	Nfld.	PEI	N.S.	N.B.	Que.	Centre	North	West	East	Man.	Sask.	Alta.	Van.	Int.	Isl.	TOTAL
% OF POPULATION (1971)	3%	1%	5%	4%	Not incl.	30%	5%	7%	7%	6%	6%	10%	7%	5%	3%	100%
Disability pension			7	2		8	9	4	1	1	1	1	3	4	1	42
Surviving spouse's pension		1	1		2	1	1	1	1			1	2	1	1	13
Retirement pension			2			2							1	1		6
Orphan's pension			1	1						1						3
Death benefits										1						1
TOTAL	- -	1 (1½%)	11 (17½%)	3 (5%)	2 Not incl.	11 (17½%)	10 (16½%)	5 (8%)	2 (3%)	3 (5%)	1 (1½%)	2 (3%)	6 (10%)	6 (10%)	2 (3%)	65 (100%)

Source: PAB roll of hearings

In the field of *CPP benefits*, since the PAB acts as a second-level appellate tribunal, cases can be brought either by the Minister of National Health and Welfare or by claimants. In evaluating the success rate of appeals, we must therefore take into account the distinction concerning the identity of the appellant. Of 121 decisions published in the CCH Digest, 107 were rendered on appeals initiated by the Minister. These figures by themselves would already tend to suggest that the Review Committees, which have primary appeal jurisdiction, are generally more favourably disposed to beneficiaries. In 76 cases out of 107, the Minister won the appeal before the PAB; in 7 further cases, the Board vindicated the Minister's claim in part.[183] Of the 14 decisions rendered on appeals initiated by beneficiaries, 11 were in favour of the Minister and a twelfth divided between the litigants. To sum up, therefore, the PAB's decisions were in favour of the Minister in 87 out of 121 cases (a success rate of 72%); they were entirely in favour of the claimant in only 24 cases (a success rate of 20%). It is somewhat revealing that only two beneficiaries whose claims had been rejected by the Review Committee were successful in their appeal to the PAB.

Our sample of litigation in the field of CPP benefits is made up of 65 cases entered on the PAB's roll between July 1, 1975 and December 31, 1976. Of these, 36 were settled before the end of 1976, either by decisions rendered after hearings on the substance of the cases or by out-of-court agreement between the parties or withdrawal of the appeal. Twenty-eight of the 36 appeals had been initiated by beneficiaries and 8 by the Minister. This ratio, very different from that applying to decisions published for the 1971-1976 period, is indicative of a progressive change in the attitude of the Review Committees, now less and less habitually inclined to favour beneficiaries. Of the 21 decisions handed down by the Board following a hearing, 13 were in the Minister's favour and 3 were divided between the parties. Our survey has also revealed a high number of out-of-court settlements prior to hearings (10 cases), whether tending to favour the Minister or the beneficiaries. Five appeals were withdrawn, four of them by the Minister. Although the sample on which these observations are based is limited in size, one is led to conclude that, when the total number of cases brought before the PAB is taken into account, the availability of a second level of appeal in the area of CPP benefits works more to the advantage of beneficiaries than the mere study of decisions rendered in consequence of a hearing might suggest. One might also expect that in the wake of the Review Committees' changing attitude PAB caselaw will undergo a corresponding evolution: the Board's role as a counterpoise to the

somewhat permissive rulings of the Review Committees will probably diminish.

In the area of *QPP benefits*, the 74 decisions published in the CCH Digest for the 1970 to 1974 period exhibit a success rate that is very similar to that experienced in the total number of CPP benefit cases (whether initiated by the Minister or the beneficiaries). The PAB being the only level of appeal under the Quebec plan, it follows that all appeals were initiated by beneficiaries. Their rate of success against the Pension Board amounted to 23%, 3% of the decisions rendered by the PAB being divided between the litigants.

CHAPTER 3

The decision-making processes

The purpose of the present chapter is to describe the processes whereby decisions subject to appeal to the PAB are made. A knowledge of the decision-making process is indispensable to understanding the process whereby the PAB arrives at its own decisions.

As we have already remarked, the various types of decisions over which the PAB exercises appeal jurisdiction result each from a process peculiar to itself. We must therefore distinguish between the treatment accorded to claims in matters of CPP contributions, CPP benefits, unemployment insurance contributions, and QPP contributions. To these four areas of concern, we have also added that of QPP benefits, which, though no longer within the PAB's jurisdiction, was so from 1965 to 1975.

Taking each of the five areas of jurisdiction in turn, we shall describe successively the internal organization of the administrative authorities charged with making the initial decision, the process of decision-making itself (especially, the mechanics of initiating the procedure, the fact-finding process and the formalities of the decision), the possibility of recourse against the decision prior to appeal to the PAB, and the sanctions guaranteeing the efficient functioning of procedure.

SECTION I

The decision-making process in matters of CPP contributions

Although it includes no provision for the contentious review of decisions at a level inferior to the PAB, the decision-making process in the field of CPP contributions is a relatively complex one. The questions to which the process must furnish answers are whether a given occupation represents salaried employment or independent work, whether it is a pensionable employment or one excluded from the plan, and lastly what contribution should be required of an employee or employer.[184]

After identifying the decision-making body in this area of concern, we shall proceed to an analysis of the various processes through which decisions are made. We shall end the section with a description of the sanctions that may be applied to contributors.

A. The decision-making body

The administrative authority charged with the application of Part I of the CPP (that is, the part concerned with contributions) is the Minister of National Revenue.[185] In actual practice, the Minister's powers are exercised by officials of the Taxation Branch of the Department of National Revenue, under a delegation of authority under section 41(2) of the CPP.[186] The overall effect of this delegation is to entrust the application of Part I of the CPP to units in charge of the federal income tax. The levy of CPP contributions thereby becomes the joint responsibility of the central administration of the Department in Ottawa and of its decentralized offices throughout the country.

1. The central units

Within the central administration of the Department, one division in particular, the Source Deductions Division, is primarily responsible for applying the mechanisms laid down for the levy of contributions under the CPP and the *Unemployment Insurance Act*. The division itself consists of three sections, two of which take an active part in the decision-making process. The Legislation Section deals exclusively with the drafting of legislation and regulations designed to govern the levy of contributions; there is no reason to treat it in detail here. The Coverage and Interpretations Section has as its essential function the supervision, control and uniformization of the decision-making activities of the decentralized units of the Department, in matters touching the coverage of individuals by the CPP and by unemployment insurance; in certain cases, as we shall see, this section itself exercises decision-making power. The Determinations and Appeals Section is charged with formulating decisions and passing upon appeals as provided for under sections 28 of the CPP and 75 of the *Unemployment Insurance Act*. It thus exercises through appeals some form of control over rulings emanating from the Coverage and Interpretations Section as well as from the decentralized units.

The two sections are small administrative entities, containing only eight medium-ranking officials each. Although not trained in law, they are (especially those in the Determinations and Appeals Section) thoroughly familiar with the tasks of the Department.

2. The decentralized unit

The Department of National Revenue has established a network of twenty-eight district offices throughout the country. The principal activity of these offices is in the field of federal income tax. Nevertheless, forty Rulings Officers specialized in questions of coverage by the CPP and unemployment insurance are on permanent assignment at these offices. It is the decisions made by these Officers that are subject to control by the Coverage and Interpretations Section. The Rulings Officers themselves are officials of comparatively lower rank than those in the two sections of the central administration; their experience has been gained for the most part through previous employment in the payroll departments of private business firms. The district offices also have on their staff tax in-

spectors specialized in the examination and investigation of taxpayers' books; these inspectors, as we shall see, play a certain role in the decision-making process with regard to contributions to the federal social security schemes.[187]

B. The decision-making process

Our survey of the structures of the Department of National Revenue has already referred to the existence of three types of decision: ruling, determination, and decision following an appeal. Each of these types of decisions is associated with a particular procedure.

1. Rulings

A ruling is an initial decision by the Department of National Revenue concerning the coverage of employment by the CPP and the amount of contribution payable under the CPP. Decisions of this type originate either with a Rulings Officer assigned to a district taxation office or with the Coverage and Interpretations Section. The process through which interpretations are arrived at is not expressly governed by any provision, unlike determination and appeal, two procedures fairly rigidly formalized under section 28 of the CPP.

The district taxation offices receive a steady stream of enquiries from individuals and business firms concerning the coverage of particular positions by the CPP. A large part of these enquiries are easily answered and can be disposed of without delay by junior Department officials. Indeed, the Rulings Officer's expertise will very likely not be pressed into service unless the situation in question presents a certain difficulty or unless the enquirer, mindful of his legal position, insists on obtaining a formal decision on whether he is subject to the CPP.

a) Initiation of the process

A Rulings Officer's intervention in a case may be brought about in any one of three ways: through the request of an individual worker, through the request of an employer, or through an auditing of accounts.

An individual worker may turn to the Department to obtain a ruling concerning his own status under the CPP, when he believes that his employment constitutes pensionable employment but no contributions have been levied on his earnings, or when he has contributed at the rate of a self-employed individual. Conversely, he may ask for a ruling when contributions have been deducted from his income even though he believes that his occupation places him beyond the scope of the CPP.

An employer may request a ruling when he is unsure as to whether an individual to whom he pays a remuneration is subject to the CPP.

Similarly, an inspector of the Department may ask an employer to obtain a ruling on the status of a person remunerated by the employer, following audit of the employer's payroll accounts. Although the enquiry in this case will be formally initiated by the employer, in reality it will be at the prompting of the administrative authority that the question is raised.

Most often, the point at issue is whether an individual comes within the scope of the CPP. The difference of opinion may, however, concern the amount of contribution to be deducted from earnings when the mere fact that contribution is due to be paid is not itself in dispute. Whatever the precise motive for the enquiry may be, the procedure leading to a ruling remains unchanged.

b) Examination of the case

The Officer to whom the enquiry is addressed first sees to it that the principal elements of the problem are indicated on a special form filled in for the purpose by the enquirer. The information gathered by means of this form will be supplemented, if need be, by data already in the Department's possession by virtue of sections 201 and 203 of the *Canada Pension Plan Regulations* (which oblige employers and their legal representatives to file with the Minister information returns concerning their employees; these provisions are authorized by section 41(1)*b*) of the CPP), or section 31 of the CPP (which obliges self-employed individuals to file a declaration of income). The necessary information may be obtained by means of an interview with the enquirer. Should the need to do so arise, the Officer can formally require the disclosure of additional information or the production of necessary documents, under pain of a fine.[188]

If the enquiry is made by a worker, the Officer will obtain his authorization to consult the worker's presumed employer concerning the former's employment status in the business and the manner in which he is remunerated. If the worker refuses to give this authorization — probably so as not to disturb his relationship with his employer — the Officer will attempt to secure the necessary information by proceeding to an accounting examination of the business firm.

Where the request originates with an employer, the worker in question is informed to that effect by the Officer, who asks for the latter's opinion on the matter. The same process ensues when the problem arises as a result of a fiscal inspection of the business firm by the Department.

Regardless of the source of the enquiry, therefore, the procedure aims at bringing together the opinions of both employer and employee. Insofar as the respective interests of the two parties may be at variance with each other, the procedure is not unlikely to take on something of a contradictory nature. As we shall have occasion to see, however, the likelihood of such contradictions arising is far greater in the subsequent phases of the process, that is, at the determination and the appeal stage.

To arrive at a decision, the Rulings Officer is encouraged by his service instructions to consult precedents, whether set by other Rulings Officers themselves, by officials of the Coverage and Interpretations Section or of the Determinations and Appeals Section, or, finally, by PAB caselaw. The duration of the fact-finding phase of the process will be from two to four weeks on the average.

c) The decision

Once his examination of the case is complete, the Rulings Officer — to the extent that he feels qualified to take a decision (we shall later discuss the circumstances under which he must refer the case — prepares a report in which he records his findings and the reasons for the decision he has taken. The decision itself is transmitted without reasons being given and makes no mention of the contents of the Officer's report. Indeed, the report, as the entire file, is not accessible to the parties. The originator of the enquiry is informed of the decision reached and advised at the same time of his right to ask for a determination by the Minister. The determination

procedure, accordingly, plays the part of a recourse against decisions initially taken under the ruling procedure. All parties affected by the decision are notified of its existence at the same time as the originator of the enquiry is.

d) Internal control over decisions

As we have already noted elsewhere, the Coverage and Interpretations Section is charged with supervising, reviewing and ensuring the uniformity of rulings given by the district offices. Its intervention in the procedure conducted by Rulings Officers can take three forms. Service instructions specify the circumstances in which each of these three forms of intervention is to be applied.[189]

In the first type of situation — presumably, the most complex of all, or at least the one with the most significant possible repercussions — the Officer refrains from making a decision altogether. After examining the case, he extracts the essential question that it raises and formulates it in concise terms, proposing a solution for it. The report is transmitted to the Coverage and Interpretations Section which may request additional information to be developed and made available to it by the district office. The Section then formulates a decision in much the same way as the Rulings Officer might do.

In the second type of situation, the procedure is allowed to take its normal course up to the transmission of the Agent's decision to the parties. The file, however, is concurrently forwarded to the Coverage and Interpretations Section so as to enable it to verify the decision. This control procedure may on occasion lead the Section to ask the Officer to modify his original decision or to obtain further information until a new decision, itself subject to control by the Section, can be formulated. In the event that a case becomes the subject of a second decision (whether at the wish of the central administration or as a result of further fact-gathering by the Officer), the time limit for appeal is computed as from the date on which the second decision was made.

In a third type of case — presumably, the simplest of all — the Rulings Officer merely transmits to the Coverage and Interpretations Section a reference-card outlining the basic elements of the case and the decision reached. These cards are filed under the name of the individual subject to contribution, and may be easily retrieved for reference in the event of a repeated enquiry on the same case.

It should be pointed out that these control mechanisms of reference or review are not brought to the attention of the parties; the procedure, accordingly, is not one of internal review but simply of internal hierarchical supervision. A member of the public who expresses his disagreement with the Officer's ruling should be informed all the more since the decision may be reversed by the central administration. The Coverage and Interpretations Section for its part never enters into direct contact with the parties in the context of these proceedings.

e) Internal review

The practice of the Department of National Revenue allows for the possibility that a person affected by a ruling may have his case reviewed, by presenting new facts to the decision-making authority. The Department, at the same time, tries to ensure that the use of this recourse will not cause the parties to let the period elapse within which they may apply to the Minister to obtain a determination of their case.[190]

f) Statistics on rulings

Each year, the Department of National Revenue makes a rather considerable number of rulings concerning the scope of the CPP's application to individuals. Since 1971, when the Department received the same jurisdiction in connection with unemployment insurance, virtually all its rulings have dealt at one and the same time with the coverage of individuals by both of these plans. Statistics on the Department's activities in these fields will be presented in Section III, in conjunction with our examination of the decision-making process in unemployment insurance.

2. Determinations by the Minister

This procedure, unlike the preceding one, is not merely the outcome of administrative practice. It is established in a fairly elaborate way by sections 28 and 30 of the CPP. Several of the provisions of the *Canada Pension Plan Regulations* concerning the disclosure of information, already mentioned in our discussion of the interpretation procedure, apply here also. The power conferred on the Gover-

nor in Council, by section 41(1)*i*), to make regulations concerning the procedure to be followed in the determination by the Minister of questions under Part I of the CPP has not, however, been put to use.

It must be noted that the determination procedure concerns only employers and employees. The settlement of questions connected with self-employed contributions takes place in a different context, through the examination by the Department of National Revenue of declarations of income filed by the individuals concerned.[191] This procedure is of course much simpler since it assumes the existence of only one interested party (the self-employed person) rather than of two (the employee and his employer); it leads directly to the formulation by the Department of a notice of assessment obliging the party to pay the amount of contribution assessed. It is against this notice of assessment that the self-employed individual may lodge an appeal in accordance with the procedure provided by the *Income Tax Act*.[192]

By contrast, the determination procedure is aimed at establishing whether an employee or employer is subject to the CPP and, if so, what the amount of the contribution due from either should be.

a) Initiation of the process

The determination procedure under section 28(1) varies as to its meaning depending upon whether it follows a ruling procedure or not. If it does, the request for a determination by the Minister amounts, in effect, to an application for a relatively formal hierarchical review of the initial decision taken either by a Rulings Officer at the district level or by the Coverage and Interpretations Section. If it does not, the determination represents merely a more formal phase in the elaboration of the initial decision.

An application for a determination may be presented by an employee, an employer, or by the representative of either. The possibility of representation enables unions to undertake the defence of their members' interests when the latter's coverage by the CPP as employees is questioned. The application must be presented on a form especially designed for the purpose;[193] it must be accompanied by a detailed account of all the facts or reasons that justify the request.

The Minister may likewise make a determination on his own initiative — probably in cases where no ruling has been initially given.

To obtain a determination by the Minister, the employer or employee must present his request not later than April 30 of the year following that to which the question of coverage by the plan or of the amount of payable contribution applies. The existence of this time limit can make for some difficulty when a ruling procedure has been initiated but has not yet reached its conclusion before the advent of the date effectively prescribing further action. Such, for example, is the predicament of a non-contributing employee who belatedly raises the question of whether he should have been subject to the CPP in the preceding year. In such situations, in order to enable the employer to bring the question quickly before the Minister, the Department will often omit the ruling phase of the procedure; it will instead forthwith issue an assessment under section 23(1). Although the issuance of the assessment imposes a retroactive obligation on the employer to pay the amount of contribution assessed, it also opens the door to an appeal to the Minister within a period of 90 days, under section 28(2). The issuance of the assessment, incidentally, guarantees the employee all the rights consequent to his participation in the CPP during the preceding year. Sometimes the ruling procedure is carried to its conclusion in spite of the fact that the time for asking a determination by the Minister has almost run out. If one of the parties, acting with dispatch, asks for a determination a few days after the statutory limit has been passed, the head of the Determinations and Appeals Section will invoke the Minister's power to make determinations at any time on his own initiative,[194] so as to be able to rule on the question.

b) Examination of the case

Once the procedure has been put in motion, whether at the request of a party or at the initiative of the Department, the latter must hear the case. The head of the Determinations and Appeals Section assigns the case to one of his subordinates, who remains responsible for its conduct until such time as a determination has been made. This official has the task of notifying the employer or the employee, or the representative of either, as the case may be, of the receipt of an application for a determination. When the procedure is undertaken at the Minister's initiative, the Minister must notify to that effect not only the employer and the employee directly

involved in the matter, but any other employee that may be affected by the determination.[195] The Minister must then, "as the circumstances require", afford the parties an opportunity to furnish information and to make representations to protect their interests. In fact, notification of the Minister's intention to determine a question is always accompanied by an invitation to the parties to submit representations. The notification is sent out over the signature of the Director of Legal Services (Taxation).[196] It specifies that representations to be addressed to the Minister must reach him within a fortnight. If at the end of an additional seven-day period of grace a party has not submitted any representation, his wish not to intervene in the procedure is presumed. If the originator of a request for a determination subsequent to a request for an interpretation fails to submit representations, the initial decision will as a rule be maintained after a summary examination of his case. In practice, however, it appears that by far the greatest majority of individuals and business firms directly involved in a case will avail themselves of the right to submit representations, unless the affair concerns a large number of employees in the identical situation. Occasionally, the parties retain the services of a lawyer for the purpose of drafting their representations. Representations submitted by one of the parties are not divulged to the other parties in the case, unless they appear to be difficult to reconcile with each other; in the latter event, the official in charge of the case will sometimes organize a confrontation between the parties.

In order to hear the parties in person and to gather information at first hand, Section officials will occasionally take a personal part in these proceedings. They do, however, possess the same power to investigate cases and to compel the production of documents as do Rulings Officers.[197] Under the CPP, they are obliged to proceed "with all due dispatch" in their fact-finding activities.[198] They are expected to be familiar with, and to take into account, previous determinations, PAB jurisprudence and, to a certain extent, the common law relating to labour contracts.

c) The determination

At the end of the fact-gathering phase of the work, the official in charge of the case drafts a report outlining the facts, his evaluation of the facts, and the caselaw and legal rules applicable to the case. The report must receive the approval of the head of the Determinations and Appeals Section. The decision is then transmitted to the

parties by the Director of Legal Services (Taxation), acting in the name of the Minister, by means of a form-letter which draws the parties' attention to the possibility of appealing their case to the PAB within the next 90 days, under section 29 of the CPP. The letter includes the postal address of the PAB. As for the determination itself, the form-letter confines itself to stating briefly the solution to the question raised, without going into details of fact or of law or into the reasons for arriving at the decision. But for the existence of the right of appeal, the determination is final and binding.[199]

In the normal course of events, approximately three months will elapse between the time that a determination is requested and the date that it is delivered to the parties.

In the ten-year interval from April 1, 1966 to March 31, 1976, the Determinations and Appeals Section received 538 applications for determinations by the Minister concerning the payment of CPP contributions. During the same period, the Section formulated 469 determinations, 270 of them (i.e., 57.5%) confirming the solution initially put forward and 199 (i.e., 42.5%) reversing it. Since 1971, when the *Unemployment Insurance Act* came into effect, transferring primary jurisdiction in unemployment insurance contributions from the Unemployment Insurance Commission to the Department of National Revenue, the great majority of determinations have dealt, at one and the same time, with contributions to both these plans. Table XIV provides a statistical record of the Section's activities in this regard from 1966 to 1976.

3. Appeal to the Minister

Like the determination, the appeal is a relatively formal procedure governed by sections 28 and 30 of the CPP. It is, essentially, a recourse to the hierarchical review of an assessment. The assessment may be defined as the act whereby the Department of National Revenue claims from an employer payment of the contribution corresponding to an employee in his business firm. The assessment is issued for the total amount due, and includes both the portion to be paid by the employer and the portion to be deducted by him from the employee's wages.[200] During the 1975/76 fiscal year, the various district offices of the Department issued 49,500 notices of assessment.[201] Assessments may be challenged on two grounds: first, on the amount of contributions assessed against a party, and, secondly,

TABLE XIV

DETERMINATIONS BY THE MINISTER OF NATIONAL REVENUE, UNDER SECTION 28(1) OF THE CPP

Year	Determinations applied for*	Determinations made*		
		Total	Upholding previous decision	Reversing previous decision
1966/67	82	23	18	5
1967/68	65	90	29	61
1968/69	31	45	23	22
1969/70	22	22	16	6
1970/71	92	24	12	12
1971/72	28(4)	92	87	5
1972/73	65(54)	43(31)	18(6)	25(25)
1973/74	57(48)	47(40)	24(19)	23(21)
1974/75	56(50)	62(53)	30(22)	32(31)
1975/76	40(34)	21(16)	13(9)	8(7)
Total	538	469	270	199

*Figures within parentheses indicate the number of determinations applied for or delivered in connection with both the CPP and unemployment insurance.

Source: Archives, Determinations and Appeals Section

TABLE XV

APPEALS TO THE MINISTER OF NATIONAL REVENUE, UNDER SECTION 28(2) OF THE CPP

Year	Appeals lodged*	Decisions made*			
		Total	Confirming the assessment	Vacating the assessment	Varying the assessment
1966/67	19	2		2	
1967/68	82	30	15	15	
1968/69	74	86	37	49	
1969/70	75	54	33	21	
1970/71	56	52	38	14	
1971/72	64(5)	45	22	19	4
1972/73	88(39)	46(9)	24(4)	14(3)	8(2)
1973/74	117(66)	83(52)	32(19)	34(23)	14(10)
1974/75	69(62)	82(71)	24(22)	43(38)	15(11)
1975/76	70(64)	45(37)	20(17)	16(12)	9(8)
Total	714	525	245	230	50

*Figures within parentheses indicate the number of appeals or decisions in connection with both the CPP and unemployment insurance.

Source: Archives, Determinations and Appeals Section

on the issue of whether any contribution is payable, which raises the question of coverage by the plan. Experience seems to indicate that appeals are more or less equally divided between these two types of challenges.

At the procedural level, the processes of determination and appeal are virtually indistinguishable. What we have said of the formalities of initiating the process, of examining the case and of formulating a decision in the determination procedure applies also, *mutatis mutandis*, to the appeal procedure. The sole significant difference between them is that of the time allowed for instituting the two processes: in the case of appeals, a period of 90 days from the date of the assessment.

When the vast number of assessments issued each year is taken into account, the number of appeals almost dwindles into insignificance. The total number of these, for the period for April 1, 1966 to March 31, 1976, was a mere 714. During the same ten-year period, the Determinations and Appeals Section ruled on 525 appeals. In 245 cases (i.e., 46%), it confirmed the assessments under challenge; in 230 cases (44%), it vacated them; and in the remaining 50 cases (10%), it modified them. Since the passage of the *Unemployment Insurance Act*, in 1971, an identical appeal procedure has come to apply to both CPP and unemployment insurance assessments; as in the case of the determination procedure, the great majority of appeals since that time have dealt with assessments issued under both these plans. Table XV presents a statistical summary of the Section's activities in this respect for the ten-year period from 1966 to 1976.

C. Sanctions

The CPP, like many other administrative statutes, includes a number of substantive and procedural rules of a prohibitive nature — rules designed to serve as sanctions against various offences tending to subvert the legal order created for applying the plan. Some of the proscribed acts are related to the payment of benefits; these will be enumerated in their proper place. Others are connected with the levy of contributions both on self-employed individuals and on employers.

Essentially, two types of sanctions are recognized in what we might call administrative penal law (that is, the body of prohibitory

provisions included in administrative legislation). The first, by its purpose, nature and mode of operation, forms an integral part of general criminal law: sanctions of this type are criminal sanctions, in the fullest sense of the term. The second variety is, however, peculiar to administrative law: its object is not so much to repress anti-social behaviour as to guarantee the proper conduct of administrative activity. Unlike most of the sanctions provided by criminal law, these measures can be executed only against the property, and not against the person, of the offender. Finally, their application is entirely entrusted to the administrative authority itself which, although it may from time to time call upon the civil courts to help enforce their execution, never brings the criminal courts in to intervene. The sanctions are, in a word, truly administrative.

We shall examine the criminal and administrative sanctions applicable to the CPP in turn.

1. Criminal Sanctions

Criminal offences arising out of the application of Part I of the CPP (dealing with the levy of contributions) are defined in section 42 of the Plan.

Subsection (4), the most important of all, provides penalties against the following types of behaviour:

- any action undertaken with intent to evade compliance with the Act or payment of contributions,
- any false or deceptive statements made in fulfillment of any requirement under the Act,
- any falsification, alteration or destruction of the records or books of account of an employer, for the purpose of evading the payment of contributions, and
- any conspiracy with another or others to commit any of the foregoing acts.

Offenders are liable to fines that may vary from $25 to $5,000 plus, in an appropriate case, an amount not exceeding double the amount of the contribution that they have evaded, or attempted to evade, paying; in addition to either or both of these fines, offenders may be imprisoned for a term not exceeding six months. The foregoing penalties are without prejudice to any administrative sanctions to which offenders may be liable by virtue of provisions later to be examined.

It must be pointed out that the element of intent is not a necessary component of every offence enumerated under the above subsection. False or deceptive statements or written representations may constitute an offence even if made in good faith. Subsections (1) to (3) of the section create specific offences to which a series of special sanctions apply, above and beyond the general sanctions provided by subsection (4).[202]

Thus, an employer's failure to deduct contributions from his employees' wages constitutes an offence, as does his failure to keep the amounts so deducted in a distinct account or to remit them on the prescribed date to the Receiver General. Any one of these offences renders the employer liable to a maximum fine of $5,000, to which may be added the further penalty of imprisonment for up to six months.

It also is an offence for an employer to fail to keep and maintain books of account as required by law, and for anyone to hinder, interfere with, or refuse to cooperate in, the authorized inspection of these accounts. As section 42(2) of the CPP does not specify the penalty attached to this offence, section 115 of the *Criminal Code* comes into play, providing for a two-year term of imprisonment.

Finally, it is likewise an offence for a self-employed individual or his representatives to fail to declare the earnings realized through his work; the violation of any regulation requiring the production of information concerning CPP contributions or the notification of that information to the contributor being equally the subject of sanctions. Offenders are liable to fines which may vary in amount between $25 and $1,000, without prejudice to such additional administrative sanctions as may be otherwise imposed on them.

Once again, attention should be drawn to the fact that the offences created by subsections (1) to (3) of section 42 do not require the presence of the element of intent. Mere non-compliance in good faith with the various provisions referred to suffices to render the individual liable to criminal action.

All offences created under section 42 are to be prosecuted according to the summary procedure provided by Part XXIV of the *Criminal Code* (summary conviction). Inspectors of the Department of National Revenue have authority to initiate these proceedings themselves.[203] The decision to institute prosecutions under section 42 is not subject to any control on the part of the PAB. Only the

regular courts of criminal jurisdiction are competent to rule on the validity of the accusation.

It will be noted that the legislator has shown no hesitancy in providing heavy criminal sanctions as a means of guaranteeing the regular conduct of administrative procedure in the area of CPP contributions. Proof of this fact is afforded by the circumstance that the legislator has made many of the sanctions applicable even in the absence of fraudulent intent on the offender's part. The severity of these provisions is, however, somewhat mitigated through the existence of administrative sanctions.

2. Administrative Sanctions

Four sections of Part I of the CPP provide for administrative sanctions in the form of "penalties". They are section 22, with regard to employers; section 36, with regard to self-employed individuals; section 41, applying generally to all contributors; and section 42, which specifies the relationship between criminal and administrative sanctions.

Section 22(6) is aimed at the employer who neglects to remit to the Receiver General by the prescribed date the sums representing his own share of contributions to the plan as well as those of his employees. The defaulting employer is liable to a penalty of 10% of the amount outstanding. This penalty is distinct from the interest due on his debt.

Section 36(1) concerns the self-employed individual who fails to file within the prescribed time limit a statement of the earnings derived from his work. Such an individual is liable to a penalty amounting to 5% of the balance of his contribution still outstanding as of the filing date. The Minister may, however, remit the penalty, either in whole or in part, if a penalty has already been imposed on the individual for the same year under the *Income Tax Act*.

Section 36(2) concerns the agents, trustees and assignees of the self-employed individual.[204] These persons may be called upon to file a statement of the self-employed worker's earnings, in the event of the latter's failure to do so. The penalty prescribed for their non-compliance, however, is of far less severity than that imposed on the principal: $5 for each day of default, but not exceeding $50 in all.

Section 41(1) delegates to the Govenor in Council the power to make regulations prescribing the submission of information required in connection with contributions under the CPP and the transmission of this information to contributors. By virtue of paragraph *d*), the Governor in Council may also prescribe by regulation penalties not exceeding $10 a day, and up to a limit of $250 in all, to be applicable to any person failing to file or to transmit such information. It was under this provision that sections 200 to 205 of the *Canada Pension Plan Regulations* were established. The last of these sections, in fact, fixes the penalty applicable in the event of a failure to file or to transmit information at the maximum provided by the CPP.

It will be remarked that virtually all the acts and omissions subject to the criminal sanctions provided by section 92 are equally susceptible of incurring administrative sanctions under sections 22, 36 or 41. Section 42, thus, provides, on the one hand, by subsections (1), (3) and (4), that the imposition of criminal sanctions will not preclude, in principle, the application of administrative sanctions. On the other hand, subsection (5) adds an important specification as to the order in which these different sanctions must be applied. In the event of the violation by an employer of his duty to deduct employee contributions at the source and to remit these to the Receiver General, or in the event of non-fulfillment of the obligation to file and to transmit to the employee information concerning contributions, administrative sanctions can not be added to criminal sanctions, unless the payment of the penalty was demanded before the information or complaint giving rise to the conviction was laid or made. This provision appears to suggest that the legislator regarded administrative sanctions as the first instrument of enforcement, to be used prior to the application of criminal sanctions.

Penalties are collectible by the same right and means as the contributions themselves. This signifies, in practical terms, that they are included in the amount of the assessment transmitted by the Minister to an employer[205] or to a self-employed individual,[206] and that they constitute a debt to the Crown, recoverable in the Federal Court.[207]

The imposition of a penalty may, thus, be challenged before the PAB by lodging an appeal against a notice of assessment. However, to the best of our knowledge, such a challenge has never, been attempted.

Administrative penalties, as indeed criminal sanctions, are applicable even in the absence of fraudulent intent. Their existence is further evidence of the legislator's will to place in the hands of administrative authorities charged with the levy of CPP contributions powerful means to enforce their part of the Plan and to ensure the efficient and ordered conduct of procedure.

SECTION II

The decision-making process in matters of CPP benefits

The decision-making process that precedes the PAB's involvement in a case is particularly complex in the field of CPP benefits. This complexity is due, in part, to the fact that the process itself may vary according to the type of benefit in question, and in part to the existence of three successive levels of decision in each type of case.

Out first object in this section will be to identify the decision-making bodies that exercise jurisdiction in the matter of benefits. We shall then examine the decision-making process itself as it unfolds at each of three successive levels: the units of the Department of National Health and Welfare, the Minister, and the Review Committees. Last of all, we shall give special attention to two special problems: the recovery of overpayments and the imposition of sanctions.

A. The decision-making bodies

The decision-making process in the sphere of CPP benefits brings two types of administrative structure into motion: the one an integral part of the central federal administration (the Department of National Health and Welfare), the other a comparatively autonomous body.

1. The Department of National Health and Welfare

The application of Parts II and III of the CPP is entrusted to the Minister of National Health and Welfare.[208] The units charged with

the application of the CPP are entities within the Welfare sector of the Department. Within this sector, one assistant deputy minister is responsible for the income security programs: family allowances, old-age security pensions, and the CPP. The Director General, Programs Operations, acts under the authority of this deputy minister, and has under his supervision all the units whose activities are of concern to us here.

The Director General exercises, by delegation, the principal powers conferred on the Minister under parts II and III of the CPP.[209] In addition to various administrative support, planning and control units, the CPP Administration includes a Regional Services Division, in charge of the network of decentralized offices throughout the country, and three units with a direct role to play in the decision-making process, whose functioning we shall describe in greater detail.

Peripheral to this administrative structure is an Advisory Committee on the CPP, whose composition and functioning must also be briefly recalled.[210] This standing Committee is constituted of sixteen members representing various interests — employers, employees, self-employed individuals and the public at large — all appointed by the federal Cabinet. The Committee's task is to report to the Minister with regard to the application of the CPP, the state of its investment fund, as well as the coverage and benefits provided under the Plan.

The decision-making process within the General Directorate itself follows a pattern of movement from the periphery to the centre. It will therefore be useful to begin our account with a description of the decentralized units of the Directorate and to go on from there to a survey of its central units.

a) The decentralized units

The General Directorate is organized on the principle of limited territorial decentralization. This principle calls for the assignment of certain functions to subordinate administrative units, each of them exercising a limited territorial jurisdiction. In the particular context of the General Directorate, this decentralization of powers is especially limited since the decentralized units exercise no decision-making authority in the matter of benefits. The units in question are of two kinds: district offices and local offices.

(i) *District Offices*

There are, in all, thirty-eight district offices throughout the territory of Canada and in all provinces except Quebec. Applications for CPP benefits emanating from Quebec are handled by the Ottawa District Office. The division of the country by the General Directorate does not correspond to that effected by the Department of National Revenue, nor, until recently, to that in effect for purposes of the Old Age Security pension plan.

Most often, however, the CPP district office is located in a building occupied by other service units of the federal government also, such as a Manpower Centre or an Unemployment Insurance Office. In about 30% of the cases, the CPP district office occupies space in a private building or in a municipal or provincial administration building. For some time now an attempt has been made to accommodate under the same roof offices of the CPP and the Old Age Security pension and to give each unit of the two plans the same geographical territory of jurisdiction.

The staff attached to a district office may vary in number from 5 to 20 individuals and is made up principally of CPP agents and information clerks.

The principal function of the district offices is to act as a clearing house for applications for benefit, to assist applicants in filing their claims by explaining to them the procedure involved, the documents needed to substantiate their claims and the various options open to them. District offices are the only distribution centres for application forms to the members of the public. Agents of the CPP see to it that the file of each applicant is complete before it is forwarded to the General Directorate in Ottawa for further processing. The agents' participation in the decision-making process is thus limited essentially to the role of informing claimants and verifying their applications. This function puts the agents in contact not only with those seeking benefits but also with various other individuals, such as employers and physicians, capable of providing the information or documentation necessary for the processing of claims.

District offices have also the task of providing information to the public at large. Information clerks respond to numerous enquiries of a more or less general nature, both by telephone and by mail. CPP agents engage in publicizing and "promoting" the plan, chiefly by means of talks delivered to the widest variety of audi-

ences. The district offices also see to the distribution of explanatory material concerning the operation of the CPP through post offices, banks and social welfare services.

Finally, district offices are called upon to intervene in the decision-making process at the Review Committee level. As we shall see further on, the district offices are responsible for organizing the sittings of these Committees which not infrequently take place on their premises.

(ii) *Local offices*

The activity of the district offices throughout their territory of operations is reinforced by a network of local offices made up of some one hundred units dispersed throughout the provinces in which the CPP functions. These local offices are little more than casual quarters, installed usually in Canada Manpower Centres. They are served by travelling agents attached to the district office of the area and making more or less frequent visits on their rounds. The idea behind the system is to save members of the public the cost and hardship of having to travel considerable distances to the district office in order to obtain information and assistance. The drawback of the system is that a considerable length of time may elapse before a travelling agent visits a locality; an applicant who insists on discussing his situation with an official face to face before submitting his application in practice runs the risk of some delay.[211]

b) The central units

As we have already remarked, decision-making power in questions of CPP benefits is concentrated at the central Ottawa office of the General Directorate. Three constituent units of the General Directorate share immediately in the exercise of the power: the claims and Benefits Division (CB), the Disability Assessment Division (DA) and the Appeals Section.

(i) *The Claims and Benefits Division*

This Division, acting in the name of the Director General, has full authority to decide upon all applications for benefits, except upon those aspects of disability pensions that concern specifically

the disability itself. The Division's work consists of receiving and processing applications forwarded to it by the district offices and of ruling upon the claimants' eligibility for benefits. In the majority of cases, this is simply a matter of verifying, at two hierarchical levels, the applicant's file, of ascertaining whether all the conditions laid down by the CPP have been met and of preparing the necessary forms to authorize payment of the pension. Since the statutory conditions of eligibility are almost exclusively objective in nature, the work is comparatively simple. Difficulties are only likely to arise in cases where the existence of certain statutory conditions is doubtful or hard to establish, or when the Minister (that is to say, the Director General acting under delegated authority) is asked to exercise the discretionary power conferred upon him by section 63.[212]

The Division's work, however, extends beyond the taking of the initial decision. Certain types of benefits require in effect the exercise of sustained supervision to ensure that certain conditions of eligibility continue to be met (e.g., the state of widowhood, the existence of a relationship of financial dependency by a child, attendance by the child of beneficiary of an educational institution).

(ii) *The Disability Assessment Division*

This Division devotes its efforts exclusively to the settlement of questions of disability raised by an application for benefits — i.e. for disability pensions or for disabled contributor's child's benefits. In all other respects, the applications come within CB's purview. Like its sister division, DA intervenes in the settlement of applications for reconsideration and of appeals arising out of its own decisions.

But the very nature of what constitutes the beneficiary's right to a disability pension under the CPP impresses an altogether different character on DA's work. This right, in effect, is contingent upon the fulfillment of certain conditions whose appreciation calls for special qualifications, chiefly of a medical kind. DA's staff includes some fifteen physicians, half-a-dozen nurses and a number of specialists expert in the field of professional rehabilitation. Moreover, whenever the circumstances of a case so demand, DA does not hesitate to consult specialized physicians in private practice.

The element of duration being one of the critical factors in the determination of disability, it is imperative for DA to provide sustained supervision to ensure that conditions of eligibility for benefits

continue to be met. The performance of this task makes greater demands on the time of DA staff members than it does on that of CB personnel.

(iii) *The Appeals Section*

Properly speaking, this unit of the General Directorate does not exercise decision-making power, as such. Its role consists essentially of ensuring the correct conduct of procedure at the first two levels of appeal. As we shall see further on, this role has two aspects. On the one hand, the Appeals Section ensures liaison between the beneficiary and the other parties concerned, the district office and, at the second level of appeal, the Review Committee. On the other hand, it coordinates the participation of the central units in the appeal process, in liaison with CB or DA, as the case may be.

2. The Review Committees

The Review Committees are one of the most original features of the CPP. Neither British nor American law could have provided the model for such an institution to the legislator in 1965. Even in Canadian law, one can at best discern a vague affinity between these committees and the Boards of Referees established by the *Unemployment Insurance Act*. Since 1965, however, federal legislation has established in the context of other social security statutes appellate bodies with a composition noticeably akin to that of the CPP Review Committees.[213] Conversely, the Quebec legislator has chosen to take a different course in designing the QPP.

The essential features of the Review Committees are delineated in the first four subsections of section 84 of the CPP. They emerge into view as a sort of people's appeal tribunal, constituted *ad hoc* of members designated on an equal basis by the litigants, with no permanent infrastructure and capable of sitting in any convenient place. Their composition depends entirely on the will of the parties, the sole proviso of membership in the committees being Canadian resident status. To constitute a Review Committee, one member is nominated by the dissatisfied applicant for benefits, the other by the Director General, and a third — the Chairman — is coopted by the other two members — or, in the event of disagreement, designated by a superior court judge at the summary request of the members.

a) Formation of the committees

The task of forming a Review Committee, following an appeal against a decision rendered under section 83, generally devolves upon the district office within whose territory the appellant resides. An exception to this rule is made, however, when the appeal concerns the legal or common-law spouse's right to a surviving spouse's pension. Since in such cases two persons who may reside at considerable distances from each other are involved, the task of organizing the Review Committee is, logically enough, entrusted to the Appeals Section attached to the central administration of the CPP. In principle, the appellant is expected to have already identified the person that he wishes to appoint to sit on the Review Committee, on giving notice of his intent to appeal;[214] in practice, however, this appointment often does not take place until after the appellant has been invited to proceed, by a letter addressed to him by the Appeals Section acknowledging receipt of the appeal and outlining the general procedure of the Review Committee to be constituted.

Very frequently, the process of forming the Committee is, thus, begun with the designation, within fifteen days of receiving the notice of appeal, of a secretary and, later, of the committee member whose appointment devolves on the Minister.[215] Theoretically one of the tasks of the Director General, the designation of these individuals is in practice effected by the head of the district office concerned. His role at this stage of the proceedings consists essentially of putting in touch with each other the committee members appointed by the two litigants and of helping them in the choice of a chairman. As for the selection of the committee member, the head of the district office disposes of a standing list of possible candidates from which to make the appointment. The list enumerates several individuals of good reputation and with varied backgrounds — usually local dignitaries or citizens of standing with whom the head had previously made contact in a social setting, through clubs, charitable associations, etc. At the time of their being "drafted" for eventual duty on a Review Committee at the request of the Minister, these individuals had been given some general indication by the head regarding the committees' manner of functioning. Service instructions issued to the head of the district office are quite explicit as to the need to select individuals whose impartiality is above suspicion. To this end, officials of the Department of National Health and Welfare are automatically barred from appointment; indeed, an attempt is made to avoid designating any official employed in the

federal civil service. The following categories of individuals are considered to be particularly suitable for appointment:

- Businessmen (bankers, personnel managers, chartered accountants),
- retired businessmen or members of the liberal professions,
- directors of social clubs in the region,
- provincial or municipal officials exercising supervisory or managerial functions,
- ministers of religion,
- school trustees,
- self-employed individuals,
- housewives with a certain amount of experience in business or the exercise of a profession.

Once the appointment is made, the secretary informs the appellant and the other committee member accordingly. He then invites the two members to meet and to agree on the appointment of a chairman, within thirty days.[216] In practice, if no agreement is reached on the choice of a chairman before the end of this period, the Department will take the initiative of suggesting, through the agency of the secretary, the names of several individuals resident in the region who have already served on a Review Committee, in any one of a number of functions. In the rare event that the appellant should remain adamant in the face of all the suggestions put forward by the secretary, service instructions provide that the head of the district office ask the member designated by the appellant to propose the name of a person acceptable to him. It is up to the head then to attempt to secure the other member's consent to this proposal. In whatever way the chairman is finally chosen, the secretary must see to it that both committee members have given their written consent to the former's appointment.

To sum up, then, there are two categories of persons involved in Review Committees. Needless to say, the member designated by the appellant is usually friendly to the latter's cause: in the normal course of events, he is the appellant's relative, friend, family physician, fellow-worker or union official; possibly, his lawyer's partner, or even his M.P. or M.L.A.[217] The Chairman and the member nominated by the Department are local dignitaries — there is a case on record of an Anglican bishop presiding over a Review Committee — who normally approach the litigation with a good deal of detachment. Even if, theoretically, the Review Committee should, as a whole, undertake its task in a spirit of impartiality, it is quite evident that the attitude of its members will differ considerably. The Chair-

man's impartiality, however, remains a positive obligation for him; it is, in effect, seldom called in doubt.[218]

It should be pointed out that neither the Chairman nor the members of the Review Committee are in any way remunerated or compensated for their services. The unpaid character of their work makes this form of review mechanism quite inexpensive to operate, a consideration that was probably not without weight with the 1965 legislator.

b) Powers of the committees

The powers of the Review Committee in adjudicating a case are described in sections 84(6) and 86 of the CPP. They are identical to those of the PAB with regard to a decision handed down by the Review Committee.[219] The Committee may affirm or vary the Minister's decision, or take any action that might have been taken by the Minister himself. In this sense, the Committee has authority to decide any question of law or fact concerning the appellant's eligibility for benefits. Its decision is conclusive as to the appellant's age;[220] in other matters, it is subject to appeal to the PAB. The Committee is free to revise its own decision in the light of new facts.[221] In conformity with PAB caselaw, however, the Committee has no authority to substitute its own judgment for that of the Minister in the exercise of a discretionary power.[222]

B. The initial decision

The process whereby the initial decision is rendered by the Minister — that is, by the officials of the CPP Administration — on a claimant's entitlement to benefits is governed by section 59 of the CPP. The drafting of this provision, reasonably clear and simple in comparison to the Act as a whole, has been unfortunately obscured by the introduction, in 1977, of subsections (1.1) to (1.4). These new provisions spell out a series of special conditions concerning benefits payable to deceased persons or to children; we shall deal with them elsewhere, as the legislator should have done. It will suffice for the moment to transcribe here the contents of the three original subsections of this section. They provide in effect:

- that no pension benefit shall be payable to any person unless he has made an application for it;

- that the application must be made by the intended beneficiary himself or by a person empowered to do so on his behalf;
- that the application must be in writing;
- that it must be presented at a decentralized unit of the Department, within the area of the applicant's residence;
- that the Department shall examine the application forthwith on receiving it;
- that the Department shall either approve the payment of benefits and determine their amount or decide that no payment of benefits is in order;
- that a negative decision must be communicated to the applicant as soon as practicable and in writing.

To this fundamental procedural framework a number of other provisions of the CPP may be added as having relevance to the treatment of benefit applications. Of particular importance is section 91(1)*b*), authorizing the Governor in Council to make regulations prescribing the manner of making application for benefits, of furnishing evidence to justify claims, and the procedures to be followed in dealing with and approving applications.

In order to analyze these provisions and describe the administrative process to which they give rise, it is necessary to make a clear distinction between applications for disability benefits and applications for benefits of other kinds.

1. Applications for disability benefits

The benefits in question here are the disability pensions provided for under sections 43(2), 44(1)*b*) and (2), 54, 70 and 71 of the CPP and the disabled contributor's child's benefit, provided for under sections 43(1), 44(1)*f*) and (2), 58, 77, 78 and 79.

The essential conditions of eligibility for a disability pension are described in section 43(2). The term "disability" is defined in the section as a state of "severe and prolonged mental or physical disability". The severity of the state must be such as to render the disabled person "incapable regularly of pursuing any substantially gainful occupation". To be considered as "prolonged", the disability must appear to be "likely to be long continued and of indefinite duration or ... likely to result in death".

Whether these conditions are in fact present and what the expected duration of the disability is are questions calling for medical expertise. The evaluation of a disabled individual's residual working capacity likewise requires specialized knowledge of the nature and demands of various types of employment. A considerable part of the PAB's caselaw is, in fact, devoted precisely to the clarification of the terms of section 43(2), especially of the concept of what amounts to "severe" disability. Suffice it to say in this connection that the evaluation of the claimant's medical state must take into account individual factors such as his age, aptitudes and professional training, but not economic or geographical circumstances such as the availability of suitable jobs in the region of the applicant's domicile.[223]

Benefits tied to the continuance of a claimant's disability make his eligibility depend upon factors that are likely to disappear with the passage of time. The beneficiary of a pension may cease to be disabled — a hypothesis obviously contemplated by section 43(2)*b*). Similarly, the child of a disabled contributor will cease one day to be dependent upon him. Continuing review of the beneficiary's entitlement to his pension is therefore required.

The technical nature of the determination of whether a beneficiary is entitled to receive a disability pension has led to the establishment of a particularly complex procedure. In the pages that follow, we shall present a phase-by-phase description of it, sketching in turn the initiation of the process, the examination of the application, the decision and the control of benefits.

a) Initiation of the process

Applications for disability pensions and for disabled contributors' children's benefits (as indeed for all other types of benefits) must be in writing.[224] They may be transmitted by mail or by any other means of delivery.[225] By virtue of section 91(1)*b*), the Governor in Council has obliged applicants to use the prescribed forms to furnish the data required by section 514 of the *CPP Regulations*. The application form must be accompanied by documents to enable the authorities to check the accuracy of the data; a statement of earnings and contributions for the last two years must likewise be submitted.[226] The application must be sent or delivered to the CPP district office within the service territory of which the applicant has his domicile.[227]

In principle, the application should be presented by the contributor himself. Another person or body may, however, be authorized to do so on his behalf. To be permitted to do so, the applicant's representative must show that the contributor is incapable of managing his own affairs by reason of disability, sickness, insanity, or for some other cause. The Director General must be, furthermore, satisfied that federal or provincial law authorize the would-be representative to act on the contributor's behalf; failing this, the Director General appoints a representative acceptable to him.[228]

The CPP does not specify a time limit within which an application for benefits must be presented following the occurrence of the disability. No application, however, can have retroactive effect beyond the twelve-month period immediately preceding its presentation.[229] The new version of section 59 of the CPP recognizes one exception to this rule: the case of the disabled contributor who dies before having had the opportunity to submit an application for benefits for himself and for his dependant children. A representative acting on behalf of the deceased contributor may in these circumstances be permitted to exercise the latter's right to benefits, by submitting an application within a year of his death. Such an application is presumed, for the purposes of the Plan, to have been filed on the day of the contributor's death, which in turn allows the claim to have retroactive effect over any period of the contributor's disability within the twelve months immediately preceding his death.[230] Legislative amendment of the section in this sense had become necessary in order to nullify the PAB's jurisprudence, which disallowed the right of a disabled contributor's heir to apply for the payment of a disability pension following the contributor's death.[231] An analogous provision also enables the person or institution having custody of a disabled contributor's child to submit an application for benefits on the latter's behalf within a year of the date of the child's death.[232]

On receiving the application, the district office dispatches a more detailed questionnaire to the claimant, concerning the nature and consequences of his disability, the medical treatment that it necessitates, his occupational pursuit and earnings since the onset of the disability, his professional training, experience and the nature of his customary employment.[233] The claimant must fill in and sign the questionnaire, and return it to the district office. A CPP agent then undertakes to check the accuracy of the answers, by meeting the claimant in person, at the latter's home if necessary. Following this interview, the agent will append to the application his own observa-

tions on the claimant's state, before transmitting it to the office of the CPP Administration in Ottawa. It will be noticed that this manner of proceeding dispenses the claimant from the necessity of obtaining, at this stage at any rate, a medical report on his disability. It also allows personal contact to be made and information to be exchanged between the administration and the applicant, though the decision-making authority takes no part in this process.

Information furnished by the claimant — or gathered by the Department from other sources — on the occasion of an application for benefits is considered confidential in nature. The privilege protecting the information is such as to prevent its disclosure even to the courts, except in prosecutions related to the application and execution of the CPP. It may be disclosed, however, to certain federal administrative authorities, including the Department of National Revenue, the Department of Supply and Services or the Canada Employment and Immigration Commission, for the specific purposes of applying the CPP or the *Unemployment Insurance Act*. Authorities administering the QPP have access to the information in the event of there arising a need for one plan to compensate the other; within limits, a similar reciprocity of information exists with the authorities in charge of provincial health insurance schemes. Some of the information may be divulged at the request of the individual in question. All unauthorized disclosure of information by an official makes him liable to criminal prosecution.[234]

The claimant retains the right to withdraw his application for benefits up until the thirtieth day following the date of issue of the first cheque in payment of benefits. He must, however, avail himself of this right prior to cashing the cheque, which must be returned to the Director General. A favourable decision on the claimant's first application does not prejudge his eligibility in the event of a subsequent application.[235]

b) Examination of the application

The initial scrutiny of applications for disability benefits is, as we have seen, a responsibility shared by the two principal divisions of the CPP Administration. The Claims and Benefits Division takes charge of the simpler aspects of the case: the sufficiency of contributions, the determination of earnings, and checks on the proofs of age and dependency. The Disability Assessment Division, by contrast, addresses itself to the central issue: the disability of the claimant. It

also assesses disability where the matter arises in connection with an application for benefits of another type, for example, for a surviving spouse's pension.

The examination effected by the Disability Assessment Division is the subject of fairly elaborate regulations. These are based principally on paragraphs *b*), *e*) and *f*) of section 91(1) of the CPP. By virtue of that section, the Governor in Council is authorized to make regulations on

- procedure for the examination and approving of claims in general;
- the determination of disability;
- conditions for the payment of disability benefits, particularly the manner in which the disability will be initially assessed and the rehabilitation measures to which the beneficiary may be reasonably subjected;
- the assumption by the budget of the CPP of the cost of such assessments of disability and rehabilitation measures;
- the treatment of the beneficiary's refusal to submit to assessments of disability and rehabilitation as a ground for his becoming ineligible for benefits.

The prominent place accorded in these provisions to the determination of disability should not make us lose sight of the fact that an application for disability benefits can raise other questions as well: for example, the question of how long the claimant has been contributing to the CPP, or whether the children of a disabled contributor attend school. Since these questions do not exclusively arise in connection with applications for disability pensions, we shall deal with them later, in our description of the decision-making process regarding applications for other types of benefits.

As we have already mentioned, the task of determining the nature and extent of disability is entrusted to the Disability Assessment Division (DA). At the legal level, however, the work of preparing the decision to be formulated by the Director General is left to a Disability Determination Board. The Boards are, as it were, "work groups" formed within the Division and functioning in a collegial manner.

Every application for a pension is, as a matter of course, referred to a Disability Determination Board composed of several staff-

members of the Division, at least one of whom is a physician.[236] The Board's task is to provide "advice and assistance" to the Director General with a view to determining whether the payment of a disability pension is justified. The Director General, for his part, is not bound by the Board's advice: he is merely obliged to "consider" it and may obtain other expert advice before rendering a decision.[237] Needless to say, in actual practice, the Board's advice normally decides the event.

The Board's work consists, first of all, of examining the information submitted to the Director General in the pension application and questionnaire filled in by the claimant. If the committee considers that the data before it is not sufficiently specific, clear or recent, the Board physicians will request a medical report from the claimant's treating physician.[238] It should be pointed out that at no time do members of the Board enter into communication directly with the claimant; all exchanges with the latter take place through the mediation of the district office which first forwarded the application. If the disability is the outcome of a work accident or occupational disease, the Board secures a report of the medical findings of the workmen's compensation commission of the claimant's province of residence. Even though the workmen's compensation commission's decision whether the claimant is entitled to compensation or not does not in any way predetermine the Department's decision on the claimant's right to a pension, the additional data thus obtained facilitates the decision-making process. "Reasonable" costs incurred in bringing to light further information considered necessary by the Board are borne by the CPP. It must be presumed that the claimant himself could only be held accountable for "unreasonable" expenses occasioned by his negligence or his bad faith.[239]

In approximately 25% of the cases, the information furnished by the claimant or obtained by the Board is insufficient to enable the latter to make a conclusive determination as to the severity or duration of the disability. In such an event, the Board can require the applicant to submit to a medical examination at the hands of a specialist designated by the Department and practicing in the region of the applicant's residence.[240] The expenses incurred by the claimant as a result of this examination, including the medical specialist's fee, are borne by the CPP; indeed, with the Director General's consent, an advance may be granted to defray the claimant's outlay.[241] In the event of the claimant's refusal to undergo the medical examination, his application is evidently rejected for lack of conclusive evidence of his disability.

It is possible that even this "special examination" may not decisively dispose of the question of the applicant's disability, especially if the prognosis is difficult and the specialist's findings do not confirm those of a recent examination by the attending physician. In such a case, the Board may resort to expert advice to help in the interpretation of the data, in an attempt to complete its fact-finding in the matter.[242]

Another kind of expert may also be called upon to intervene in an advisory capacity. Indeed, in addition to evaluating the strictly medical aspects of the claimant's case, the Board must also rule upon the question of whether the disability has rendered the claimant "incapable regularly of pursuing any substantially gainful occupation".[243] To do so, the Board must examine his physical and intellectual skills, his training and his occupational antecedents, as far as the claimant's statements and the documents in his file make possible any conclusions on such matters. The Board must, furthermore, assess the residual work capacity of the claimant, following the determination of his rate of disability based on his medical examinations. Working from these data, the occupational rehabilitation specialists attached to the Division construct an "employment profile" for the claimant, that is, a description of this capacity for employment, given the limitations and handicap of his disability, and a descriptive list of occupations whose skill requirements correspond with his abilities. The assessment of work capacity is largely theoretical, in the sense that it is established in terms of the claimant's potential for employment of hypothetical employment requirements rather than in terms of actual availability of employment in the area of the claimant's domicile.

In the light of all these elements, the Board in charge of an initial application for disability benefits formulates a recommendation to the Director General, in which it gives its opinion on

- the claimant's disability as of the date of his application;
- the date of onset of the disability, within the twelve-month period immediately preceding the date of the application;
- the state of the claimant's disability at the time of the report or, if such is the case, the date at which he ceased to be disabled;
- the practicability of requiring reasonable measures of rehabilitation.

The Act does not require the Board to give reasons for its opinion. In practice, however, reasons are invariably given, and

serve, for all practical purposes, as the Director General's own. The latter retains, however, the (largely theoretical) freedom to disregard the Board's conclusions and to gather expert opinion on the case before making his decision.[244]

c) The decision

The question may first be put: how much time usually elapses from the day on which the claimant submits his application at the district office until the day on which the Director General makes his decision? Figures available on the subject are hard to reconcile with each other, even when they reflect the experience of comparable periods. According to information that we received, the average processing period, in May 1975, was 49 days, the actual time required to dispose of claims varying between 21 to over 100 days. By contrast, statistics released by the Department for the 1975-1976 fiscal year indicate a time-span of 83 days between the date of submission of an application for disability benefits and the date of issue of the first cheque. The latter statistical average appears, all in all, more reliable, having been more carefully computed. Be this as it may, it should be noted that since the early 1970's the processing period for disability-pension applications has tended to become shorter and shorter. At the same time, it is also true that in the 28 disability-pension cases heard by the PAB between July 1, 1975 and December 31, 1976 the average processing period before the initial decision was 128 days.

The Act requires that the Department's decision be notified to the claimant in writing.[245] A copy of the decision is forwarded to the district office. The notification itself is by means of an entirely standardized bilingual form-letter. The form-letter used to notify applicants of a favourable decision, the so-called "Notice of Entitlement", has a certain amount of information on its reverse side to which beneficiaries' attention is drawn. They are warned, particularly, of their obligation to inform their district office of the termination of their disability and of any change in their occupational activities or earnings. The form specifies that the beneficiary must give notice of having returned to work or obtained an employment or begun to work in a self-employed capacity, so as to avoid the making of overpayments which will have to be recovered by the administration. The beneficiary is likewise asked to notify the district office of the occurrence of any one of a number of situations as a result of which one of his children ceases to be dependent upon him.

In the event of a negative decision, the claimant is notified by means of a more elaborate form. The English version of the text is as follows:

> In accordance with Section 59(3) of the legislation governing the Canada Pension Plan, your application for Disability Benefits has now been carefully considered.
>
> A decision as to whether a person is disabled under the terms of the legislation is made on the recommendation of the Disability Determination Board which includes at least one duly qualified medical practitioner.
>
> I regret to advise that it has been determined that you are not eligible to receive a Disability Benefit under the Canada Pension Plan for the reasons outlined in the attached Statement of Disability Assessment.
>
> If you are dissatisfied with this decision, you may appeal in writing to the Assistant Deputy Minister, Canada Pension Plan, for reconsideration. Should you decide to proceed with a formal appeal your letter, stating the reasons why you are asking for a reconsideration of the decision, together with any additional documented evidence which might lend support to your appeal, should be forwarded to the Assistant Deputy Minister, Canada Pension Plan, ... (address).

The form-letter itself is, thus, merely a notification informing the applicant that his claim has been disallowed and indicating the course available to him to have the decision reviewed. This course consists of the appeal to the Minister provided under section 83 of the CPP. We shall examine this phase of the procedure later. Suffice it for the moment to note that the wording of the last paragraph of the notice is somewhat ambiguous; it could easily create the impression that there are two distinct courses available to the claimant: the one, "informal" (the request for a reconsideration); the other, formal (the appeal).

To learn of the reasons for the refusal of his claim, the applicant must refer to a second document appended to the Director General's form-letter and entitled "Statement of Disability Assessment". We have not examined a sufficient number of these to allow us to form a reliable judgment of their quality or style. Yet, in the few examples we have seen, it appeared to us that the Boards were not always successful in giving an explanation that was really intelligible to the layman, of the criteria established by section 43(2), according to which they were to rule on the application. The commentary was usually limited to a paraphrase of the section, completed at best by a few elliptical observations making implicit reference to PAB

caselaw. All this would be of little help in making an applicant understand why his condition could not be considered a severe and prolonged disability within the meaning of the CPP. The obscurity of the explanations provided no doubt reflects the natural reluctance of officials charged with applying a legal provision to "bind" themselves, by revealing precisely what interpretation of the provision underlies their decisions. By contrast, as one might expect of Boards largely composed of physicians, the analysis of the medical file is usually presented with clarity and precision. Since one cannot, however, say the same thing of the presentation of the legal aspects of the problem, the connection between the two parts of the argument is not always obvious.

The claimant's eligibility for disability benefits once established, the Director General must proceed to determine the amount of the pension payable. This is done on the basis of computerized data on the applicant's earnings obtained from the Department of National Revenue and listed in the Record of Earnings of the CPP Administration.[246]

If, because of inevitable delays in the transmission of relevant data by the Department of National Revenue — data to be derived from the beneficiary's personal income tax declarations — it is impossible to compute the definite amount of the pension at the time of the decision, the Director General can fix the amount of interim benefits to be paid, to be adjusted once the final calculation has been made.[247]

The Director General may also be called upon to decide to what person or institution the benefits of a claimant incapable of managing his own affairs shall be paid.[248]

d) Benefit control

Since the award of disability benefits depends on the presence of certain physical factors, it follows that the initial decision taken in a particular case must be subject to change as the physical factors upon which it was based themselves change and evolve. Thus, the state of a claimant's health may deteriorate subsequent to an initial refusal to grant him a disability pension, to the point where he might be considered as suffering from a severe and prolonged disability. Conversely, the medical prognosis of the duration of a beneficiary's disability might be proven erroneous, following the award of the pension, by an unexpected improvement in his condition, as a result

of which he may be capable regularly of pursuing a substantially gainful occupation.

The review of decisions on the ground of new facts is envisaged in section 86(2). The phrasing of the section is such as to allow review to take place whether the new facts are presented by the beneficiary or discovered by the Department; the initial decision may, in other words, be amended upon the initiative of either one of the parties. Since the possibility of review is always present, a refused claimant is always at liberty to adduce new facts to substantiate his claim, even a long time after the initial decision, without having to submit a new application.

Curiously enough, the power of reviewing a decision, unlike that of making an initial decision, has never formally been delegated to the Director General.[249] It is nonetheless logical to assume that the delegation of the power to rule on applications for benefits includes also that of the power (a power expressly created by the Act) of revising that decision. Indeed, it would be nothing short of absurd to reserve this authority for the Minister, when the power to rule on an appeal lodged by virtue of section 83 against an initial decision or a reviewed decision has been delegated to the Director General.

The Disability Assessment Division has instituted a permanent means of controlling the eligibility of beneficiaries and for reviewing its decisions.[250] First, beneficiaries are asked, on being sent their first benefit payments and periodically thereafter, to inform the district office of any change in their status, especially of their return to regular work. Furthermore, all beneficiaries receive, at least once a year, a control questionnaire. When the answers to the questionnaire, evaluated in the light of the file as a whole, suggest that a review of the decision might be in order, the case is submitted to a Disability Determination Board.

The Board reopens its examination of the file, following the same procedures as are used in arriving at an initial decision. It may require the beneficiary to submit to a medical examination, at the CPP's cost, to provide a medical report or a statement concerning his occupation or earnings, or to undergo rehabilitation measures.[251] Should the beneficiary fail to satisfy the Board's requirements, he may well forfeit his right to benefits; if he is asking for a review of his case, he will probably see the initial unfavourable decision confirmed. Indeed, the only legitimate ground for a beneficiary's or claimant's refusal to comply with the Board's requirements is that

the prescribed examination might pose a serious threat to the life or health of the person concerned.[252]

If the Board believes that a personal interview with the beneficiary might develop new and useful information, it requests that an agent from the district office hold such an interview and report back to the Board.

The reassessment of the file once completed, the Board (if the case so requires) submits a report to the Director General explaining the grounds for altering the initial decision.

e) Statistics on the determination of disability

Since the 1970-71 fiscal year, in the course of which the first disability benefit payments were made, the number of applications received at the district offices of the CPP has tripled.[253] The number of applications processed by the Disability Assessment Division has shown a proportionate increase, the volume of business currently handled being in the order of more than 25,000 applications each year. Approximately 3% of these applications are withdrawn before a decision is taken. The proportion of negative decisions fluctuates between 20% and 30%. To form an idea of the annual work-load of the Division, we must add to the 25,000 initial applications received each year, the management of several tens of thousands of beneficiary files (all of them subject to reassessment), the complete reassessment of more than 8,000 files and, as we shall have occasion to see later, the re-examination of over 2,000 cases brought before the various appeal authorities.

A statistical analysis of medical diagnoses given in favourably-determined cases reveals that approximately 40% of beneficiaries suffer from diseases of the circulatory system. Other outstanding causes of disability, in descending order of frequency, are: diseases of the bones or limbs (20%), mental illness (10%), diseases of the respiratory system (8%), affections of the nervous system and the sense organs (8%), accidents, intoxications and shock (5%), and tumours (5%).

2. Other applications

Among other types of benefits provided under the CPP, we may distinguish, on the one hand, retirement pensions[254] and. on the

other, survivors' benefits, which include the surviving spouse's pension,[255] orphan's benefits[256] and death benefits.[257]

Conditions of eligibility for the retirement pension are relatively simple. Every contributor that has attained the age of 65 years is entitled to it. The only points at all likely to present difficulty are the applicant's age (in the rare event that conclusive proof of age can not be furnished), the period for which he has been a contributor, the date on which payment of the pension should be begun and the amount of the pension. The amount of the pension payable to a beneficiary is calculated on the basis of the average monthly income that he derived from work during the time that he was a contributor to the CPP.[258] These earnings are enrolled in the Record of Earnings maintained, for purposes of the CPP, by the Department of National Health and Welfare on the basis of figures transmitted to it by the Department of National Revenue.[259] The accuracy of the amounts enrolled in the Record of Earnings can only be challenged by a contributor within four years following the period in question.[260] The operations involved in the decision concerning an application for the retirement pension are, thus, essentially mathematical; needless to say, once the amount of the pension has been established, no follow-up control of any sort is required.

Conditions of eligibility for the surviving spouse's pension are also reasonably straight-forward, except in cases where the surviving spouse does not meet the conditions relating to age or dependent children, basing the application on grounds of disability. In such cases, applications are treated in the same way as applications for disability pensions. The only truly thorny question likely to arise in connection with the surviving spouse's pension is the determination of the person to be so designated in accordance with section 63 of the CPP. We have already alluded in our discussion of the PAB's jurisdiction to the difficulties caused by the former version of this provision.[261] In its new and revised form, section 63 still maintains the Minister's discretionary power to substitute the common-law spouse for the legal spouse in awarding the surviving spouse's pension; but the conditions precedent to this substitution have been greatly simplified. For one thing, it is no longer necessary to make use of the presumption that the legal spouse predeceased the contributor in order to divest the former of the right to the pension;[262] for another, the common-law spouse need no longer prove that he had cohabited with the deceased contributor for not less than the 3 years prior to the contributor's death, in conditions suggesting that he had been publicly represented by the contributor as the spouse of

the contributor.[263] Except in cases where two persons lay claim to the pension or where the length of the contributing period or the amount of the pension is in dispute, the decision-making process is fairly simple. It must be pointed out, however, that some measure of continuing control of the initial decision is required since in the event of the beneficiary's remarriage the payment of the pension is interrupted.[264]

Conditions of eligibility for orphan's benefits are entirely objective. The only question likely to be problematical is the orphan's qualification as a dependent child — this requires continued checks on the orphan's attendance at school — apart from the questions of the length of the contributing period and the amount of the pension due.

Death benefits, as a rule, are paid in a lump sum into the estates of contributors. The only problems likely to arise in this area are, once again, the length of the contributing period and the amount of the death benefits payable.

a) Initiation of the process

The rules governing the submission of applications are no less demanding in the case of other types of benefits than in the case of disability pensions. The application for benefits must be made in accordance with the prescribed legal forms; a mere request for information, even if submitted on an official enquiry-form, is not sufficient.[265] Erroneous information provided by an official cannot create acquired rights in an applicant's favour.[266] The application must be in writing and must be accompanied by supporting documents (proof of age, statement of earnings and contributions for the last two years, proof of death, etc.);[267] it cannot be presented by telephone.[268] The role of the district offices is however less important in dealing with such applications than in dealing with those for disability benefits; it is limited, more or less, to ensuring that all necessary documents have been collected and to transmitting the application to the central units for processing.

There is no time limit, as such, for the submission of applications for the various categories of benefits. Nonetheless, applications for surviving spouses' or orphans' benefits cannot have retroactive effect beyond the twelve-month period preceding their submission. As for applications for retirement pensions, under the provisions in

force up until January 1, 1978, these could not have retroactive effect;[269] a change in the law as from that date has made retroactivity possible up to a maximum of eleven months prior to the submission date.

b) Examination of the application

The processing of all claims not involving disability is entrusted to the Claims and Benefits Division. Upon receipt of the application, a file is opened under the social insurance number of the claimant. In the vast majority of cases, a rapid examination of the file suffices to establish conclusively the applicant's right to benefits. In the event of any difficulty, the first examiner writes a report and transmits it, together with the file, to an audit and review section composed of higher-ranking officials. The thorniest problems, on which even this section is reluctant to rule — particularly, applications for pensions by surviving common-law spouses — are referred to a reconsideration committee composed of the head of the Claims and Benefits Division, the head of the Legal Services and a special advisor to the Director General. Both the section and the committee consign their observations in writing to the file. The committee is not empowered to rule on a case unless it is unanimous: in the event of disagreement among its members, the Director General personally takes the decision.

Proof of age, the essential condition that governs the award of the retirement pension and, to a lesser extent, of surviving spouses' and orphans' benefits, is the subject of precise rules in cases where the usual means for furnishing it are not available. The Director General may accept as sufficient proof of age previously made for purposes of the *Old Age Security Act* or of the *Family Allowances Act*; he may consult Statistics Canada or, as a final resort, constitute a tribunal *ad hoc*, analogous to a Review Committee, whose decision will be considered conclusive.[270]

c) The decision

The relative simplicity of the questions that are to be resolved and of the types of proof that the applicant is called upon to provide makes the time required to decide on these applications considerably shorter than that needed to rule on applications for disability pensions. According to Department statistics for the 1975-1976 fiscal

year, the average time lapse between the receipt of an application at the district office and the payment of the first benefits was 62 days in the case of retirement pensions and 67 days in the case of all survivors' benefits.

The notification of applicants of the decision reached in their case by the Director General is governed by the same rules as in the matter of disability pensions: the notice must be in writing, though the Act does not require that reasons be assigned for the decision. In practice, however, negative decisions are invariably accompanied by an indication of the reasons for the refusal and a reminder that claimants may appeal to the Minister under section 83. Notifications to successful applicants for surviving spouses' or orphans' pensions include a warning to beneficiaries to keep the district office informed of any changes likely to have an effect on their right to benefits: the remarriage of the spouse; the death, marriage, departure from home, entrance upon an employment or termination of studies of a dependent child; the end of the spouse's or child's disability.

As in the case of disability pensions, the Director General may be called upon to entrust the management of benefits paid out under the CPP to a person other than the beneficiary.[271]

The Director General's power of review over initial decisions upon the presentation of new facts applies also to surviving spouses' and orphans' benefits, especially when significant changes occur in the occupational, school or domestic status of beneficiaries or in their state of health.

C. Appeal to the Minister

Once the initial decision has been made, in conformity with section 59, there arises the question of recourse against the decision. The possibility of obtaining a review of the decision on the ground of new facts, by virtue of section 86(2), already opens up one avenue of recourse. A second is afforded by section 83, which creates the right of appeal to the Minister.

In some respects, the request for review of a case (section 86) and the appeal (section 83) are somewhat similar. In both the application is addressed to the Director General, the authority responsible for the initial decision.[272] In fact, the so-called "appeal" of section 83, notwithstanding its name, is not really a process of contentious

review, nor, for that matter, of hierarchical review. It is, properly speaking, an application for reconsideration of the case, no different in essence from, though broader in scope than, that provided under section 86. Indeed, if the supervention of new facts is the only ground for a review of the case by virtue of section 86, the same ground is also often invoked in lodging the appeal. The Director General's powers with regard to the challenged decision are identical in both cases.

By contrast, the two processes are distinct in the sense that a decision made by virtue of section 86(2) is itself subject to appeal whenever it modifies the initial decision.[273] The processes are likewise distinct at the procedural level. Whereas the possibility of requesting reconsideration of a case is always available, the appeal to the Minister must be lodged within the year following the decision. The treatment accorded to appeals is more highly formalized and more elaborate than that given to requests for reconsideration. The Act requires that reasons be given for decisions rendered on appeals; no such prescription applies to determinations following reconsideration of a case.

1. Filing of the appeal

The appeal to the Minister is initiated by means of a written request, usually in the form of a letter, for reconsideration of a decision. It is frequently in these terms that a claimant will couch his wish to contest a decision rendered in his case; depending upon circumstances, his letter may be interpreted either as a notice of appeal or as a request for internal review. If the intention to lodge an appeal is obvious and the communication arrived within the statutory time limit of one year, the Department will treat it as an appeal. Conversely, if the one-year limit has expired and the claimant, above all, appears to invoke new facts, his letter will be regarded as a request for review. The interpretation itself calls for a judgment on the part of the Appeals Section: if in the opinion of the Section review is requested, it will transmit the claimant's letter to the appropriate Division for action. If, on the contrary, it chooses to interpret the letter as a notice of appeal, it will retain responsibility for the further conduct of the procedure.

In contrast to an initial application for benefits, the appeal must be addressed to the central administration of the CPP, to the attention of the Deputy Minister of Social Welfare; the district office is

simply apprized of the fact that an appeal process has been initiated, by the Appeals Section.

The Minister, it should be noted, can authorize a person other than the applicant to file an appeal on the latter's behalf, if the applicant is incapable of managing his own affairs.[274]

2. Examination of the appeal

As a preliminary step, the Appeals Section undertakes to verify all the fundamental factual elements in the file. If, for example, no adequate proof of age has been provided, it will ask the appellant to do so. If the contributions paid are insufficient to justify a claim for benefits, the appeal may be summarily rejected without the necessity of studying the substantive arguments bearing upon the question of eligibility.

If the appeal involves a question of disability, the Appeals Section calls upon DA for an opinion. DA, in turn, places the file in the hands of a Disability Determination Board, none of whose physician-members participated in evaluating the initial application. The Board gives due consideration to the new circumstances adduced by the appellant and, if necessary, arranges for a new medical examination so as to update the information in the file concerning the claimant's state of health. Alternatively, the Board may ask an agent of the district office to meet the claimant, or it may proceed to a consultation of specialists. Finally, the committee sends a report to the Appeals Section, with the recommendation that the original decision be confirmed, vacated or modified. The recommendation most frequently made is that a change be made in the date of onset of the disability. On the basis of the Board's report, the Appeals Section prepares a draft decision.

Virtually all appeals lodged under section 83 involve questions of disability. Of the slight number of appeals in other areas, the majority so far have dealt with the award of the surviving spouse's pension: the most usual situation here is that of two individuals, the legal spouse and the common-law spouse, laying claim to it. Appeals of this type are handled by the Appeals Section itself: it examines the file, including the observations placed on record by the various decision-making authorities of the Claims and Benefits Division, and drafts a report recommending a particular decision.

3. The decision

The draft decisions prepared by the Appeals Section conform, as a rule, to specific form-letters intended for the appellant and setting out (whenever the decision is negative) the reasons for the rejection of his appeal. Thus, the form-letter informing the appellant of the rejection of his appeal for disability benefits mentions the re-examination of all the documents in his file by officials responsible for determining questions of disability. It provides some explanation of the meaning of the words "severe and prolonged disability"; analyzes briefly the facts submitted in support of the appeal in the light of this criterion, and concludes that, in view of the present content of the file, it is impossible to recognize the appellant's disability. It invites the appellant to submit a new application in the event of a change in his situation and explains that such an application will be reconsidered on the basis of the new facts that accompany it. It informs the claimant of his right to challenge the decision rendered on his appeal within 90 days before a Review Committee. Finally, it outlines the procedure to be followed in such appeals: it mentions where notice of appeal must be sent and what information it ought to contain.[275] In summary, the notification sent to the appellant on this occasion, as prescribed by section 83(2), is much more complete than in the initial decision, since it makes an attempt to demonstrate how the criteria laid down by the Act apply to the applicant's personal situation.

The notification is sent to the appellant under the signature of the Director General. A copy of it is also transmitted to the district office, to enable it to play the role of the claimant's permanent interlocutor more effectively and, should the case so require, to organize the appeal to the Review Committee.

The process of handling appeals to the Minister ought, in principle at least, to be quick. Section 83(2) requires the Minister to reconsider the initial decision "forthwith". In practice, however, the frequent introduction of new facts and the control measures that their introduction necessitates tend to slow down procedure considerably. Conversely, it must be recalled that the time limit permitted for lodging the appeal is twelve months following notification of the initial decision. According to our sampling of cases heard before the PAB between July 1, 1975 and December 31, 1976, on the average a period of five months had elapsed between the initial decision and the appeal decision.

4. Statistics on appeals to the Minister

Statistics in our possession concerning appeals brought under section 83 cover the period from April 1, 1970 to December 31, 1976. They are presented in Table XVI. It will be noted that the number of appeals lodged each year tends to remain in the range of 1,500 to 2,000 appeals. Of these, disability claims represent between 94% and 98% of the total number of cases appealed. It would appear that the number of dissatisfied claimants appealing against negative decisions of DA is actually on the increase; in the last two years covered by our statistics, the appeal rate had reached 37%.

Little over one-half of the appeals to the Minister are upheld, that is, lead to at least some change in the initial decision. This proportion would be even slightly higher if only disability claims were taken into consideration: the success rate of appellants is substantially lower in matters of retirement and survivors' pensions. In many cases, in the area of disability pensions, the success of an appeal does not mean the reversal of the initial decision; more often than not, the successful outcome of the appeal is due to the supervention of new facts since the initial decision. It is consequently clear that the appeal to the Minister is regarded, as indeed the appeal to the PAB,[276] as affording the opportunity for a trial *de novo* susceptible of producing the same practical results as a request for reconsideration.

D. Appeal to the Review Committee

The appeal process provided under section 84 of the CPP, unlike the first recourse available to claimants dissatisfied by the initial decision of their case, is one of real contentious review. By means of this process, the litigation is brought before an authority outside the Department and largely independent of it. Still, in the strict sense of the word, the appeal to the Review Committee is not any more a real appeal than is the appeal to the Minister provided under section 83 of the CPP. For in addition to the power to affirm or to vacate the challenged decision, which is characteristic of appeals,[277] the Review Committee may also take into account new facts, an attribute of reconsideration.[278]

Unlike the appeal to the Minister, the appeal to the Review Committee is subject to fairly elaborate procedural provisions in regulations made under section 91(1)*c*). These regulations are com-

TABLE XVI

CPP: APPEALS TO THE MINISTER OF NATIONAL HEALTH AND WELFARE – SECTION 83

Period	Appeals lodged	Appeal rate (disability)	Decisions rendered	Appeals upheld		Appeals dismissed	
				Number	%	Number	%
1970-1971	232	19%	166	81	49%	85	51%
1971-1972	[700]	[23%]	562	297	53%	261	47%
1972-1973	[1750]	[31%]	1716	735	43%	981	57%
1973-1974	2025	31%	1985	846	43%	1139	57%
1974-1975	1805	37%	1976	1208	61%	768	39%
1975-1976	1457	37%	1432	738	51%	694	49%
1976 (9 months)	1629	not available	1464	760	52%	704	48%

Notes: The appeal rate (disability) is the ratio between the number of appeals dealing with disability and the number of initial decisions rejecting applications for disability pensions. Bracketed figures are estimates.

Sources: CPP Annual Reports;
Appeals Section statistics;
Disability Assessment Division statistics.

pleted by ample internal rules concerning the Appeals Section, the Disability Assessment Division and the district offices. Taken all in all, the rules and regulations invest the process of appeal to the Review Committee with a far more formal character than in the case of previous phases of the decision-making process.

1. Initiation of the appeal

The appeal to the Review Committee must be initiated by a notice of appeal in writing addressed to the Director General.[279] Thus, once again at this stage of the proceedings, the district office is not implicated in the procedure at first, no doubt to speed matters up. Nevertheless, as we shall see, it does take an active part in it later. Obviously, the appeal cannot be addressed to the committee that will eventually hear it for it is not yet in existence. Yet there is reason to fear that this manner of proceeding can only undermine the committee's credibility in the appellant's eyes: he could be led to believe that since it is up to the Director General to take charge of forming the committee, the latter is a creature of the Department. This impression should, however, be dispelled once the appellant realizes the importance of the influence he exerts on the composition of the committee.

The time limit for appeals at this level is considerably shorter than before: 90 days from the date on which the Minister's decision was transmitted to the appellant. The deadline may, however, be extended by the Director General.[280] The Director General's refusal to do so cannot, because of its discretionary nature, be challenged before a Review Committee unless an abuse of discretionary power is alleged. Such is the essence of the PAB's decision in the *Herschel* case.[281] Herschel, the claimant in the case, had presented in April 1972 an application for a disability pension, which was disallowed. He did not appeal the decision until May 1974, long after the time limit had expired. The Director General held that no extension of the time limit was in order. In the meantime, in March 1974, the claimant had presented a second application, which was accepted, the date of commencement of the disability having been fixed in March 1973. The applicant then proceeded to lodge an appeal against this second decision, alleging that the commencement of his disability should have been fixed at a considerably earlier date, prior even to that of his first application. The second case went before the Review Committee which chose to interpret the appeal as one concerning the first application. In so doing, the Committee evidently quashed

the decision, regularly taken by the Director General, not to accept the first appeal because of its belated presentation. The Committee clearly proposed by this means to circumvent the obstacle placed in the appellant's path by section 43(2), which prohibits the backdating of a disability to more than one year prior to the submission of the application. Upon the Minister's appeal against the Committee's decision, the PAB held that since the Minister had not exercised his discretionary power in an irregular manner, the Committee had no authority to reverse the Minister's decision to refuse to extend the time for lodging an appeal.

The appeal may be initiated either by the appellant himself or by the person authorized by the Minister to manage his affairs.[282] Where two parties claim benefits by virtue of contributions paid by the same contributor, and where the reasons for their appeals are similar (as in the case of a disabled person and his dependent children), they may proceed by giving joint notice of appeal.[283]

Apart from containing a clear identification of the appellant or, if the case so requires, of the contributor by virtue of whose contributions benefits are sought, the notice of appeal must mention the date on which the appellant was notified of the decision on the first appeal.[284] It is from this date that the time limit for appealing to the Review Committee begins to run. The Director General is thus enabled to determine whether the time limit has in fact been respected and, if necessary, decide upon the advisability of granting an extension.

The notice of appeal must present the reasons for the appeal and the facts pertinent to it. This requirement is an indication of the greater formality that surrounds this phase of procedure. It allows the appellant to avail himself of facts that may bring about a review of the decision handed down on his first appeal. Above all, it is needed so as to acquaint the Review Committee which will have to deal with the case, with the appellant's point of view. Generally speaking, the presentation of facts is more complete and methodical when it is prepared by a lawyer, but in the majority of the cases the appellant does not retain the services of counsel.

Finally, the notice of appeal must identify the person that has accepted the appellant's appointment to act on the Review Committee.[285] In practice, however, as we have already remarked, it frequently happens that the appellant neglects to include this information in his notice of appeal.

2. Preparations for the hearing

The task of directing the operations of this procedural phase falls to the Appeals Section. The object of the activities that it coordinates or executes in this case is the compilation of the file on which the Review Committee will be called upon to rule. The course and sequence of the operations will somewhat differ, however, depending upon whether the process involves a disability pension or a surviving spouse's pension claimed by both the legal spouse and the common-law spouse (these two categories of cases in fact represent virtually the only ones to be appealed to Review Committees).

On receiving the appellant's letter, the Appeals Section first ascertains that it can be considered as amounting to a notice of appeal. For this to be the case, the author of the letter must have explicitly indicated his intention to lodge an appeal and not simply expressed his dissatisfaction with the decision at issue. An official of the Appeals Section then acknowledges receipt of the notice of appeal by means of a fairly lengthy letter, in which the appellant is advised of the salient points of procedure governing the functioning of the Committee. The following is an excerpt from this letter:

1. A Review Committee might best be described as an impartial three-man citizen's Committee. One member is appointed by the applicant. A second member of the Committee is appointed on behalf of the Minister of National Health and Welfare and the third member, who is to be the Chairman of the Committee, is appointed on the agreement of the other two members.

2. Once established, the Committee meets to hear the appeal in the general area in which the applicant lives. In this regard, you will be hearing from the ..... District Office of the Canada Pension Plan in the near future. At this time, suitable arrangements as to the location for the hearing can be made.

3. At the hearing, the applicant or representative is given a full opportunity to present the appeal verbally. Evidence may be submitted by way of letters, affidavits and written representations to support the appeal. In addition, the applicant may bring witnesses to testify on his/her behalf. He/she may also have a representative assist him/her or present the case for him/her. This person would be in addition to the person appointed to be a member on the Review Committee.

4. A representative for the Minister of National Health and Welfare is also present at Review Committee hearings and submits verbal and written evidence to support the position of the Minister.

5. The Review Committee, after hearing the appeal and the response from the Minister's representative, reviews all of the evidence pre-

sented and arrives at a decision. That decision may either uphold or dismiss the appeal.

Because of the information that it contains, this letter is certainly of considerable importance to the appellant. The latter may well have lodged his appeal in a moment of indignation at the refusal of his appeal to the Minister, without having much of an idea of what was involved in submitting his case to a Review Committee.

The Appeals Section must then determine the Department's own position with regard to the appeal. A distinction must be made here between appeals concerning disability pensions and those touching surviving spouses' pensions.

a) Disability pensions

If the case involves a question of disability, the Appeals Section transmits the appellant's file to the Disability Assessment Division. DA re-examines the medical file, possibly in the light of any additional information provided in the notice of appeal. If the obsolescence of the data on file seems to warrant it, DA may require the appellant to submit to a new medical examination in accordance with section 531(2) of the *Canada Pension Plan Regulations*. Following this re-examination the Division determines the Department's stand on the appeal. If in its opinion the appeal is justified, it informs the Appeals Section accordingly, which in turn notifies the appellant and thereby puts an end to the proceedings. If, however, DA persists in the belief that there is no ground for changing the challenged decision, it drafts a memorandum over the signature of the director of the Division, summarizing the medical findings.

The memorandum has annexed to it copies of all medical reports either submitted by the applicant or drawn up as a result of special examinations required by the Director General. At this stage, the Division must also decide, in the light of the problems raised by the case, on the choice of a person to defend the Minister's position before the Review Committee. It may entrust the task to the director of the district office involved. Most often, however, the Division considers it necessary for a physician of the Division, either acting alone or jointly with the director of the district office, to represent the Minister before the Committee.

The memorandum from DA is then forwarded to the Appeals Section, which takes the necessary steps to set up the Committee and to contest the appeal on the Department's behalf.

On the one hand, the Section asks the director of the district office, on the occasion of forwarding to him a copy of the letter acknowledging receipt of the notice of appeal, to appoint a Committee secretary from among the members of his staff as well as a Committee member from the list of citizen volunteers.[286]

On the other hand, the Appeals Section transmits the file, together with the DA memorandum, to the Legal Services of the Department, which in turn prepares a reply to the notice of appeal. This document, prepared according to the rules of the art, is quite vague in content, in the sense that it does not set out to justify in precise terms the Minister's contestation of the appeal. The Appeals Section subsequently assumes responsibility for transmitting the reply to the appellant, over the Director General's signature.[287]

The last contribution of the Appeals Section to preparing the hearing is making up the file that is to be submitted to the Review Committee. The file is produced in five copies, one for the secretary and for each of the members of the Committee as well as for the Minister's representative. It contains, first, the documents enumerated in section 4(2) of the *Rules of procedure of the Review Committee*, that is: the application for benefits, the initial decision (accompanied by the statement of disability assessment), the appeal to the Minister under section 83, the Minister's decision on the appeal, the notice of appeal to the Review Committee and the reply to this notice of appeal. All participants in the proceedings, except the secretary, receive, furthermore, copies of the text of the CPP (with an underlining of sections 83 to 88 and of those cited in the reply to the notice of appeal) and of the *Rules of procedure of the Review Committee* (with an underlining of section 8, concerning hearing procedures). The secretary is provided with a form for recording the Committee's decision, a model agenda for the hearing, and three copies of an undertaking to keep the matter of the hearing secret, of which more will be said later. The Minister's representative receives, for his part, six copies of DA's memorandum, no copies of it being passed out at this stage either to members of the Committee or to the appellant. The medical documentation on which this memorandum is based does not appear in the case file prepared for the Committee, either. Certain other papers likely to be found in the CPP file are likewise excluded from the Committee's case file, such

as internal memoranda, observations by members of the Disability Determination Boards involved in the case at various points, correspondence concerning the application, etc.

According to section 4 of the *Rules of procedure of the Review Committee*, all these operations must be effected within fifteen days. So short a preparation time would be difficult to adhere to even if DA, having in its hands a recent and complete medical file, considered itself capable of determining its stand on the appeal after a rapid examination of the file. As it is, however, this process of preparing the file almost inevitably takes several weeks to accomplish.

In the interim, the director of the district office will very likely have proceeded to nominate the Committee member appointed by the Department. The appellant will have been invited to do likewise, for his part, by the Appeals Section, unless he has already indicated his choice of a Committee member at the time of serving notice of appeal. Throughout these proceedings there are numerous indeterminate elements likely to make for further delays in preparing for the hearing.

Once in possession of the names of both Committee members designated by the two parties, the secretary calls on the former to appoint a chairman within thirty days.[288]

The Committee having been finally formed, the secretary can now transmit to each member a copy of the file drawn up by the Appeals Section.[289] The appellant himself is entitled officially only to receive the reply to his notice of appeal. He is assumed to have in his possession already all the documents relating to his case or at least to have knowledge of their contents. It appears that in practice, however, the secretary usually transmits to the appellant, some time before the date of the hearing, a copy of the file that has been distributed among the members of the Committee. The appellant thus receives a copy of the text of the CPP as well as of the *Rules of procedure of the Review Committee* for his own use.

According to service instructions, the secretary of the Committee, if he considers it useful, may meet the appellant some time before the hearing in order to draw certain aspects of procedure to his attention. The secretary may take this occasion to elaborate on the information contained in the letter written by the Appeals Section to him, acknowledging receipt of the notice of appeal. The

appellant may thus be reminded of the fact that the burden of proof at the hearing lies on him as well as of his right to legal counsel or other assistance, at his own cost. The secretary may wish to reassure the appellant with regard to the atmosphere prevailing at Review Committee hearings, far less formal than that of regular court proceedings. Lastly, the secretary may choose to warn the appellant that since Committee members are bound to impartiality they would not be permitted to testify or to plead on his behalf at the hearing. If the appellant designated his physician, lawyer or a member of his family for membership on the Committee, this information may persuade him to revoke the appointment and to make another so as not to deprive himself of the services of a valuable witness or advisor.

b) Surviving spouses' pensions

The Minister's legal stand on the appeal is determined by the Legal Services of the Department, following a study of the file forwarded to it by the Appeals Section. Once the answer to the notice of appeal has been prepared and dispatched over the Director General's signature, the Appeals Section proceeds to produce five copies of the case file for the use of the secretary and members of the Committee. The case file contains essentially the same documents as that prepared for a disability pension appeal; it excludes observations made on the merits of either application for benefits by the various examining bodies of the Department such as the audit and review section and the reconsideration committee.

In cases of this type, the Minister's representative before the Review Committee is a lawyer on the staff of the Department of Justice. This lawyer receives a far more detailed file on the case than do members of the Committee, including the applications presented by the two claimants, the documents and sworn statements taken in support of these applications, the decision handed down in each case, all the correspondence between the Department and the parties, and finally internal notes, memoranda and observations placed on file at various times during the proceedings. No copies of these documents are made available either to members of the Committee or to the appellant.

In other respects, the procedure preparatory to the hearing agrees by and large with that used in the case of appeals for disability benefits.

3. The hearing

According to the Act, the time and place of the hearings are determined by the Chairman, after taking into account the convenience of the parties.[290] In actual practice, however, this power is exercised by the director of the district office. Hearings are generally held on CPP premises, unless one of the Committee members proposes an alternative site whose size and location appear suitable to the purpose.

On the day of the hearing, but some time before it opens, the secretary meets the members of the Committee to brief them on the nature of their duties. It must be remembered that in the majority of cases the three individuals have had no prior experience in proceedings of this kind. Their knowledge of the CPP and of the case that they are called upon to adjudicate in the light of the Act is often quite rudimentary or at any rate recently acquired. The secretary, accordingly, outlines for their benefit the sequence of steps involved in the decision-making process for the allocation of CPP pensions and places in this context the various phases to which the various elements in the case file correspond. If necessary, he draws the Committee members' attention to sections 44(1)*b*) and 43(2) of the Act, which define the conditions of entitlement to disability pensions. He reminds them of the nature of the Review Committee as a citizens' tribunal charged with making an impartial decision on the basis of the facts submitted to it in evidence. He impresses upon the members designated by the appellant and the Minister that they must maintain impartiality and objectivity, and that their presence on the Committee is not in the role of spokesmen for the parties by whom they were appointed. The secretary himself pledges to act in a similarly impartial and objective manner, and offers his services to the Committee to take notes and to resolve any procedural problems that may arise in the course of the hearing. Finally, he reminds the Chairman of his duty to direct and moderate the discussion, and presents him with the model agenda drawn up by the Appeals Section.

The secretary then takes a few minutes to speak to the appellant in order to put him at ease and to inform him of the manner in which the hearing will be conducted.

The conduct of the hearing itself conforms more or less to the model agenda. Proceedings open with an introductory statement of the elements of the case by the secretary; this is followed by the

presentation of arguments by the appellant who is then questioned by the Committee and by the representative of the Minister; the latter then makes his presentation to the Committee, after which a last question period follows. The Committee, despite the model agenda, remains entirely free to determine its own procedure, however; it is at liberty to modify or to depart from it as it sees fit, provided that in so doing it does not interfere with the right of the parties to be heard, either in their own persons or through their representatives.[291] This freedom of procedure must not compromise, however, the orderly conduct of the hearing. It is the responsibility of the Chairman to ensure, with the secretary's help, the maintenance of due decorum during the proceedings, without destroying the essentially informal character of the hearing.[292]

The hearing opens with a statement by the secretary, who takes the opportunity to sketch briefly the provisions of the CPP, especially with regard to appeals against decisions by the Minister in the matter of the allocation of benefits. The secretary describes the place occupied by the Review Committee within the context of the appeal process, emphasizing that the Committee is to hold, not a trial, but an informal hearing called at the claimant's request to gather the pertinent facts so as to enable the Committee to rule on the merits of the appellant's application. The secretary incidentally points out the existence of an appeal authority of last resort, the PAB, to which either party to the present proceedings may apply.

The hearing is normally held *in camera*, although observers may be admitted with the authorization of the Committee and the appellant. The members of the Committee are, moreover, obliged to preserve the confidential character of all documents and information submitted to them in the course of the process.[293] The purpose of this provision is manifestly to protect the appellant's privacy against the unjustified use of information touching his mental health or private life, which must be divulged to the Minister and to the Committee to enable it to rule on the application for benefits. In this regard, the secretary makes the three Committee members sign an undertaking at the end of the hearing not to disclose the deliberations of the Committee, any papers or documents produced in evidence, any statements made in the course of the hearing or the decision reached at its outcome, except to the extent provided by the CPP and the regulations governing its implementation.

Almost invariably, the appellant appears before the Review Committee. Generally, he pleads his own case. However, when the

appellant applies for a disability pension as a result of a work accident, his union will often take an active part in defending his interests.[294] The parties are seldom represented by counsel, except in cases where the surviving spouse's pension is claimed by two adversary appellants.

Depending on the nature of the question at issue, the Minister may be represented either by a DA physician or by a lawyer from the Department of Justice; the director of the district office lends his assistance to either.

Types of evidence admissible in hearings of the Review Committee are oral testimony and written evidence in the form of letters, statements under oath or representations.[295] Albeit the list is quite inclusive, it is undoubtedly not without significance that the Committee has not been authorized to take evidence in any form that it deems suitable, as is the case with other administrative tribunals. The habitual inexperience of most Committee members may have induced the legislator to be somewhat cautious so as not to give the impression of too great a latitude.

The most valuable witness that a disability claimant can produce is his attending physician. It would seem that small-town and rural practitioners, whose work schedule is somewhat flexible, are usually quite willing to be of service to their patients in coming to defend their medical findings before the Committee. Physicians practicing in large urban centres are generally less amenable. As for the Minister's representative, he tables the summary of the medical documentation prepared for him by DA with the Committee and offers his remarks on it. No copy of this document, however, is given to the appellant.

In disputes concerning the surviving spouse's pension, the legal and the common-law spouses of the deceased contributor ordinarily make use of the testimony of their children, their parents, friends or neighbours to establish the nature of their relationship with the deceased prior to his demise. The Minister's lawyer, for his part, tries usually to demonstrate that the conditions precedent to the exercise of the discretionary power conferred by section 63 were present, and to disprove, if the need arises, allegations of the irregular use of this power.

The appellant is always free to avail himself of any new facts in his favour. If such facts are presented in evidence, the Minister's

representative will usually content himself with declaring that they were not known to the Minister at the time that the decision was rendered; he will avoid speculating as to what the effect of the new evidence may be on the determination of the case.

In order to safeguard their confidential character, documents contained in the case file or tabled before the Committee during the hearing are placed under the secretary's custody "at all times", that is up to the end of the proceedings.[296]

As far as we could ascertain, hardly any mention is made in the course of Review Committee hearings of PAB caselaw, even when it is obviously applicable to the case in hand. In part, this is undoubtedly due to the slight publicity given to PAB jurisprudence,[297] which places it virtually beyond the reach of Committee members and appellants, unless assisted by a determined and particularly conscientious lawyer. For the rest, it may be ascribed to the Minister's reluctance to present to the Committees texts which they are ill-equipped to interpret and to apply. In certain cases where Committees had been informed of the tenor of PAB caselaw on questions at issue, they deliberately disregarded it. The PAB, being subsequently appealed to in these matters, repeatedly reminded the Review Committees of their obligation to abide by its decisions.[298]

4. The decision

Once the Review Committee has gathered sufficient information and is satisfied that the parties have been heard on all pertinent matters, it closes the hearing. The appellant and the Minister's representative are asked to withdraw, with the Committee's assurance that its decision will be transmitted to them in due course by the secretary. The latter remains at the Committee's disposal, even though in principle he, too, might be excluded from the deliberations of the Committee.

The Review Committee has full authority to review the decision of the Minister: it can vary it or vacate it, it may take any action (particularly as regards the payment of benefits) that might have been taken by the Minister under section 83,[299] it can determine any question of law or fact raised by the litigation, and it may take into account new facts.[300] In cases concerning the application of section 63, if the Committee vacates the Minister's decision as to the existence of conditions precedent to the exercise of his discretionary

power, it must send the case back to the Minister so that he may exercise his discretionary power anew in the light of the Committee's conclusions.[301]

The Committee generally formulates its decision on a special form provided for that purpose by the secretary. The form itself gives no indication as to how it is to be filled out, and the Committee enjoys a great deal of latitude in this respect. Judging from specimens we have inspected, Committees usually give their decisions in a few lines. One seldom finds a coherent and balanced analysis of the elements at issue as they were developed in the course of the hearing. At best, a casual mention is made of the sections of the CPP on which the Committee has presumably based its decision. In a word, although the import of the decision is usually quite clear, the reasons for it are not, even though the Committee is obliged to provide justification for its decision.[302] Nonetheless, the PAB has held that the Review Committee's failure to give reasons for its decision does not make the decision invalid. If such a case is brought in appeal before the PAB, the Board considers itself authorized to substitute its own decision for that of the Committee or to affirm the latter, assigning to it whatever reasons it deems to be justified in the circumstances.[303] In appeals concerning disability benefits, the Committee will fairly often leave unresolved the important question of when the appellant's disability began. In such cases, once again, the only means of making the decision specific is to carry the matter before the PAB in appeal.

Given the rarity of any allusion to PAB caselaw in the course of Committee hearings, it is hardly surprising to find Committee decisions very seldom making any reference to it.

The Act implicitly recognizes the right of any one of the three Committee members to withhold his assent from the decision of his two colleagues; nevertheless, the decision of the majority is considered to be the decision of the Committee.[304] Since the decision report form must be signed by all members, the dissenting judgment of any one must be recorded in the context of the majority decision, if it is to be recorded at all. The absence of unanimity in Review Committee decisions is by no means infrequent: out of 38 cases (our sampling of PAB files dealing with CPP benefit claims), 6 had been resolved by majority decision.[305] There is reason to believe that the dissent of the Committee member designated by the appellant is often the factor that induces appellants to carry their case to the PAB, either because the dissenting judgment reinforces the appel-

lants' conviction that they are in the right or because it convinces them that they have not received equitable treatment at the hands of the Committee.

The deliberations of the Committee once at an end, the secretary must collect from the members all the documents in their possession concerning the appeal: namely, the appeal file handed out in advance and the documents produced in the course of the hearing by either of the parties (chiefly, the summary of the medical file). The secretary adds to this documentary material the form recording the Committee's decision as well as the pledge signed by all members to keep the subject matter of the hearing secret.

The Committee's decision is transmitted in writing to the appellant, the Director General,[306] and the Registrar of the PAB.[307]

The appellant is notified of the outcome of the hearing within 48 hours of the decision. Needless to say, where the member designated by the appellant was his spouse or close friend, one can assume that the latter will have informally notified him of the decision much sooner — notwithstanding the undertaking signed by the member not to divulge information relative to the hearing. A form letter accompanies the notification of decision. If the decision was unfavourable to the appellant, he is advised of his right to appeal to the PAB, provided that he has been authorized to do so by the Chairman of the PAB. The letter informs the claimant that he must lodge his appeal within 90 days, a period that may be extended on request by the PAB, and indicates the address of the Registrar to whom all communications are to be directed. Finally, a copy of *Rules of procedure of the PAB (CPP Benefits)* is enclosed with the secretary's letter. If the decision is in the appellant's favour, the form letter notifies him that the Minister has the right to appeal to the PAB on the same conditions, and that the Registrar of the PAB will inform him in the event of the Minister's decision to avail himself of this right.

In practice, the Director General is informed of the Review Committee's decision immediately, since the director of the district bureau learns of it from the secretary and can transmit it by word of mouth to the Appeals Section. The physician or lawyer who acted as the Minister's representative also receives a copy of the decision from the secretary, as well as all the documents that were introduced in evidence before the Committee by the appellant. Finally, the secretary forwards to the Appeals Section a complete file, to-

gether with a report in which he summarizes the appellant's allegations and arguments at the hearing and provides, if applicable, the names of his representative and his witnesses. It is on the basis of this file and report, as well as of the recommendation made by the Minister's representative before the Committee, that the Director General may have to decide whether to lodge an appeal to the PAB or not.[308]

The purpose of notifying the Registrar of the PAB of the outcome of the Review Committee hearing is to afford the Chairman an opportunity to peruse the file before having to decide whether to grant or to refuse leave to appeal, should the losing party request it. Accordingly, the secretary transmits to the Registrar, by registered mail and within 48 hours of the decision, a complete file made up of the appeal files provided to members of the Review Committee prior to the hearing, the originals of all documents tabled before the Committee by both litigants, the original of the decision, and the signed undertaking of the Committee members to keep the matter of the hearing secret.

It will be remarked that despite this distribution of records relating to the Review Committee hearing none of the recipients is given a transcript or minutes of the proceedings. Indeed, neither the regulations nor custom oblige the secretary to prepare any. The notes that he takes in the course of the hearing serve only to assist the Committee in its deliberations on the case.

5. Statistics on appeals to the Review Committee

The fiscal year 1969-1970 saw the first appeals to the Review Committee. Despite the rather sporadic use made of the recourse at first (only six cases were heard in 1969-1970), the number of appeals was to grow rapidly, to 20 in 1970-1971, 45 in 1971-1972, 250 in 1972-1973 (following the appearance of the first disability benefits), and 369 in 1973-1974. Since then, as column A of Table XVII indicates, the number of appeals has tended to flag somewhat. The year-to-year variation has been sufficiently large to make predictions as to the future rather uncertain; unless significant changes are made in the CPP, nevertheless we might expect that the number of appeals may become stabilized around 200 *per annum.*

The proportion of appeals concerning disability pensions is slightly lower at this level than at the inferior level of recourse, and

tending to diminish over the years: from representing 96% of the cases in 1973-1974, the rate has fallen to 86% for the last nine months of 1976. The remainder is more or less equally divided between retirement pension and survivors' benefits cases.

The Appeals Section has been keeping detailed statistics on appeals to the Review Committee only since 1973. Tables XVII and XVIII present a synopsis of the data for the period running from April 1, 1973 to December 31, 1976; the former summarizes the experience of the Review Committees in terms of the total number of appeals, whereas the latter deals exclusively with appeals in the area of disability pensions.

A conspicuous feature of the statistics is that, generally speaking, more than 60% of cases appealed never in fact come before a Review Committee. In more than half the cases (more than 60% for disability benefit claims), the decision of the Director General is changed in a way satisfactory to the appellant. The appeal, in other words, serves merely to activate the review mechanism provided for under section 86(2). Moreover, between 5% and 10% of the appeals lodged are withdrawn, either because the appellant decides to waive his right to contest the decision or because, for one reason or another, the prosecution of the appeal would be to no purpose. These proportions have remained by and large unchanged since 1974-1975.

Only approximately 35% to 45% of appeals are in fact heard by Review Committees (the proportion in disability claims ranges between 30% and 40%).

During the period covered by our statistics, a progressive reversal in the dominant tendency of the Review Committees' decisions may be observed. Whereas in 1973-1974, two-thirds of the appellants that brought their cases before the Review Committee obtained a favourable decision, by the last nine months of 1976 this proportion had fallen to a mere one-third. This change in the attitude of Review Committees may be attributed to greater public familiarity with the CPP, the possibility of appointing to the Review Committees individuals having prior experience of service on a Committee, and the more effective representation of the Minister before the Committee.

We have no data regarding the geographical distribution of appeals to the Review Committee. There is reason to believe that it does not differ substantially from that of appeals to the PAB.[309]

TABLE XVII

CPP: APPEALS TO THE REVIEW COMMITTEE – SECTION 84

Period	A Appeals lodged	B Appeals liquidated	C Decisions changed before hearing (% of B)	D Appeals withdrawn (% of B)	E Rev. Com. decisions (% of B)	F Appeals upheld (% of E)	G Referred to Minister (% of E)	H Appeals dismissed (% of E)
1973-1974	369	348	113 (32%)	51 (15%)	184 (53%)	118 (64%)	3 (2%)	63 (34%)
1974-1975	274	351	198 (56%)	28 (9%)	125 (35%)	65 (52%)		60 (48%)
1975-1976	195	192	107 (56%)	19 (10%)	66 (34%)	28 (43%)	1 (1%)	37 (56%)
1976 (9 months)	217	189	97 (51%)	7 (4%)	85 (45%)	28 (34%)	1 (1%)	55 (65%)

Notes: 1. All cases of decisions changed before Rev. Com. hearing concern disability pensions.
2. All cases of referral to the Minister by the Rev. Com. concern surviving spouses' pensions.

Source: Appeals Section statistics

TABLE XVIII

CPP: APPEALS TO THE REVIEW COMMITTEE – SECTION 84 (DISABILITY)

Period	A Appeals lodged	B Appeals liquidated	C Decisions changed before hearing (% of B)	D Appeals withdrawn (% of B)	E Rev. Com. decisions (% of B)	F Appeals upheld (% of E)	G Appeals dismissed (% of E)
1973-1974	355	332	113 (34%)	50 (15%)	169 (51%)	112 (66%)	57 (34%)
1974-1975	254	339	198 (58%)	27 (8%)	114 (34%)	59 (52%)	55 (48%)
1975-1976	176	171	107 (62%)	15 (9%)	49 (29%)	20 (45%)	27 (55%)
1976 (9 months)	187	165	97 (59%)	6 (4%)	62 (37%)	21 (34%)	41 (66%)

Source: Appeals Section statistics

It is hardly surprising that the handling of cases appealed to the Review Committee should take several months. The appellant, first of all, has an initial period of 90 days in which to lodge his appeal. The subsequent phases of the process, including the re-examination of the decision, the constitution of an appeal file, the formation of the Committee and the convocation of the hearing, inevitably take some time. In the 38 cases constituting our sample of appeals brought before the PAB, the average time that elapsed between the rendering of a decision on the appeal to the Minister and the decision of the Review Committee amounted to 276 days; for the 28 disability-related claims of our sample, it was 296 days. Supposing that the appellant lodges his appeal at the end of the 90-day period allowed him — admittedly, not the usual case — it may take an additional 6 or 7 months before the Review Committee convenes for its hearing.

E. Recovery of overpayments

Beneficiaries of certain types of pensions paid under the CPP may, in certain circumstances, receive benefits to which they are not entitled, or benefits in excess of what they ought to receive. This situation arises when a change occurs in the beneficiary's status affecting his eligibility for benefits and he neglects to inform the CPP district office accordingly. As we have noted, the notice of entitlement used to inform beneficiaries that their application for benefits has been granted expressly reminds them of their duty to bring such changes to the attention of the CPP Administration. The Disability Benefits Notice of Entitlement specifies that "failure to do so may result in an overpayment of benefits which would have to be recovered" by the Canada Pension Plan Administration. The application form for benefits, moreover, contains an undertaking, to be signed by the applicant, to notify the Administration of any change that might have an effect on his eligibility. Finally, officials of district offices never fail to remind applicants for benefits of their obligation in this respect in speaking with them. Despite these warnings and undertakings, however, it happens regularly that the beneficiary of a surviving spouse's pension neglects to inform the district office of his remarriage, that a disabled contributor recovers his health and goes back to work, or that the dependent child of a disabled contributor or surviving spouse marries or leaves his studies before the age of 25, without notification to that effect.[310] The irregularities are eventually discovered, either in the course of a periodic check on the beneficiary or as a result of the voluntary but

belated advice of the beneficiary. The latter of course remains free to contest the justice of the decision declaring him non-eligible, by recourse to the means provided under section 83 and following.

The phenomenon, admittedly, is not of very common occurrence. Since the beginnings of the CPP, unjustified payments have amounted to less than .03% of the total figure paid out in benefits. Little more than the proverbial drop in the bucket, these overpayments still represent, for the 1966 to 1977 period, a total of $700,000. From the beneficiary's point of view, however, the recovery of amounts that he may have received in good faith and at a time of strained finances can be a cause of considerable hardship.

Three provisions should be noted in this regard.

First of all, section 65 of the CPP obliges any beneficiary that has received or cashed a cheque to which he was not entitled, or the amount of which exceeded the sum that he was entitled to receive, to return the cheque or to reimburse the issuer to the amount of the excess payment immediately. Failing to do so, he renders himself liable to civil prosecution in the Federal Court, in recovery of the excess amount of what has been paid to him. The form letter addressed to the recipient of an overpayment to claim reimbursement of it invites him, however, to get in touch with the district office and negotiate terms for repaying the excess amount, if he finds that a lump sum settlement of the matter would cause him financial hardship. The CPP Administration is, in fact, entirely willing to conclude arrangements for repayment by instalments. In its history it has never had to resort to legal action in order to effect recovery, nor even to threaten such legal action.

In the event that the debtor still remains eligible to receive benefits, or becomes eligible to do so by the subsequent turn of events, the debt may be far more easily recoverable by the Department, however, through the use of recoupment. The technique is one frequently resorted to in such cases. Section 505 of the *Canada Pension Plan Regulations* specifies the conditions governing its use. It authorizes the Director General, "having regard to all the circumstances of the case", to apportion the recovery of overpayments over a period of time that he considers reasonable. In practice, the district office director will be authorized to negotiate with the debtor the amount to be deducted from each benefit cheque still payable. One can only presume that the Director General will be very accommodating indeed if the overpayment arises not from the

beneficiary's failure to disclose information but from an error in the calculation of benefits due. Fortunately, such errors occur very infrequently.

To whatever circumstance the overpayment may be due, the Minister has the option of waiving in whole or in part his right of recovery against the beneficiary, when the debt appears to be practically irrecoverable, or the sum to be recovered is insufficient to justify the expenses inherent in effecting recovery, or again, and above all, when recovery would result in "undue hardship" for the debtor. Here, once more, the district office staff, being in contact with the debtor, plays a crucial role. Being as it were in the position to assess *de visu* the financial predicament of the debtor, it can inform him of his right to request a remission of the debt and recommend to the Minister that the latter exercise his discretionary power to write off the overpayment. As of December 31, 1976, the Minister had accordingly authorized, for a variety of reasons, the writing off of 30% of beneficiaries' outstanding debts for overpayments issued until that date.

The remission of the debt may not be authorized, however, in cases where the overpayment was due to the deliberately fraudulent conduct of the beneficiary, a conduct which renders him liable to criminal sanctions under section 92. This provision has never, however, been applied.

F. Sanctions

The orderly conduct of the decision-making process in the area of CPP benefits is not guaranteed by any administrative sanction. By contrast, applicants, beneficiaries and federal officials may be subject to criminal sanctions.

We have just alluded to section 92 of the CPP. The provision contemplates false or misleading statements (either by commission or omission) made with the deliberate purpose of obtaining benefits, the cashing of a cheque representing a benefit payment to which one is not entitled, and the deliberate failure of the recipient of an overpayment to send back the cheque or to reimburse the Department to the sum of the overpayment. The element of intent is an essential ingredient of these offences, except for the cashing of a cheque representing an overpayment, a curious exception in any

event.[311] The offences must be prosecuted by way of summary conviction within five years of the commission of the offence.

The deliberate disclosure by an official of information concerning an individual, obtained for CPP purposes, to a person having no legal right to the information is covered by section 107(7). This offence, too, renders the offender liable to prosecution by way of summary conviction within five years of the commission of the offence.[312]

SECTION III

The decision-making process in matters of unemployment insurance contributions

The decision-making process that concerns us here is governed essentially by Part IV of the *Unemployment Insurance Act*.[313] Without going into a detailed account of its provisions, let us merely draw attention to section 90, which empowers the Minister of National Revenue, with the approval of the federal Cabinet, to make regulations on various aspects of this process.[314] We shall have occasion, moreover, to make mention of two sets of regulations adopted under this enabling provision: the *Unemployment Insurance (Collection of Premiums) Regulations*[315] and the *Umpire Rules of Procedure*.[316]

The present section, it will be remarked, is considerably shorter than the sections preceding it. That is because section I, dealing with CPP contributions, applies equally to the sphere of unemployment insurance contributions, and we shall accordingly refer the reader extensively to it. Only those points in which procedure diverges from that already described will be treated in detail. After identifying the administrative authorities possessing jurisdiction in the area of unemployment insurance contributions, we shall go on to an account of the initial decision-making process. We shall then proceed to a more elaborate presentation of the first level of contentious review: that of the unemployment insurance Umpire. Our account will end with a description of the sanctions applicable in this field.

A. The decision-making bodies

The decision-making process in the sphere of unemployment insurance contributions brings three distinct authorities into action, discounting the PAB: the Department of National Revenue, the

Employment and Immigration Commission, attached to the Department of the same name, and the unemployment insurance Umpire.

1. The Department of National Revenue

The Minister of National Revenue is responsible for applying Part IV of the *Unemployment Insurance Act*.[317] The administrative tasks inherent in this mandate are entrusted to the same administrative units of his Department as those charged with applying Part I of the CPP. The internal organization of these units has already been described in section I of the present chapter.

2. The Employment and Immigration Commission

Since August 15, 1977, the Minister of Employment and Immigration has been responsible for applying the *Unemployment Insurance Act*. He has delegated his powers under this head to the Canada Employment and Immigration Commission,[318] the successor of the Unemployment Insurance Commission, which was established in 1940.[319] The new Commission differs from its predecessor both in its composition and in its attachment to a Department of government.[320] Its essential role, like that of the former Commission, is the allocation of benefits provided by the *Unemployment Insurance Act* to wage-earners without employment. In respect of this function, its internal organization and decision-making process have undergone no change since the days of the former Commission.[321]

Very early on in the process of deciding upon an application for benefits, a Commission official must ascertain whether the applicant held insurable employment.[322] The questions to be determined are whether the claimant was a salaried employee and, if so, whether his employment fell into one of the categories of employment excluded by section 3(2) or section 4(3). These issues must be settled before the Commission can rule on his application for benefits. Accordingly, the questions are submitted by the Commission to the Department of National Revenue, pursuant to the procedure established by section 75(3), to be described farther along in this study. The procedure is one involving the referral of a question by one administrative authority to another, prior to the exercise of decision-making power by the referring authority.

Up until the reform of unemployment insurance in 1971, the Unemployment Insurance Commission exercised jurisdiction in the area of contributions as well as of benefits. Most of its powers in respect of the former are currently exercised by the Minister of National Revenue. The Commission has conserved the power, however, of modifying more or less extensively, by means of regulations approved by the federal Cabinet, the differentiation of occupations into insurable employment and excluded employment.[323]

3. The Umpire

The unemployment insurance Umpire is an administrative tribunal exercising appeal jurisdiction in questions of unemployment insurance benefits and contributions. The constitution and organization of this jurisdiction have been the subject of a monograph study published by the Law Reform Commission of Canada, which readers are invited to consult.[324] We shall describe the manner of the Umpire's functioning in matters of unemployment insurance contributions further along in this study.

B. The initial decision

The decisions of the Department of National Revenue in the area of unemployment insurance contributions may be formulated in accordance with four distinct procedures. Three of these (ruling, determination by the Minister, and appeal to the Minister against an assessment) are equally applicable to contributions to the CPP. The fourth (referral on the occasion of an application for benefits) has unique application in the domain of unemployment insurance.

1. Ruling

This procedure is identical to that already described in section I of our study. Comparatively informal, the procedure is not authorized by any specific provision. It involves an initial decision rendered at the local level or, in more difficult cases, by the Coverage and Interpretations Section of the Department. The decision may bear upon the eligibility of an occupation for contribution or the

amount of contribution payable for unemployment insurance purposes. The procedure may be set in motion by a worker, an employer or a Department inspector.[325] The Rulings Officer in charge of the case may demand the employer to provide information by means of a questionnaire to which the latter must respond; his refusal to do so renders him liable to a fine.[326] The procedure provides for the consultation of the two parties concerned by the Officer. No reason is assigned for the decision, although the parties are informed of their right to ask for a determination by the Minister on the question at issue.

Since the establishment of the CPP in 1965 and the reform of unemployment insurance in 1971, the Department has given many such rulings each year. As Table XIX shows, the vast majority of these decisions deal currently with unemployment insurance contributions. The question of whether an individual is subject to CPP contributions is seldom examined by itself.

TABLE XIX

RULINGS BY THE DEPARTMENT OF NATIONAL REVENUE CONCERNING COVERAGE BY THE CPP AND UNEMPLOYMENT INSURANCE

Year	CPP only	CPP and UI	UI only	Total
1965/66	appr. 1200			appr. 1200
1966/67	1517			1517
1967/68	1909			1909
1968/69	987			987
1969/70	960			960
1970/71	756			756
1971/72	938	426	225	1589
1972/73	136	1503	1317	2956
1973/74	113	1563	2322	3998
1974/75	41	1637	4317	5995
1975/76	61	1615	6500	8176

Source: DNR statistics

2. Determination by the Minister

This procedure, like its counterpart in the CPP, is structured by the Act.[327] The Minister and the federal Cabinet have not, however, made use of their power to regulate the procedure in further detail.[328] Although the provisions of the two Acts are identical in import, those of the *Unemployment Insurance Act* are clearer in their formulation.

The determination may be made either at the request of the employer or employee, or at the initiative of the Department. It is worth noting that, unlike the CPP, the *Unemployment Insurance Act* does not authorize the representative of an employer or employee (such as a businessmen's association or a trade union) to apply for a determination on behalf of the party concerned. Conversely, a question coming within the scope of section 75(1) may be submitted to the Minister when it arises in the course of proceedings before a court and when it has not yet been ruled upon by the Minister. In such a case, the court should defer its decision in the matter, possibly until a decision has been rendered by the Umpire.[329] The determination may deal with the question of whether a party comes within the scope of the Act or with the amount of the contribution payable.

The procedure also calls for the notification of third parties likely to be affected by the Minister's decision. The Minister is required to afford an opportunity to all parties concerned to submit observations in writing.

The officials of the Determinations and Appeals Section take into account, in drafting the determination, not only PAB caselaw but also the Umpire's caselaw, to the extent, obviously, that the latter has not been reversed by the PAB.

Notice of the determination is transmitted to the parties in the same way as in the case of CPP-related determinations. No reason for the determination is given, though the notification indicates the possibility of appeal to the Umpire, under section 84.

The majority of determinations issued apply at once to the CPP and to unemployment insurance (see Table XIV). Consequently, the notification to the parties makes mention also of the possibility of appealing to the PAB with reference to the CPP-contribution part of the Minister's determination.

3. Appeal to the Minister

The terms of section 75(2) of the *Unemployment Insurance Act* are identical to those of section 28(2) of the CPP. The appeal to the Minister provided under both Acts is in fact a recourse for hierarchical review of an assessment directing an employer to pay contributions and to deduct and retain his employee's contribution from the latter's salary.[330] The appeal may focus on whether the worker is an employee subject to the Act or on the amount for which he has been assessed. The procedure used is identical to that applied in the case of determinations.

In the majority of appeals, both CPP and unemployment insurance contributions are at issue (see Table XV). The notification informing the parties of the decision draws their attention to their right to appeal, on the one hand, to the PAB (as regards their CPP contribution) and, on the other, to the Umpire (as regards their unemployment insurance contribution). It invited them to communicate with the Registrars of the respective administrative tribunals, indicating the address of each and specifying the time limit within which an appeal may be lodged.

4. Referral on an application for benefits

Section 75(3) provides for a procedure analogous to that of the determination or appeal, but begun at the initiative of the Employment and Immigration Commission. Questions raised by virtue of this subsection must have two specific characteristics: first, they must arise in consequence of an application for unemployment insurance benefits; and second, they must concern exclusively the determination of whether the occupation of the worker in question is subject to the plan.

Officials in the Commission district office draw up a request for a decision in which they enumerate all the relevant information obtained in their interview with the beneficiary. This request is transmitted to a Rulings Officer attached to the Department's regional office. If in the Officer's opinion further information is necessary, he contacts the parties directly; the Commission itself plays no part in the formulation of the decision.

The Officer transmits his decision, without assigning reasons for it, to the Commission. The latter then rules on the application for

benefits in the light of the Officer's decision. If the Commission rejects the application on the ground that the claimant's occupation does not come within the scope of the Act, the claimant has 90 days within which he may challenge this ruling, by asking the Minister to render a determination. If, on the contrary, the agent considered the applicant's occupation to be insurable employment and the Commission accordingly deemed the claimant's application for benefits acceptable, it is the employer that has the right to contest the ruling and ask the Minister for a determination. It would appear, however, that the claimant and the employer are not always informed of this avenue of recourse by the Commission.

The referral procedure is not without certain difficulties and may occasionally be the source of unjust dealing. This results, in part, from the fact that the Commission may request a Department decision not only when an application for benefits has been presented but at any time subsequent to its submission; in part, from the fact that the Department can always revise a decision that it considers erroneous or based on incomplete facts. In either of these cases, the following sequence of events might take place. The Commission, believing either on its own authority or as a result of a referral to the Department that the claimant held insurable employment, accepts his application for benefits. The claimant accordingly begins to receive benefits in perfect good faith. Later, in consequence of a referral by the Commission or a reconsideration of the initial decision by the Department, it is established that the claimant's employment was not insurable. The Commission now proceeds to recover from the claimant all the benefits to which he was not entitled, which may represent a considerable amount. In cases where the overpayment was due to an error on the part of the Commission, the Umpire, appealed to against the new determination by the Minister, has refused, in accordance with common law, to hold that the Commission could be bound by a decision incompatible with the Act and due to an error made by its staff. At the same time, the Umpire has urged the Commission to waive its right to recover the overpayment for humanitarian reasons, as it is authorized to do under the *Unemployment Insurance Regulations*.[331]

C. Appeal to the Umpire

The decisions that may be appealed to the Umpire by virtue of section 84 of the *Unemployment Insurance Act* are thus determinations and decisions on appeals to the Minister of National Revenue,

inasmuch as these decisions concern unemployment insurance contributions.

The powers conferred on the Umpire under the section are very extensive. He may rule on any question of fact or law whose solution is necessary to the settlement of the litigation, and he may, of his own authority, vacate or vary the challenged decision. His decision-making power is, in effect, no less broad than that of the Minister.[332]

The designation of the process as "appeal" is somewhat misleading as to its actual nature. In reality, because of the highly elliptical character of the Minister's decisions and the negligible documentary content of the appeal file, the hearing before the Umpire is not so much a new trial, as a first trial.

1. Initiation of the appeal

The phrasing of the form letter whereby the Department of National Revenue informs parties of its decision has not always been free of ambiguity in characterizing the process of appeal to the Umpire. Indeed, it used merely to invite the parties to "communicate" with the Umpire's office. This formulation tended to confirm many individuals in the belief that the Umpire was simply one more level of the administration, rather than an administrative tribunal. The widespread confusion which this ambiguity engendered among appellants made it doubly necessary for the Registrar to be liberal in his interpretation of what constituted a notice of appeal. A change in this state of affairs was imperative, and early in 1977 the phrasing of the form letter was finally changed. It now informs the parties that the manner in which the right of appeal created by section 84 may be exercised is determined in the *Umpire Rules of Procedure*,[333] and that the form indispensable for initiating an appeal may be procured by applying to the Registrar.[334]

Indeed, in principle the notice of appeal must be filed with the Registrar in accordance with the form prescribed under section 4 of the *Rules of Procedure*. It must contain a presentation of the facts in the case and the grounds on which the appellant relies in his appeal; it must specify the date of the challenged decision as well as the date on which it was communicated to the appellant. The latter information is evidently required so as to enable the Registrar to verify

whether the 90-day time limit for filing has been respected by the appellant.

In practice, a very liberal interpretation has had to be given to the rules regarding notice of appeal and the appellant's obligation to show the grounds for his action. Quite apart from the misunderstandings to which the phrasing of the Department's notification was only too likely to give rise, it must be remembered that a great many of the appellants are simple working people, ill-prepared to cope with the intricacies of legal formality. Indeed, section 26 of the *Rules of Procedure* allows the Umpire to dispense appellants from strict adherence to prescribed form, a power he has made considerable use of.

Be this as it may, it remains true that the formalities surrounding the initiation of an appeal to the Umpire are sufficient to have led many an appellant to wonder whether they had become involved in a complicated judicial process. Dismayed at the realization that their claim is not to be settled around a table but at a formal hearing, a fair number of appellants withdraw their appeals or simply drop the matter. Others consider it wise to consult a lawyer, who not infrequently convinces them of the futility of their appeal.[335]

Section 84 provides for the possibility of securing an extension of the time limit for filing an appeal, so long as the application for the extension is made within the time limit. It is seldom the case. The Umpire usually rules on the request in the light of the appellant's written observations, without a hearing.[336]

2. Preparations for the hearing

Upon receiving notice of an appeal, the Registrar forwards a copy of it to the Department.[337] The Department in turn must transmit a copy of the notice to each of the parties whom it had notified of the challenged decision.[338] Indeed, unless the 90-day time limit has expired, the parties are still free to appeal in their own right; they have likewise the right to intervene in an appeal lodged by another party within 30 days of being notified of its having been filed.[339] Concurrently with serving notice on the parties, the Department must also begin to assemble the appeal file in the Registrar's hands. To this end, the Department transmits to the Registrar all the documents concerning the prior phases of the process (that is, depending on the case, the application for a determination or the

assessment and the appeal to the Minister, as well as the notification of the decision).[340] In practice, the Department adds to these documents any correspondence to which the treatment of the appellant's claim may have given rise.

Further documents integrated into the appeal file include any notices of appeal given by the parties concerned, whose appeals may be joined with that of the initial appellant by the Umpire, or at the request of the Minister, the appellant or any one of these parties.[341] Any notices of intervention received from any of the parties concerned are also added to the appeal file, either jointly or severally as the Umpire may deem expedient.[342]

The appeal file is completed by the addition of the reply filed by the Minister to each notice of appeal and notice of intervention, in accordance with section 11 of the *Rules of Procedure*. By his reply, the Minister joins issue with the various parties on the facts, and presents the legal arguments and precedents on which he intends to rely. The reply is evidently transmitted to the appellant and to all intervenors. The Minister, it should be noted however, does not append to his reply the text of the PAB's or the Umpire's decision that he cites in his plea.

At the end of the period set aside for the production of the reply, the case is presumed to be ready for hearing.[343]

The Registrar now makes up a roll of hearings including appeals concerning contributions as well as benefits. The time and place of the hearing are set by the Umpire acting either on his own authority or at the request of one of the parties.[344] The efficient organization of hearings is subject to the same constraints in appeals relating to contributions as in those dealing with benefits: there are geographical and logistical problems (the Umpire is an itinerant administrative tribunal), difficulties of settling on hearing dates convenient to all the parties, and complications arising out of the Umpire's own overloaded work calendar, as a member of the Trial Division of the Federal Court.[345] Parties are entitled to receive notice of hearing at least twenty days prior to the date of the hearing.[346]

3. The hearing and the decision

Appeals lodged before the Umpire in matters relating to unemployment insurance contributions must be heard in open hearing.[347] In practice, however, the parties may waive their right to a

hearing if they can agree among themselves to submit their dispute to the Umpire by means of a joint brief.

The rule of informality laid down in section 93(l) applies to the hearings. The Umpire is free to direct procedure as he sees fit, provided only that he does not abridge the parties' right to be heard.[348] Although oral testimony by witnesses is the rule, the Umpire may treat other forms of evidence as admissible.[349] Parties may either present their own argument or authorize any representative to do so on their behalf. The Umpires' clerk prepares a shorthand transcript of the proceedings for use in the event of an appeal to the PAB.[350]

The Umpire's decision, affirming, vacating or varying the Minister's determination or the assessment, must be given in writing and must have reasons assigned to it.[351] It is drafted by the Umpire according to the usual standards of judicial decisions and handed to the Registrar who puts it in final form, files it in the Umpires' archives and sends a copy of the decision to each of the parties. The form letter accompanying the decision itself simply points out that a decision rendered by an Umpire on an appeal against a decision by the Minister of National Revenue is subject to appeal to the Pension Appeals Board at the request of one of the parties, and that only appeals on questions of law, made with the prior leave of the Board will be entertained.

The Umpire may refer to the PAB any question of law concerning the interpretation or application of section 3, which defines "insurable employment".[352] By this device, the likelihood of contradictory rulings by the Umpire and the PAB on what employment comes within the scope of unemployment insurance and the CPP is precluded; were it not for the mechanism of referral, conflicting decisions might be handed down by the two tribunals with regard to the same employment, which could only be reconciled by appealing the Umpire's decision to the PAB. The device is also used when the question is formulated in identical terms for the unemployment insurance and the Canada Pension plans in a joint appeal by the parties. Despite the utility of the referral procedure, it is relatively seldom used.[353]

4. The Umpire's caselaw

To the extent that they have not been reversed or vacated by the PAB, the decisions handed down by the Umpire in the sphere of

unemployment insurance contributions create binding precedent. The caselaw, however, is neither published nor even indexed, unlike that of the PAB[354] and unlike that of the Umpire himself in the sphere of unemployment insurance benefits.[355] As soon as the Umpire renders judgment under section 84, the Registrar assigns a serial number preceded by the letters "NR" (National Revenue) to his decision. The decision may thereafter be cited by the use of this number. For all its legal effect, the Umpire's caselaw has very limited publicity. In fact, it never reaches beyond the pale of the federal administration itself, since its use is restricted to the central administration and district offices of the Department of National Revenue, the Department of Justice, the Employment and Immigration Commission, and the PAB.

It is hardly surprising that the Umpire's caselaw is almost never cited by other than Department of National Revenue lawyers pleading before the Umpire and, occasionally, by the Umpire himself. The lawyer of an appellant or an intervenor, if by chance he knows of the existence of the caselaw, could at best turn to the closest National Revenue district office or if not, to the Umpires' Office in Ottawa with the request to look over the entire collection, since the decisions are not indexed to help him in his research. In a word, the Umpire's caselaw is a jurisprudence available only to the initiated. The same holds true, incidentally, of the caselaw established by the Unemployment Insurance Commission between 1940 and 1971; it, too, is still occasionally cited by a number preceded by the letters "CUC" (Canadian Unemployment Coverage).

5. Judicial review of the Umpire's decisions

Since the *Federal Court Act*[356] came into effect, on June 1, 1971, judicial review of the legality of the acts of federal administrative authorities has been exercised by the Federal Court. Various procedures can set the Court's review authority into motion. First and foremost, the Federal Court has jurisdiction to rule on applications "to review and set aside a decision or order", under section 28 of the Act. The Court has, furthermore, authority to apply a number of extraordinary remedies derived from common law and enumerated at section 18. The former comes within the purview of the Federal Court of Appeal, while the latter is within the jurisdiction of the Trial Division.

In the case of an administrative tribunal such as the Umpire, whose activity consists exclusively of making decisions in accordance with a process that may be characterized as judicial, it is only to be expected that judicial review would be exercised most often by means of applications to review and set aside, lodged before the Federal Court of Appeal. In the hypothetical event that the act of an Umpire before the rendering of a decision were to be contested by means of one of the extraordinary remedies provided under section 18, the judges of the Trial Division would find themselves in the incongruous situation of having to rule upon the legality of their own acts, performed in the capacity of Umpires.

As a matter of fact, since 1971, the decisions of Umpires in the area of unemployment insurance benefits have often been challenged before the Federal Court of Appeal, under section 28. No one has ever called in doubt the propriety of such proceedings against these decisions. Indeed, the *Unemployment Insurance Act* itself explicitly provides, under section 100, for the intervention of the Federal Court in these matters. The intervention appears in the Act as an exception to the finality of the Umpire's decision on an appeal lodged under section 95.

The possibility of resorting to the same review process to contest the legality of an Umpire's decision in the sphere of unemployment insurance contributions has been upheld in two recent decisions handed down on the same day by the Federal Court of Appeal.[357] The Court had been asked by the Minister to review and set aside decisions made by the Umpire, on the ground that the latter had made an error in law. The Court was unanimous in finding that there had, indeed, been an error, but divided as to its own authority to review the decision.

In the majority view of the Court, section 85 of the *Unemployment Insurance Act*, conferring a final and definitive character, unless otherwise provided by the Act, on the Umpire's decision in any appeal brought under section 84, does not have the effect of precluding the review of that decision under section 28 of the *Federal Court Act*. The terms of section 85, according to the majority ruling, mean simply that the Umpire's decision is not subject to appeal, except in cases where appeal to the PAB lies by virtue of section 86. Indeed, that the right of appeal is described in the section as an exception to the finality of the Umpire's decision.

The majority of the Court then goes on to reject the argument that, in order to give the Federal Court review jurisdiction in the

matter of contributions, that jurisdiction should have been expressly reserved for it, as it was in section 100 with special reference to decisions in the area of benefits. According to the Court, the reservation under section 100 was only rendered necessary because the section excludes in principle any judicial review of the Umpire's decisions. There being no such exclusion in section 85, no express reservation of the jurisdiction was needed.

Finally, the majority view invokes common law jurisprudence to conclude that conferring a "final" character on the decision of an inferior court does not put the decision beyond the reach of review according to the traditional remedies available. The majority refuses to assign a broader meaning to this expression, so as to limit the application of the review jurisdiction created by section 28 of the *Federal Court Act*.

The Chief Justice of the Federal Court, however, dissented from his colleagues' judgment. Some of the reasons presented in the Chief Justice's minority decision deserve to be noted here. He observes, first of all, that the *Unemployment Insurance Act* being subsequent to the *Federal Court Act*, and section 85 having less general import than section 28, the former must be accorded priority over the latter. According to the Chief Justice, this view is confirmed by two elements of the *Unemployment Insurance Act*.

On the one hand, the existence of a right of appeal to the PAB in certain cases may have induced the legislator to preclude judicial review. In this regard, the Chief Justice notes (without commenting, however, on the meaning that he attaches to it) that the decisions of the PAB are expressly removed from the Federal Court of Appeal's jurisdiction, by section 28(6). Perhaps the Chief Justice meant to suggest by this that if the decisions of the PAB are placed beyond the Court's judicial review, there is no reason why those of the Umpire within the same sphere should not be likewise. Such an interpretation, in our opinion, mistakes the meaning, however, of the exception made in the PAB's favour in section 28(6) of the *Federal Court Act*; we shall return to this question in chapter 4.

On the other hand, the fact that the Federal Court has had review powers expressly reserved for it in the field of benefits litigation, without a corresponding reservation of powers in the area of contributions, would tend to reinforce one's belief that the legislator had fully intended to maintain a distinction between the two jurisdictional spheres.

In view of the weight of the arguments advanced on both sides, it is to be hoped that the Supreme Court will soon be called upon to resolve the debate.

Another aspect of the *Federal Court Act* has also been applied in the area of unemployment insurance contributions. This is the procedure of reference, provided under section 28(4), whereby a "federal board, commission or other tribunal" can refer any question of law whose solution is necessary to the disposal of a matter *sub judice*, to the Federal Court for determination. The Umpire has availed himself of this provision in the action *Re Martin Service Station*,[358] to obtain a ruling on a constitutional question (the validity of certain provisions of the *Unemployment Insurance Act*) from the federal Court of Appeal and, in the last resort, the Supreme Court of Canada, rather than from the Umpire and the PAB.

6. Statistics on appeals to the Umpire

We have drawn upon two distinct sources of data for our analysis of the functioning of this tribunal.

First, we proceeded to a comprehensive analysis of the Umpire's work load since 1973, the year in which the first appeals were entered on the tribunal's roll of hearings. The following data were collected from the rolls for each year, up to the end of 1976: the number of appeals entered on the rolls, the proportion of appeals heard, withdrawn or outstanding at the end of the period, the geographical distribution of the appeals, and the time that elapsed between the initiation of the appeal and the Umpire's decision. The results will be found in Table XX.

Our statistics lend substance to the following observations. First of all, the number of appeals is not very high: 237 in four years. In the same period, the Umpires entertained no fewer than 1,000 appeals in the area of benefits. In other words, the sector of contributions accounts for approximately one-fifth of the Umpires' total work load — leaving aside, of course, their regular work load as judges of the Federal Court.

Although the proportion of appeals withdrawn (10%) is by no means negligible, our statistics tend actually to understate the situation: a considerable number of appeals have not been included in our statistics, having been withdrawn prior to their entry upon the rolls.

TABLE XX

UNEMPLOYMENT INSURANCE CONTRIBUTIONS – THE UMPIRES' WORK LOAD (1973-1976)

	Geographical origin of appeals											Status as of 31.12.1976		
Year	B.C.	Alta.	Sask.	Man.	Ont.	Que.	N.B.	P.E.I.	N.S.	Nfld.	Total	Heard	Withdrawn	Pending
1973	1	12			6	25	2			2	48	25	2	21
1974		2	1	3	11	17	1	1		6	42	34	5	3
1975	9	4	1	1	18	38		1	5	2	79	45	10	24
1976	4	5			15	37	1			6	68	7	8	53
Total	14	23	2	4	50	117	4	2	5	16	237	111	25	101
	(6%)	(10%)	(1%)	(2%)	(21%)	(49%)	(2%)	(1%)	(2%)	(7%)		(47%)	(10%)	(43%)

One should also add a certain number of cases that have dragged on since 1973 and were still pending at the end of 1976; these matters will probably never come to a hearing.

The rate at which cases are finally settled (47%) has been disappointingly low. This is closely related to the long interval between the filing of a notice of appeal and the rendering of a decision on the average case. For the 111 appeals that had been disposed of as of December 31, 1976, the average interval had been 305 days. The tribunal's record of performance in the field of contributions-related appeals is even poorer than its none-too-enviable record of settling appeals in the area of benefits (252 days on the average).[359]

On examining the geographical distribution of appeals, one fact is conspicuous: one-half of the appeals in the sphere of contributions originate in Quebec. This phenomenon (which, though to a lesser extent, is observable in the area of benefit-related appeals also) is probably due to differences in fundamental political attitudes. As far as the experience of the other provinces is concerned, the relative under-representation of Ontario and British Columbia and the very substantial year-to-year fluctuation in the number of appeals seem to defy all attempts at a logical explanation.

In an effort to obtain a more precise estimate of the nature of the Umpires' work load, we have also analyzed a sample of 40 appeal files upon which decisions were rendered in 1975. We were particularly interested in ascertaining the following questions:

- the nature of the contested decision,
- the initiator of the appeal (whether employer or employee),
- the subject of litigation,
- the decision, and
- the period required for disposal.

Our conclusions are that in more than one-half of the cases (21 out of 40), the appeal concerned a determination by the Minister under section 75(1); in 14 other cases, the determination followed a referral by the Unemployment Insurance Commission under section 75(3); only five appeals in all concerned an assessment maintained on appeal by the Minister, under section 75(2).

More than three-quarters of the appeals (31 out of 40) had been initiated by employees.

Only three of the cases involved litigation concerning the amount of contributions assessed. The remaining 37 all questioned the parties' coming within the scope of unemployment insurance. In 23 of the cases, the issue was whether there existed in fact an employer-employee relation between the parties; in the rest, the question was the insurability of the employment. In all cases, the decision had borne more or less directly upon a question of law tied to the interpretation or application of section 3, and was therefore subject to appeal to the PAB, under section 86.

Less than one-quarter of the appellants obtained a decision in their favour (9 out of 40). Twenty-eight appeals were rejected outright, and two were withdrawn. The remaining one case was referred by the Umpire to the PAB.

The average handling time from the date of filing the appeal until the date of the decision was somewhat shorter than in the case of our more inclusive sample: 254 days.

The correlated results of our statistical survey are given on Table XXI.

D. Sanctions

The orderly conduct of administrative procedure in the matter of unemployment insurance contributions is guaranteed by a number of administrative and criminal sanctions. The sanctions are primarily aimed at the employer who, by his tardiness or neglect, or by his deliberate intent to evade the payment of contributions, hinders the financing of the unemployment insurance plan and compromises his employees' rights to receive benefits at need.[360]

Section 90(1)*c*) confers authority to prescribe by regulation penalties applicable to employers who fail to fill out a questionnaire dealing with any category of information required for the assessment of contributions or who fail to transmit this questionnaire to the employees concerned. It was in the exercise of this regulation-making power that section 23 of the *Unemployment Insurance (Collection of Premiums) Regulations* was drafted, fixing the amount of the penalty at the maximum figure authorized by the Act.

Section 68(6) provides for the payment of a penalty by an employer who fails to remit on the date due the full amount of

TABLE XXI

UNEMPLOYMENT INSURANCE CONTRIBUTIONS – SAMPLE OF APPEALS TO THE UMPIRE

		Decision			
		Affirmed	Reversed	Referred to PAB	Total
APPEAL OF A DETERMINATION MADE UNDER SECTION 75(1)					
Appeal by employer:	• Insurability				
	• Relation	3		1	4
	• Amount				
Appeal by employee:	• Insurability	10*			10
	• Relation	2	4		6
	• Amount	1			1
Total		16	4	1	21
APPEAL OF A DECISION RENDERED UNDER SECTION 75(2)					
Appeal by employer:	• Insurability	1			1
	• Relation	1			1
	• Amount	1*	1		2
Appeal by employee:	• Insurability				
	• Relation		1		1
	• Amount				
Total		3	2		5
APPEAL OF A DETERMINATION MADE UNDER SECTION 75(3)					
Appeal by employer:	• Insurability				
	• Relation		1		1
	• Amount				
Appeal by employee:	• Insurability	3			3
	• Relation	8	2		10
	• Amount				
Total		11	3		14
GRAND TOTAL		30	9	1	40

Subject matter totals: Insurability: 14 Relation: 23 Amount: 3 *includes 1 withdrawal

contributions owing — that is to say, the sum total of contributions payable by the employer himself and of those payable by, and deducted from the wages of, his employees. Contributions must be paid by the fifteenth day of the month following that to which they apply, at the latest.[361] The penalty amounts to 10% of the unpaid balance, plus interest up to the day on which the employer finally discharges his obligation.

The amount of these penalties constitutes a debt to the Crown,[362] recoverable by the registration in Federal Court of a certificate issued by the Minister of National Revenue[363] or by the garnishment of amounts paid to the debtor by third parties.[364] In the absence of fraud, the debt is prescribed after three years.[365]

As for the criminal sanctions provided under the *Unemployment Insurance Act* with regard to the payment of contributions, these are of two types.

On the one hand, section 123(1), a general provision applying to both the collection of contributions and the payment of benefits, makes it an offence to contravene or not to conform to a provision of the Act or of the Regulations. The formulation of the section does not require the presence of the element of intent; the act alone suffices to engage the criminal liability of the offender, regardless of fault. It may be noted that this provision accords to the regulations for implementing the Act, as to the Act itself, the guarantee of a criminal sanction. Besides, the extreme generality of section 123(1) leaves no place for the application of section 115 of the *Criminal Code*.

The penalty corresponding to this general offence applies in all cases where a specific penalty has not been provided by the Act. This residual sanction calls for a maximum fine of $500 and six months of imprisonment, or either of these two penalties.[366]

The Act moreover creates a certain number of specific offences directed against particular modes of conduct. In the area of contributions, the offences in question are described principally in section 88.

The employer's failure to respond to a questionnaire or to furnish copies of it to employees concerned, renders him liable, in accordance with the regulations made under section 90(1)*a*) and *b*), to a fine of not less than $25 and not more than $1,000 per day, in

addition to penalties elsewhere prescribed.[367] The element of intent, once again, plays no part in the offence.

The employer's failure to keep books of account and records, as required by section 72, or to lend his assistance in an inspection of accounts effected by the Department of National Revenue by virtue of section 73, renders him liable to the penalty provided under section 124.[368] Once more, the element of intent is not a condition of this offence.

Anyone who makes false or misleading statements in a declaration or questionnaire required by virtue of Part IV of the Act, is liable to a fine not exceeding $1,000, to which is added a sum equal to twice the amount of the contribution that should have been payable or imprisonment for a period not exceeding six months.[369] The statements need not be made knowingly to constitute this offence.

The same penalty applies to anyone who makes false or misleading entries in books of account or records required to be kept by law, or to anyone who omits any essential detail from them.[370]

Conversely, section 122 applies to false or misleading statements *deliberately* made concerning the exercise of insurable employment by a person or his remuneration. In addition to such other penalties as may be exacted by other provisions of the Act, the offender renders himself liable to a fine not exceeding $5,000 to which may be added a sum equal to twice the amount of the benefits unduly paid on the strength of these statements, or imprisonment for a period not exceeding six months.

The element of intent is equally a *conditio sine quâ non* of two offences created by section 88. The first concerns the destruction, alteration or falsification of records or books of account required to be kept by law; the second, of a more general nature, the wilful attempt to evade in any manner compliance with the Act or the payment of contributions.[371] The penalties provided — the same as those applying to false statements — are in addition to such administrative penalties as may be otherwise prescribed.

The employer's failure to deduct employee contributions, to keep them in an account separate from his own funds, and to remit them to the Receiver General by the prescribed date, renders him liable, in addition to the administrative penalty provided under sec-

tion 68(6), to a maximum fine of $5,000 to which may be added imprisonment for a period of up to six months.[372] The element of intent is irrelevant to these offences.

Section 83 describes the manner in which those guilty of these offences must be prosecuted before the criminal courts. Criminal prosecutions must be begun within the five years following the subject matter of the offence.

The coordination of administrative and criminal sanctions is ensured by section 88(5). The section specifies that the payment of a penalty can be required of a person found guilty of an act subject to double sanction only if the penalty is imposed prior to the initiation of criminal proceedings.

The Department of National Revenue thus disposes of an impressive arsenal of repressive measures to guarantee the effective enforcement of its collection of unemployment insurance contributions. The sanctions that it can apply are the more powerful insofar as intent is not an essential condition of a number of offences under the Act, and in view of the very broad character of some of its provisions, notably section 123.

SECTION IV

The decision-making process in matters of QPP contributions

The process whereby decisions liable to being challenged before the PAB are made in the sphere of QPP contributions is relatively simple. The decisions, as is the case with the CPP, bear essentially on two questions: the obligation to contribute to the QPP, and the amount of the contributions due. As with the CPP, we may distinguish between two modes of exercising decision-making power in these questions: the one is the "decision" rendered on request by the Minister (corresponding to "determination" in federal law); the other, the "assessment" which, as in federal law, is subject to appeal to the Minister. Either mode of exercising decision-making power can give rise to appeals to the PAB.

As we have already remarked, this body of litigation represents only a very small portion of the PAB's total activity.[373] The number of decisions taken each year even at the lower decision-making levels is very slight. We shall, accordingly, confine our treatment to a brief description of the process in question.

A. The decision-making body

The application of Title III of the QPP, dealing with contributions, has been entrusted to the Quebec Department of Revenue.[374] Administrative operations connected with the QPP are in general carried on by departmental units charged with the collection of provincial taxes. A degree of specialization has, however, emerged within the Legislation Branch, the body specifically responsible for the strictly legal aspects of Quebec's fiscal establishment. A unit within this Branch deals with objections and appeals in tax matters proper, but does not intervene in the treatment of matters related to

the QPP. The latter devolves upon another unit, the Interpretation Directorate, and within that body, upon a Source Deductions and Social Plans Division. The Department maintains a number of decentralized offices throughout the territory of Quebec; these regional offices, however, neither exercise any decision-making power nor intervene in the procedure for purposes other than transmitting information.

B. Conduct of the process

The QPP differentiates between two procedures: the one leading to the rendering of a decision at the request of an employer or employee, under section 62; and the other, the assessment procedure provided under section 63 and following. Both procedures, however, appear in the QPP under the general title of "Assessment". The decision-making procedure under section 62 therefore appears as a first, though not mandatory stage in the assessment procedure.

1. The decision

Section 62 authorizes an employer or employee to apply to the Minister to determine whether a person is required to make a contribution and if so what the amount of the contribution must be. This provision is thus of no interest to self-employed persons whose status as such has been established as a matter of record; but it may be invoked in cases where an occupation has not yet been characterized by the Minister as self-employment or salaried employment.

The application must be submitted on a special form prescribed for the purpose and available from the central administration of the Department, in Quebec City. If the question raised is whether an occupation is salaried employment or self-employment, the applicant must likewise fill in a questionnaire explaining the nature of the work-relations subsisting between the worker and the person that has retained his services. If, as is almost invariably the case, the application is filed by an employer, the Department makes a point of collecting information and observations also from the worker concerned. Indeed, it is obliged to do so, by paragraph 3 of section 62.

Should the Department find that other individuals are also engaged in work of a similar nature for the same person's account, and

are therefore concerned in the outcome of the decision, it invites them to fill in a similar questionnaire and to submit it within thirty days. The answers provided by the initial enquirer as well as by these subsequent "intervenors" are then studied all together, with further information obtained at need in interviews between the persons involved and officials of the regional offices. At no point, however, are the various "parties" confronted with each other.

The Minister is obliged to make his decision "with dispatch". Preparing the decision itself is the task of a specialized section of the Source Deductions and Social Plans Division. The section drafts an opinion, presenting the facts and the legal rules applicable to the case, drawn from the Act, PAB caselaw and the jurisprudence of the common law courts. The formal decision itself, bearing the signature of the deputy minister, is much briefer, however, and assigns no reasons for the Minister's answer, although it does indicate the possibility of appealing the decision to the PAB. It is sent not only to the employer who presented the application and to the worker directly concerned, but also to all the workers who had been invited to make representations.

The Minister may rule on the question of whether a particular occupation comes within the scope of the QPP without having been requested to do so by one of the parties concerned. This possibility is one that emerges by implication from section 61, envisaging the consequences of the situation in which the Minister, having decided of his own initiative that an occupation falls beyond the scope of the QPP, revises his opinion on the occasion of an application for a decision or on the issuance of an assessment.[375] Unlike the Minister's decision rendered in answer to the request of a party, by virtue of section 62, the Minister's determination on his own initiative is not directly subject to appeal; but the assessment that follows it in due course may give rise to an objection, which in turn may lead to an appeal to the PAB.

2. The assessment

Assessment is the act whereby the Minister determines the amount of the contributions that shall be payable in any one year under the QPP.[376] An employer's assessment is made up of the contributions payable both by the employer himself and by the employee, the latter amount having been duly deducted by the employer from his employee's salary.[377] For all practical purposes,

the assessment takes the form of a notice prepared by the general income tax services under section 63. The verso side of the notice draws the recipient's attention to his right to enter an objection to the assessment and notes the time limit within which he may avail himself of this right. Employers are invited to apply to the central administration of the Department to obtain a notice of objection form.

The notice of objection must be forwarded to the deputy minister within 90 days of the mailing date of the notice of assessment. Objections are frequently submitted *seriatim* by an employer several of whose employees find themselves in the same situation. Section 66 obliges the Minister to give each one of these employees "the opportunity to supply information and to make representations to safeguard his interests". The decision-making process in the case of objections is the same as that utilized in the case of applications to the Minister, under section 62.

If the Source Deductions and Social Plans Division concludes that the assessment should be maintained, a decision to this effect, signed by the deputy minister, is forwarded to the objecting employer. The notice, giving a summary account of the grounds for the decision and indicating the recipient's right to appeal the matter to the PAB, is by means of a letter sent by the Division; identical notices are also sent to all employees concerned, informing them likewise of their right of appeal.

If the objection leads to the modification or outright cancellation of the assessment, the general tax services simply issue a new tax assessment.

The Division receives approximately 75 to 100 objections each year; their processing may take from 6 to 12 months. In about half the cases, the assessment is maintained without change.

C. Sanctions

Title III of the QPP attempts to ensure the orderly conduct of administrative procedure and to curb fraud and the violation of secrecy through a system of administrative and criminal sanctions.

Section 96 authorizes the Quebec Cabinet to make regulations requiring employers to file the required returns in connection with

contributions paid by themselves and deducted from their employees' wages, to supply copies of these returns to the employees concerned, and to pay an administrative penalty in the event of their failure to comply with these regulations. This regulation-making power has been exercised, and the penalty fixed at the maximum figure provided by the Act, that is, at an amount not exceeding $10 a day for each day of default and not exceeding in all $250.[378] The violation of these provisions may likewise render the offender liable to criminal proceedings, under the third paragraph of section 97. The sanction in the latter event is not less than $25 a day for each day of default, not exceeding in all $1,000.

Section 98 specifies the relationship between the administrative penalty and the criminal sanction. It obliges the Minister first to apply the administrative sanction before resorting to criminal proceedings. Under the section, payment of the penalty cannot be demanded after the information giving rise to conviction by a criminal court has been laid.

It will be noted that the Minister's decision to impose an administrative penalty does not come within the scope of section 62 (decision requested concerning the obligation to contribute or concerning the amount of the contribution) or 66 (decision rendered upon an objection to an assessment); accordingly, the imposition of such penalty cannot be appealed to the PAB, under section 190. Besides, it would be difficult to contest the imposition of a penalty since the provisions for the violation of which such would be imposed (section 96 *b*) to *d*)) do not involve the element of intent.

The second paragraph of section 97 provides for the imposition of administrative penalties for the violation of section 56, which requires that employees' contributions be deducted at the source. The original formulation of section 60 permitted, in effect, the imposition of a penalty on the employer in default.[379] Since 1972, however, the employer's failure to comply with this provision has rendered him liable only to criminal sanctions, under section 97.

Section 99 is intended to suppress a variety of fraudulent practices, such as the making of false or misleading statements, the destruction, alteration or secretion of books of account, the making of false or deceptive entries in them, and the attempt wilfully to evade the payment of contributions. In the case of false statements or entries, the offence does not require the element of intent. The penalty provided for these offences is a fine not exceeding $5,000,

plus twice the amount of the contributions that the offender attempted to evade paying. The Act also envisages the imposition of administrative penalties for these offences, but neither the QPP nor its regulations in fact stipulate any.

Section 230 *g*) makes it an offence for an official or employee of the Quebec Pension Board to violate the confidential nature of information concerning a contributor and obtained by virtue of the QPP. Such information is declared privileged by section 214 of the Act.

Prosecutions under the foregoing provisions are governed by the *Summary Convictions Act* of Quebec, and must be instituted within a period of not more than five years following the date of commission of the offence.[380]

SECTION V

The decision-making process in matters of QPP benefits

A knowledge of the decision-making process in the sphere of QPP benefits is no longer indispensable to understanding the functioning of the PAB. Since August 1, 1975, the PAB has not had jurisdiction in this area. Yet the process is well worth knowing, if for no other reason than the fact that from 1967 to 1974 appeals concerning QPP benefits represented a substantial proportion of the PAB's work load.[381] In addition to any historical interest that the subject may command, a comparison of the decision-making processes in the spheres of QPP and CPP benefits bring out significant points of contrast.

To the extent that the provisions of the two plans are similar, their basic characteristics are generally identical. Admittedly, in the last few years certain differences have appeared between the federal and the provincial schemes; but these differences have been by and large transitory, innovations introduced into either plan being usually soon incorporated into the other as well. The administrative structure and procedure of the QPP reflect the same sharp dissociation between disability benefits, on the one hand, and retirement and survivors' benefits, on the other, as we have already noted in the context of the CPP. There are, however, differences between the way in which the decision-making process is handled in the two plans — differences which assume increasing significance as the case progresses through the sequence of procedural steps.

A. The decision-making body

We have already mentioned that, in 1965, the Quebec legislator, unlike his federal counterpart, preferred to entrust the task of al-

locating benefits under the newly-established contributory pension plan to an autonomous agency, rather than to a government department.[382] This body, the Quebec Pension Board, has since been given responsibility for supervising private pension plans,[383] adjudicating on and paying allowances under the *Quebec Family Allowances Plan*,[384] and applying the property school tax contribution programme.[385]

The Board is constituted by Title II of the QPP. It is a corporate body exercising its powers as an agent of the Crown.[386] The nature of these powers, analogous to those exercised at the federal level by the Department of National Health and Welfare, marks the Board as a management-oriented agency, even though in some of its features — those of particular concern to us here — it can be termed an administrative tribunal.[387]

In order to allow the Board to accomplish its mandate, the law has conferred upon it broad regulation-making powers. The exercise of this power is nevertheless subject to the approval of the Quebec Cabinet. The Board may, thus, regulate its own internal procedure; these regulations are not subject to publication in the *Quebec Official Gazette*, any more than its delegations of power to its officials.[388] By means of published regulations, the Board can change, to a greater or lesser extent, the scope of the QPP,[389] define certain terms used in the Act,[390] prescribe the manner in which applications for benefits will be submitted, substantiated and treated,[391] determine special conditions for the payment of disability pensions, in particular the obligation to submit to periodic examinations on pain of being considered as no longer disabled,[392] and, in general, establish whatever regulations are useful or necessary to the application of the QPP, with the exception of Title III, the application of which devolves upon the Department of Revenue.[393]

Like many other autonomous agencies of the Quebec or federal administration, the Board possesses also powers of inquiry. These powers are defined in terms of the *Public Inquiry Commission Act*.[394] The Board may delegate these powers to certain of its officials designated as inspectors or investigators, of whom we shall have further occasion to speak.

The Board may, with the authorization of the Quebec Cabinet, conclude agreements with other administrative authorities of the government of Quebec, or with the administrative authorities of other provinces, the federal government or foreign states.[395]

In the exercise of its powers, the Board is protected against the intervention of judicial power by an immunity working in favour of its officers and employees as well as by so-called "privative clauses". These provisions are aimed at depriving the courts of jurisdiction to grant extraordinary remedies and injunctions against the Board and its officials, thereby placing the Board beyond the reach of traditional methods of judicial review.[396]

The financing of the Board's activities is out of the contributions of QPP contributors. The amounts required for this purpose are taken by the Board out of moneys remitted to it by the Department of Revenue, the rest being deposited with the Quebec Deposit and Investment Fund.[397] In 1977, the administrative expenditures of the Board corresponded to 3.6% of contributions collected and 2.2% of the QPP's total revenues for the year.

The staff of the Board belong to the Quebec civil service.[398] As we shall see further along, this is not the case, however, with members of the QPB's board of directors.

Like any other autonomous agency, the Board is obliged to submit an annual report of its activities to the National Assembly.[399] Its spokesman in the National Assembly is the Minister of Social Affairs.[400]

Before embarking upon a more detailed examination of the administration and internal organization of the Board, let us draw attention to the presence in Title II of the QPP of a procedural provision of extreme importance. We are referring to section 26, which stipulates the principle that decisions of the Board shall be *in writing* and the *reasons* for them shall be stated. The decisions concerned by this provision are those taken by the Board in the exercise of its adjudicative powers (to the exclusion, clearly, of regulations) and also a number of internal decisions affecting the "management" aspect of its activities. The same section also confers on the Board the power to revise or cancel its decisions "for cause", a power the importance of which already became evident in our examination of the treatment accorded to applications for benefits under the CPP.[401]

1. The board of directors

The board of directors has been, since 1972, the directing body of the QPB.[402] Before that time, the QPB had been administered by

three Board members, exercising directly very real and extensive powers. Such a structure appeared appropriate at the time of the implementation of the QPP and the establishment of the Board. Once this had been done, it was thought wise to enlarge and diversify the directing body so as to give it a more highly representative character and to divide its responsibilities among a greater number of individuals. One of the practical consequences of this change has been in the choice of the persons appointed to preside over the Board. While in the initial phase a senior civil servant was designated for this purpose, subsequently the government chose to entrust the Board to a judge of the Provincial Court. One can only conclude that this was done to ensure initially the establishment of the Board on sound principles of financial and administrative management; once this purpose had been accomplished, the primary object became to give the public a guarantee that their interests and claims would be justly dealt with.

All members of the board of directors are appointed by the Quebec Cabinet. The board of directors is composed of the President, who acts at the same time as Director General of the Board, two officials of the government of Quebec, and nine further members representative of the following sectors:

- the business community (two members),
- labour (two members),
- socio-economic groups (two members),
- businesses or individuals working in the field of social benefits for employees (one member), and
- beneficiaries of benefits paid by the Board (two members).[403]

Before making appointments in any of these categories, the Cabinet must consult the most representative bodies in the sector concerned: business organizations, the labour movement, agricultural interests, social service organizations, insurance and trust companies, and — as far as beneficiaries are concerned — associations for aged and disabled persons. Officials presently on the board of directors are the deputy minister of Revenue and an assistant deputy minister of Social Affairs.

The President of the Board is appointed for a term of ten years; other members of the board of directors hold office for three years.[404] Only the President is obliged to devote his time exclusively to the work of the Board and the duties of his office.[405] The board of directors meets approximately once a month. Six members constitute a quorum of the board.[406]

To facilitate the exercise of its powers, the board of directors, in accordance with section 23, has adopted by-laws for its internal management. The by-laws define its own functioning as well as the powers and duties of the directors and senior officials of the QPB. A portion of the by-laws deals with the constitution and functioning of the Reconsideration Committee.[407] This committee, responsible for reconsidering decisions rendered by officials of the QPB on applications for benefits,[408] will be the subject of further discussion in our study.

The President of the board of directors is also chairman *ex officio* of the Reconsideration Committee. The board assigns two of its members to sit on the Committee and appoints in addition, upon the chairman's recommendation, two regular and two substitute members from among the officials of the QPB.[409] Three out of five members constitute a quorum of the Committee. The chairman designates the Committee secretary, usually a lawyer from the Legal Branch of the Board, who does not take part in its deliberations.

The by-law whereby it is constituted delegates to the Committee all powers of the Board for purposes of reconsideration, including the power of conducting inquiries, provided by section 26*d*), and of acting upon applications for reconsideration made under section 194.

2. The central units

The Board maintains its corporate seat and headquarters at Quebec City.[410] It is here that its essential activities are concentrated, under the aegis of three "operational" branches (QPP, Family Allowances, and Supplemental Pension Plans) and seven "support" services (Finance, Personnel, Organization and Data-Processing, Communications, Actuarial Support, Medical and, finally, Secretariat and Legal). Of the first, only the QPP Branch need concern us. Among the second, we shall deal with the Secretariat and Legal Branch and the Medical Branch.

a) The QPP Branch

This Branch comprises three divisions, the activities of each one of which concern us to varying degrees. The Claims Division receives and processes applications for retirement and survivors' pensions. It has the unique characteristic of operating from two loca-

tions, one in Quebec and the other in Montreal, with each of the two subdivisions serving a part of the territory of the province. The Disability Division receives and looks after applications for disability pensions: as we shall see, it works in close liaison with the Medical Branch. Finally, the Benefits Division is in charge of paying benefits of all kinds.

Serving the three divisions is the so-called Technical Office, a small administrative unit charged with various functions, including the interpretation of the Act, the normalizing of operations, research, and — what concerns us primarily — the treatment of particularly difficult cases and of those brought before the Reconsideration Committee.

b) The Secretariat and Legal Branch

Especially close to the board of directors, this Branch provides the legal services that the QPB requires in carrying on its activity: it intervenes in the processing of applications presenting specifically legal difficulties, it takes an important part in the process of reconsideration, and it assumes in general responsibility for representing the Board before the appeal tribunal — the PAB up until 1975 and the Social Affairs Commission thereafter.

c) The Medical Branch

Though it stands completely apart from the QPP Branch, the Medical Branch has the task, essentially, of examining the medical file compiled for each disability pension application. The Branch consists of six physicians, two of them part-time, and a specialist in vocational guidance and occupational rehabilitation.

3. The decentralized units

The Board has established offices in eight of the nine regional centres (the exception being Sept-Iles), as well as at Drummondville. These offices occupy different premises from those of other administrative authorities dealing with social security matters.

The Quebec City and Montreal offices serve as headquarters for the decision-making process in the field of retirement and survivors'

pensions, at least for the majority of cases, thanks to the existence in each office of a Claims Division. In each of the two cities, some forty officials are assigned to the processing of applications for pensions.

The other local offices of the QPP take no part in decision making. Their principal task consists in informing the public. These offices do not even act as the exclusive distributors of application forms, which may be likewise procured from other Quebec government offices as well as from credit union branches. Even so, they serve as clearing-houses for approximately 15% of all pension applications submitted, the remainder being sent by mail directly to the Quebec or Montreal office of the QPB. Generally speaking, the district office is staffed by three individuals, one of them an investigator, of whom we shall have further occasion to speak.

The function of informing the public was to some extent centralized in 1975, with the establishment at the seat of the QPB of a telephone information service accessible, toll-free, from anywhere in Quebec. The clerks manning the telephone lines in this office have immediate access to beneficiaries' files, stored in the computer bank and instantly retrievable on the terminal cathode tube.

The fact that a clerk may accidentally misinform a member of the public as to his right to benefits has no binding effect on the Board. PAB caselaw is clear on the point, and has been confirmed by the SAC, that such misinformation cannot be invoked by a claimant to oblige the QPB to pay benefits where none are due under the Act.[411]

B. The initial decision

As in the case of the CPP, a distinction must be made between the processing of retirement and survivors' pensions, on the one hand, and that of disability pensions, on the other.

Sections 156 to 163g of the QPP, nonetheless, establish a number of general rules applicable to all types of pensions. Thus, sections 158 and 159 authorize the Board to pay interim benefits where the precise amount of the benefits payable could not as yet be definitively determined. Sections 160 and 160a define the time within which benefits shall be paid. Sections 161 and 161a specify the status of benefits with reference to the beneficiary's estate. Finally, sec-

tions 162 to 163g describe the recovery of overpayments, a subject to be discussed further on in some detail.[412]

Sections 156 and 157 are more directly concerned with this phase of procedure. They lay down, in particular, the following rules:

- to obtain a pension an application must be made for it: the initiative in the procedure must be taken by the claimant rather than by the administering authority;
- the application must be in writing; the applicant will not normally be heard in person by the decision-making body;
- the application must conform to the formalities prescribed by the Act and the regulations;
- the Board must forthwith examine the application and decide whether to accept or to refuse it, no time period for this action being specified;
- the Board must notify the applicant of the decision rendered immediately; this rule completes that of section 26, which provides that the notification must be in writing and must give reasons for the decision;
- the Board must inform the applicant of his right to apply for a reconsideration of the decision.

A certain number of procedural rules of some importance appear, furthermore, in the *Regulations respecting benefits,* adopted under section 226 of the QPP. Some of these add specifications to the provisions contained in sections 156 and 157. According to the regulations,

- the application may be presented by a person other than the prospective beneficiary, provided that the former demonstrates his qualification to do so either by virtue of the Act or by proving his mandate;[413]
- the application must be presented on the form prescribed for the purpose; a written declaration manifesting the applicant's intention to apply for benefits may, however, be accepted as equivalent to a notice of claim, provided that it is followed by an application according to the prescribed form;[414]
- the application must be addressed to an office of the Board;[415]
- the onus is on the applicant to produce in substantiation of his application the factual evidence establishing his right to benefits;[416]

- the Board may, in order to secure proof of any fact, require a sworn statement or the production of pertinent documents, or undertake an investigation;[417]
- the application may be cancelled within 30 days of the date of issue of the first benefit cheque, provided that the cheque has not been cashed and without the decision rendered on the application prejudicing the determination of any subsequent application.[418]

1. Applications for disability pensions

Conditions of eligibility for a disability pension or for a disabled contributor's child's pension are the same under the QPP as they are under the CPP. The contributor must be under 65 years of age and must have been contributing to the plan for at least five years.[419] He must be disabled, that is to say, he must be suffering from a severe and prolonged physical or mental disability, that is so recognized by the Board. A disability is severe only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation. It is prolonged only if it is likely to result in death or to be of indefinite duration.[420] Given the identity of the terms in which both the QPP and the CPP define disability, the interpretation of what constitutes a disability has evolved along identical lines in Quebec and federal caselaw. The jurisprudence of both plans coincides in holding that the severity of the disability must be judged in the light of both objective and subjective elements.[421] Yet, in Quebec as in federal caselaw, the definition of "substantially gainful occupation" is not limited to work in the applicant's usual field of employment, nor does the availability or otherwise of employment in the region of the applicant's domicile have any bearing upon the question of his capability to "regularly" pursue an occupation.[422] The child of a disabled contributor may apply for a pension if he is unmarried and under 18 years of age, or under 25 years of age provided that he is a student.[423] The amount of the pension is calculated according to sections 134 to 138 and 155. The conditions of payment are stipulated in sections 172 to 174 and 181 to 185; it is to be noted that no pension is payable before the lapse of four months following the date of the onset of the contributor's disability.

a) Initiation of the process

The envelope that the prospective applicant for benefits picks up at an office of the QPB, a Quebec government administrative

office or a credit union branch contains two forms. One of them, to be filled in by himself, is the application for pension; this form must be sent to the Disability Division. The other, to be filled in by the physician most qualified to inform the Board concerning the applicant's disability, must be sent by the latter to the Medical Branch. The claimant thus is in a sense instrumental in opening the two files necessary for the processing of his application.

On submitting his application, the applicant must enclose with it his birth certificate and possibly those of his children, as well as a form in quadruplicate, signed by him, authorizing any physician, hospital centre or other person that may have information or files on him to release to the Board whatever information it may require concerning his state of health.[424] With regard to the occupational antecedents of the applicant, the Board merely asks the claimant to indicate on his application his usual employment and the length of time that he has pursued it.[425]

The medical report form simply advises the physician that he must provide all information likely to be of use to the Board's medical advisers in establishing whether the applicant is suffering from a physical or mental sickness or infirmity of indefinite duration which renders him incapable regularly of pursuing an occupation enabling him to earn his living. The physician is urged to submit his report quickly in the interest of his patient and, if necessary, to contact the Medical Branch of the Board.

A leaflet published a few years ago by the Board and widely distributed among Quebec physicians can further enlighten the practitioner, however, as to the nature of the report expected of him. The leaflet explains that disability in the sense that the term is used for QPP purposes means total and permanent disability. This interpretation of section 109 of the Act is in contradiction to a PAB ruling, in which physicians were urged to submit a report of their medical opinion and findings in accordance with the standards defined in PAB caselaw rather than with their own usual criteria; the PAB expressly refused to equate "severe and prolonged disability" with "total permanent incapacity".[426] The leaflet advises physicians not to fill in the medical report if the applicant's condition is benign and obviously inadequate to justify his right to benefits. It invites the practitioner not to mention in his report aspects of his patient's condition without a bearing on his functional limitations, regardless of their interest from the purely medical point of view. It also suggests that the Board's assessment of the disability will take into

account non-medical factors (training, age, sex and occupational background), recommending that the physician in his turn inform his patient accordingly. Finally, the leaflet assures the practitioner that the Board recognizes the privileged nature of the information that he is to provide.

The form itself asks the physician to take into account the applicant's medical history, the conclusions drawn on his last physical examination, laboratory findings, previous hospitalizations, and the diagnosis and prognosis of the applicant's state of health. The practitioner is asked to give his opinion on whether the applicant is mentally capable of managing his own affairs. He is also invited to attach to his report any documents drawn from the patient's medical file that may be relevant.[427]

The present formulation of the medical report form has been recently criticized by the Social Affairs Commission in terms somewhat reminiscent of the warning given by the PAB to physicians. The SAC has noted that the breadth of the questions put to the practitioner and the excessively summary indications given him concerning the requirements of section 109 make the medical report far less useful and precise than those written by the expert physicians of the Board.[428] Hence the SAC has remarked on "a certain imbalance between the proof submitted and the counter-proof provided by the Board", an imbalance that the SAC proposes to remedy by expressly inviting the physician to give his opinion on the severity and duration of the disability in terms of the definitions provided under section 109.

No time limit is indicated for the submission of benefit applications. The claimant is warned on the application form, however, that in order to safeguard his right to full benefits he must submit it within the year following the onset of the disability. In fact, the Board may not fix the date of the claimant's disability at a point prior to the twelve months immediately preceding the submission of his application.[429] The applicant's tardiness in this respect may, however, be circumvented by his serving written notice within the one-year time limit of his intention to apply for a pension, as we have already remarked.[430]

b) Examination of the application

The role of the Disability Division is limited to verifying the documents in the file, with the exception of the medical data. Its

task, in other words, is to ensure that the conditions of eligibility as set out in section 120 have been met.

The responsibility of the Medical Branch consists in evaluating the applicant's disability in the light of section 109, on the basis not only of the medical report but also of the applicant's occupational background as revealed by his statements and by those of his physician. If the medical file is incomplete or imprecise, the Branch will make an effort to obtain additional information by contacting the attending practitioner or examining hospitalization records obtained with the authorization of the claimant and at the expense of the Board. The Medical Branch carries on its work collegially, with the orientation and occupational rehabilitation counsellor's participation.

If the Medical Branch is of the opinion that the attending physician's report is not conclusive, it can require the applicant to submit to further examination at the cost of the Board.[431] In practice, this right is rarely invoked at this phase of procedure. Since the applicant is obliged to obtain a medical report to substantiate his claim, the Board already has in its possession the results of a recent examination.

In the rare event that the Medical Branch should judge that a disabled claimant is likely to recover within the foreseeable future, it may provide for a medical check on him at that time.

While the assessment of the strictly medical aspects of the disability is arrived at by the physicians of the Medical Branch exclusively on the basis of their personal expertise, the evaluation of the claimant's prospects of being functionally rehabilitated depends largely on a listing of trades and occupations.[432] The counsellor's work consists essentially of identifying, by means of this book, employment possibilities suited to the claimant's residual capacity. These employment possibilities are regarded by the Board as simple illustrations of the type of work that the applicant remains theoretically capable of doing.

Once the Medical Branch has determined its findings, it advises the Disability Division accordingly. If the Medical Branch concludes that the application should be rejected, one of its physician-members drafts and signs a short report exposing the reasons for the recommendation. As the following example will attest, the report is often fairly vague in its indications:

> The medical documentation that we have been given indicates that the applicant has been very sick and continues to have some serious

complications following his recovery, but that these complications will not prevent him from being able to do light gainful work not requiring physical effort, for some years yet.

Considering the evidence that has been submitted, we are led to conclude that this person is not suffering from a severe and prolonged disability that would prevent him from pursuing a substantially gainful occupation.

It will be noted that this factual account makes no mention of any precise diagnosis. Indeed, the Board considers that any such disclosure would violate the privacy of communications between physicians and patients. Nor does the report, for that matter, specify any of the employment possibilities that the Medical Branch might have had in mind in declaring its belief that the applicant would be capable of doing "light gainful work not requiring physical effort". This is said to follow from the fact that, at this stage, the onus is on the claimant to prove the severity of his physical condition, that is, his incapacity to pursue an occupation enabling him to earn his living.[433] The Board will not be called upon to specify any employment possibility unless its decision is challenged by the claimant.

c) The decision

If the opinion of the Medical Branch is in favour of the application, the Disability Division informs the claimant accordingly, notifying him of the date effective when payment of his pension is to begin — four months after the date on which the claimant became disabled, in the opinion of the Medical Branch.

If, on the other hand, the Medical Branch recommends the rejection of the application, the Disability Division informs the claimant to that effect in a letter signed by its head. The same procedure is followed in cases where the Medical Branch has decided to set the date of commencement of the applicant's disability at a different time from that shown by the latter in his application. The notification is accompanied by a copy of the opinion of the Medical Branch to which the claimant is referred by way of justification for the Board's decision. It informs the applicant of his right to request reconsideration of the decision within one year, specifying the date on which the time limit expires. Until 1975, the notification also made mention of the applicant's right to avail himself of any new facts not previously taken into account — a tacit allusion to the power of revision conferred on the Board by section 26 of the Act. It would seem that applicants seldom made use of this power. Since

1975, an application form to reconsider the decision has been included with every letter notifying claimants of the rejection of their application. This practice appears to have increased substantially the number of requests for reconsideration.[434]

d) Benefit control

The purpose of benefit control in the sphere of disability pensions is to ensure that the beneficiary has not in fact regained his capacity of regularly pursuing any substantially gainful occupation. If the beneficiary recovers his health, and *a fortiori* if he pursues a regular (albeit part-time) occupation, he is considered to have ceased being disabled. To make the continued control of benefits possible, section 226*j*) and *k*) authorizes the Board to require, by regulation, all beneficiaries to submit to periodic medical examinations so as to maintain their eligibility for a disability pension.[435]

In certain cases, the Medical Branch might be in a position to foresee, on examining the claimant's application, the likelihood of his recovery within a certain period of time; in such an event, the Medical Branch can prescribe a medical examination of the claimant at a predetermined date. Such cases, however, are relatively infrequent.

A systematic check on any income that disability-pension beneficiaries might derive from employment becomes possible on the basis of data extracted by the Department of Revenue from the income tax returns filed annually by taxpayers. This method of control has, of course, the unavoidable disadvantage of not signalling the beneficiary's return to employment until several months after the fact.

Up until 1977, the Board had no alternative method of verification available to it than periodic checks on the status of beneficiaries selected at random.

In 1977, however, more than 13,000 questionnaires were dispatched to beneficiaries concerning their occupation activities during the preceding year. Beneficiaries' failure to answer the questionnaire within the prescribed period entailed the automatic suspension of pension payments.[436] As a result of this operation, some thirty individuals no longer entitled to receive disability benefits were ferreted out.[437]

In the area of contributors' children's pensions, the Board has for several years now exercised control over the school attendance and marital status of beneficiaries aged between 18 and 25 years. The Board's efforts at verifying the eligibility of this class of beneficiaries have progressively intensified over the years; in 1977, all recipients of such pensions were subjected to verification. The stringent control exercised in this area results, in practical terms, in the disqualification of several hundreds of beneficiaries each year.

2. Applications for retirement and survivor's pensions

Recent changes in the QPP have considerably diminished the difference that had gradually arisen between the CPP and the QPP since 1975.[438]

Thus, an eligible contributor now acquires an absolute right to the full amount of his pension, regardless of what income he may derive from employment, as soon as he attains the age of 65, rather than (as used to be the case) at the age of 70.[439] From the point of view of administrative procedure, this change has done away with the necessity of continually controlling the earnings of beneficiaries of retirement pensions under the age of 70. The rules governing the calculation of the amount of the retirement pension have not, however, changed.[440]

With regard to the surviving spouse's pension, the only source of problems in this area of benefits has been, as in the case of the CPP, the settlement of conflicting claims presented by the legal spouse and the *de facto* spouse of a deceased contributor. The federal and Quebec plans have evolved in much the same direction in dealing with these problems.

In our discussion of the CPP, we made allusion to PAB caselaw on two questions arising out of section 63 of the federal plan: the extent of the Minister's discretionary power[441] and the relation between the second and third subsections of section 63.[442] Changes effected in the formulation of the section, in 1975, have greatly simplified its application by eliminating the need to presume the legal spouse's predecease, a condition considered essential in PAB caselaw to the recognition of the common-law spouse's entitlement to a pension. The changes have also mitigated the stringency of the requirements to be satisfied by the common-law spouse in order to qualify for a pension: it is no longer necessary for the deceased

contributor to have supported the common-law spouse during his lifetime, and the minimum period of cohabitation has been reduced from 7 to 3 years in cases where either partner was married and from 2 ("a certain number of years") to one year in cases where neither partner was married.

The QPP, whose original provisions on this subject were identical to those of the CPP, was of course interpreted in precisely the same way by the PAB as the federal plan.[443] In the aftermath of the transfer of appeal jurisdiction in QPP benefits to the Social Affairs Commission, however, the latter chose to disregard the PAB's ruling in this regard completely. On the one hand, indeed, the SAC has claimed for itself total authority to review all aspects of decisions made by the Board in applying sections 105 and 107 — even those which involve an element of discretionary judgment.[444] On the other hand, the SAC has held that the manifest intent of the legislator in sections 119*d*), 105 and 107 was to ensure that the deceased contributor's pension would be enjoyed by his real spouse, whether legal or *de facto*. Viewed in this light, section 105 would appear to create a right in favour of the *de facto* spouse, so that if the latter could demonstrate that he or she can meet the stringent requirements of this section, the Board could not refuse to exercise in his or her favour its discretionary power except for very weighty reasons or in altogether exceptional circumstances. As for section 107, its object is to deprive the legitimate spouse of the right conferred upon him or her by section 119*d*), when he or she is unworthy of it; the section can be applied independently of section 105, to which it is in no sense prerequisite.[445] Indeed, this section was judged to be unduly moralistic by the SAC,[446] which consequently recommended that it be repealed.[447]

These recommendations were acted upon by the legislator in 1977. Section 107 was rendered inoperative in the case of any contributor whose death occurred after July 19, 1977. By contrast, the Commission's proposal for reforming section 105 was adopted only in part.[448] The need for the spouse to demonstrate that the deceased contributor had provided for his or her support was repealed; but the minimum period of cohabitation in the case of *de facto* couples, one of whose members was married to some other person, was to remain unchanged at seven years. The QPP, in other words, remains more demanding on this point than the CPP.

Provisions concerning orphans' pensions and death benefits are the same in the QPP as in the CPP.[449]

Whatever the nature of the benefits applied for, all applications for QPP benefits are treated according to the same procedure, leading to a decision by the Claims Division.

a) Initiation of the process

The Board prescribes the use of a particular form for applying for retirement and for survivor's pensions. Each of the two forms contains a brief description of the conditions of eligibility and of the manner of payment of the pension in question.

The only supporting document that an applicant must produce in substantiation of his claim for a retirement pension is his birth certificate.[450]

Every application for survivor's benefits must be accompanied by a statement of the deceased contributor's pensionable earnings, if the contributor was a wage-earner at any time during the year of his death or in the year immediately preceding it.[451] This statement consists of a copy of the contributor's tax slips or, if these are not available, of an attestation by his employer. The requirement is due to the possibility of several months' lag between the earning of the income, their declaration for tax purposes and their entry into the QPP's Record of Earnings.

To substantiate an application for surviving spouse's benefits, the applicant must provide documentary proof of the contributor's death, a copy of his own birth certificate, and the applicant's and contributor's marriage certificate. The application form is explicit in stating that a person other than the legal spouse of the contributor may present a claim for a survivor's pension; in such an event, the Board undertakes to let the applicant know what evidence the latter must provide in order to meet the requirements of section 105. The evidence concerns the fact of cohabitation between the claimant and the deceased contributor, the duration of their cohabitation, and the public recognition of their living together. The applicant's statement in this regard may be considered sufficient unless contradicted by the legal spouse. The applicant may also produce testimony by third parties (friends, relatives or neighbours). If the representations made by the various parties appear contradictory to the Board, the latter may authorize enquiries to be undertaken by the investigator attached to its local office and demand the deposition of sworn state-

ments.[452] Until 1977, the applicant had also to prove that the deceased contributor had provided, either in whole or substantially, for his or her support.[453] This proof could be furnished by means of a comparative statement of the applicant's and contributor's incomes during their period of cohabitation; the Board already possessed sufficient additional information on this point, thanks to its record of contributors' earnings.[454]

To substantiate an application for orphan's benefits, the applicant need merely submit a birth certificate; in the initial stage of the procedure, the Board does not require proof of attendance at an educational institution from an orphan between 18 and 25 years of age.

Obviously, every application for death benefits must be supported by proof of the contributor's death. The applicant must also establish his title to claim as the deceased contributor's heir, or the fact that he assumed the expense of the contributor's last illness or his interment.[455].

No time limit is laid down for the submission of applications, except with regard to claims for death benefits which, effective from 1977, must be submitted within five years of the date of the contributor's death.[456] For all other types of benefits the only limitation that applies is that no application can be made retroactive to more than twelve months.[457] Conversely, no application may be submitted for a retirement pension more than six months before the pension becomes due.[458]

b) Examination of the application

Upon receiving an application, the Claims Division, either in Quebec or in Montreal, checks the contents of the file, particularly with regard to the exactitude of the dates and the authenticity of the supporting documentation. If the file is complete, it transmits its decision to the Benefits Division. The computerized roll of beneficiaries is updated once a week; theoretically at least, a favourable decision can thus be put into operation in as little as five working days. In practice, depending on the state of the file and the number of applications pending (which varies with the time of year and the part of the month), two to four weeks may pass before an application is processed.

A certain number of cases are, however, set aside. These include cases involving the application of section 105 (and, until 1977, of section 107), and a variety of difficult or doubtful cases enumerated in the service instructions issued by the Technical Office. Prior to 1972, the settlement of these matters devolved upon the Board directors themselves. As a result of the 1972 reorganization of the Board, jurisdiction over these claims was transferred to the President-Director General,[459] who in turn delegated the exercise of his authority to the Technical Office.

Before transmitting these "contentious" or "reserved" cases to the Technical Office, the Claims Division undertakes to complete the files by conducting an investigation at the level of the regional office. The Division then prepares a short report summarizing the facts and identifying the issues to be resolved.

At the Technical Office, a team of three agents examines the file, requests any further information that may be necessary, and prepares a draft decision for submission to the head of the Claims Division. If the latter disagrees with the agents' recommendation, the matter is referred to the head of the Technical Office. Should disagreement persist, the Legal Branch is consulted on the matter. The procedure, in fact, is reminiscent of that used in the Claims and Benefits Division of the Department of National Health and Welfare, in similar circumstances.[460] Once the decision is made, the reasons for it are summarized and placed on file, to be used to justify the decision and to serve in the event of a request for reconsideration.

c) The decision

Negative decisions for reasons of insufficient contributions[461] are communicated to applicants by means of a computer-printed form sent out by the Benefits Division. The print-out includes, among other things, a mention of the applicant's right to ask for reconsideration, a form for addressing such a request to the Board and the telephone number of the information service.

All other decisions, however produced and whatever their effect, are transmitted to applicants by the Claims Division. The form letter utilized for the purpose allows the reasons for an unfavourable decision to be summarily set forth. It also indicates the possibility of an applicant's requesting a reconsideration of the decision, and is accompanied by a copy of the form to be used for that purpose. If

the decision is favourable, the notification provides an indication of the amount of the pension allocated, the date on which it becomes payable, and the date on which the applicant may expect to receive the first payment.

d) Benefit control

Up until the present, the efforts of the Claims Division to ensure the continued control of retirement and survivor's pensions have been focused primarily on the verification of any income derived from the pursuit of an occupation by beneficiaries of a retirement pension[462] and on checks upon any change in attendance at an educational institution by recipients of orphans' benefits.[463] Each year approximately one-half of the beneficiaries in each category are called upon to declare their income or to provide evidence of the fact that they are still attending an educational institution. The exercise of these controls has brought about the disqualification of thousands of beneficiaries in both categories, but especially in the category of orphans, over the years.[464]

The need for exercising this sort of control over recipients of retirement pensions was eliminated in 1977, with the lowering of the statutory age at which contributors acquire an absolute right to their pensions, regardless of employment, to 65 years.

C. Reconsideration

The procedure laid down for the reconsideration of decisions, under sections 194 and 195 of the QPP, is one of the most interesting features of the decision-making process as it was framed by the Quebec legislator. At first glance, the recourse made available to the dissatisfied applicant for benefits may seem roughly equivalent to the appeal to the Minister, as provided by section 83 of the CPP. Both the structure of the Board and the conduct of the procedure, however, impress a radically different character on the process of reconsideration, as we shall have occasion to see.

The recourse created by section 83 of the CPP involves, in effect, the same administrative units, and the decision on the appeal emanates from the same authority, as were implicated in the original decision. By contrast, the reconsideration procedure of the QPP brings the disputed decision before a higher level of the internal

hierarchy of the Board. Thus, without affording an opportunity for contentious review — since it does not initiate controversy before an authority distinct from the decision-making authority — the procedure resembles hierarchical review rather than simple reconsideration of the decision.

It is worth recalling here that the case under reconsideration is brought before the QPB's board of directors, which has delegated authority for dealing with it to its Reconsideration Committee, chaired by the President-Director General.[465] Although two of the five committee members are Board officials (albeit chosen by the board of directors), the majority is constituted of individuals unconnected with the decision-making services and in fact not members of the civil service at all, and thus less likely to be predisposed in its favour. We must also be mindful of the fact that the present President-Director General of the Board is a judge.

Decisions concerning the allocation of a pension are not the only ones subject to the reconsideration process. A contributor can also use the recourse as a means of contesting the amount of his pensionable earnings as established by the Board and communicated to the contributor in accordance with section 200.[466] Actions of this type are prescribed in four years from the date on which earnings or contributions were entered on the Record of Earnings, although the Board may proceed after the expiry of this period to increase the contributions in the light of new facts or to transfer amounts credited from one contributor to another.[467] Finally, a contributor who has already requested a statement of earnings can resort to the reconsideration process in order to challenge a subsequent reduction of the contributions credited to his account, a reduction of which the Board is obliged to inform him.[468]

1. Initiation of the process

The application form for reconsideration that now invariably accompanies every notice of an unfavourable decision transmitted to an applicant invites him to present in ten to fifteen lines the reasons why he feels that the decision rendered in his case ought to be reconsidered and to submit documentation to support his contention. The notification informs him that he must submit his request for a reconsideration within the twelve months that follow the initial decision. In view of the length of time allowed for such applications, it is hardly surprising that, particularly in disability claims, the applicant

can often adduce new facts to support his request for a reconsideration.

The Board is not excessively formalistic in defining what amounts to an acceptable application for reconsideration. It will generally accept mere letters from applicants exposing specific reasons for their disagreement with the initial decision. Even though the Board will subsequently invite the applicant to specify his reasons on the prescribed form, it will usually accept a letter declaring the applicant's intention to ask for a reconsideration as sufficient notice and will date the process from the receipt of the letter.[469]

The Reconsideration Committee may, of course, refuse to entertain an application not submitted in time. Its refusal to do so constitutes a preliminary decision on jurisdiction rather than a decision on the merits of the case, and as such it may not be subsequently appealed to the Social Affairs Commission, given the formulation of section 196.[470]

2. Preparations for the sitting

If the application for reconsideration concerns a retirement pension or survivor's pension (as it does in 20% to 30% of the cases), it is referred to the Technical Office. This means that an application initially "set apart" for reasons of difficulty may in fact find its way before the very same officials that originally dealt with it. The reconsideration procedure does not indeed differ from that which preceded the initial decision. After evaluating any new facts introduced by the claimant and asking, if necessary, the regional office to carry out further enquiries, the officials of the Technical Office draft a recommendation to the head of the Claims Division. If the latter disagrees with the recommendation, the head of the Technical Office and the Legal Branch are brought into play. The solution finally chosen constitutes the opinion of the QPP Branch, and is submitted as such to the Reconsideration Committee.

If the application for reconsideration concerns a disability pension, it is first scrutinized by the Disability Division. Should the Division conclude that the application ought to be rejected for other than medical reasons (as, for example, on the grounds of insufficient contributions), it will itself formulate an opinion for submission to the Reconsideration Committee. If, on the contrary, the Disability Division judges that the application raises medical issues, it will refer

the matter to the Medical Branch with a request to reassess the medical file.

Given the collegial manner in which the Medical Branch functions, the file will in all likelihood pass through the hands of some of the very physicians that had initially examined it.

A request for reconsideration is often accompanied by new medical evidence. As a matter of course, however, the Medical Branch always at this stage seeks the advice of a specialist of its own choosing. This specialist, usually practicing in the vicinity of the claimant's domicile, is asked to examine the latter, the Board assuming the travel expenses of the applicant and a companion as well as the specialist's fee.

In the light of the new medical evidence put before it, the Medical Branch may conclude that the request for a reconsideration is obviously well-founded. If so, it can avail itself of the power to revise its opinion, under section 26, and transmit to the Disability Division a medical assessment recommending that a new decision be made. Such action will, of course, automatically terminate the claimant's recourse against the initial decision. It would appear, however, that this mechanism is seldom utilized.

The time required by the Medical Branch to reconsider a case will vary substantially, depending upon the availability of the examining specialist retained by the Board. In general, it will range between one and three months.

The climate in which an application for reconsideration is processed can considerably differ from that prevailing at the examination of an initial application. Whereas initially the burden of proving his claim is on the applicant, the Board assumes to a certain extent the onus at the level of reconsideration. The Board's decision having been challenged, it attempts to make certain that nothing in the file would justify the payment of a pension.

Prior to being submitted to the Reconsideration Committee, all files are examined by the Legal Branch, which may ask for further study of a case if it finds itself in disagreement with the recommended solution (except in respect of the medical findings). If the disagreement persists, the head of the QPP Branch intervenes to arbitrate the dispute and to formulate the opinion to be submitted to the Reconsideration Committee. The Legal Branch lends its aid by

preparing a concise synopsis of the case clarifying the points at issue and summarizing the pertinent caselaw. It also assumes responsibility for organizing the sittings of the Reconsideration Committee and for making up the roll of cases to be heard.

3. Sitting of the Reconsideration Committee

The Committee holds its sittings on the Thursday of every week. Three members out of five constitute a quorum.[471] In practice, the President-Director General is invariably present. Other participants in the proceedings include a physician attached to the Medical Branch or a member of the Technical Office, who is responsible for presenting the conclusion retained by the QPP Branch; a member of the Legal Branch, who acts as secretary to the meeting; and a lawyer charged with enlightening the Committee on points of law in general and on the provisions of the QPP in particular.

Very infrequently, an applicant will ask permission to appear, with or without his lawyer, before the Reconsideration Committee. Even though no regulation confers any rights on claimants to be heard by the Committee, the latter has never refused to admit those who wished to appear before it.

After presenting the case, the representative of the Medical Branch or the Technical Office is questioned by members of the Committee, who have all read the case summary prepared by the Legal Branch and made themselves familiar with the file. A discussion ensues, at the end of which the Committee attempts to achieve unanimity. In fact, there is seldom serious disagreement among the members. The secretary drafts the decision and submits it to the Committee for approval. The decision must have reasons assigned to it,[472] though it tends generally to conform to standardized formulations, such as the following:

> The claimant requests that the decision of the Board, dated , refusing to accord him the disability pension for which he has applied, be reconsidered.
>
> Considering that one of the conditions of disability as laid down by section 109 is that the disability must be severe, and that the same section stipulates that a disability is not severe unless it renders the person incapable regularly of pursuing a substantially gainful occupation;

Considering that, judging from the medical evidence produced at the time of the initial application, it was concluded that the applicant was not severely disabled within the meaning of the Act;

Considering that, following the request for reconsideration, the Committee authorized a further medical examination to take place, the results of which have not changed the original conclusions;

IT IS DECIDED that the initial decision be maintained.

The applicant is notified of the Committee's decision, by registered letter signed by the secretary of the QPB, within one or two weeks of the sitting. The notification is accompanied by a copy of the Committee's decision, to which the applicant is referred for the reasons underlying the decision. The secretary's letter also informs the claimant of his right to appeal to the Social Affairs Commission within a time limit of 90 days. It stresses the fact that the SAC is completely independent of the Board; that the appeal must be lodged by means of a declaration upon the receipt of which the secretary of the SAC will inform the appellant of what further steps need to be taken. A leaflet attached to the letter quotes the text of section 196 of the QPP, and provides the address of the SAC.

The contents of the letter have changed little from the time when appeal jurisdiction in the sphere of QPP benefits was exercised by the PAB. The notification used at that time invited the claimant to address himself to the Registrar of the PAB in order to ascertain what steps he would have to take so as to appeal the decision. We shall discuss the difficulties to which this formulation gave rise in chapter 4 of our study.

4. Statistics on reconsideration

Since 1968, the year during which the first requests for reconsideration were received by the Board, the number of cases heard, first by members of the Board, and later by the Reconsideration Committee, has increased rapidly, as reflected by Table XXII. Indeed, in a mere matter of two years, from 1975 to 1977, the number of requests for reconsideration has doubled. There is reason to fear that if current trends persist, the proper functioning of the Reconsideration Committee as it is presently constituted may be jeopardized by the very volume of business.

One possible solution to the problem may be a change in the composition of the board of directors along the following lines. The Act might require that the President-Director General be a judge of the Provincial Court; two further members of the board of directors might be appointed from among the judges of that Court or from the Bar by the Cabinet, upon motion made by the Minister of Justice after consultation of the Bar. The board of directors could thus form itself into three Reconsideration Committees, each one under the chairmanship of a jurist.

TABLE XXII

APPLICATIONS FOR RECONSIDERATION, UNDER SECTION 194 OF THE QPP

Year	Decisions rendered	% disability	Initial decision reversed	Initial decision affirmed
1968	16	n.d.	n.d.	n.d.
1969	40	n.d.	7 (17%)	33 (83%)
1970	118	n.d.	45 (38%)	73 (62%)
1971	284	61%	144 (51%)	140 (49%)
1972	443	n.d.	252 (57%)	191 (43%)
1973	708	n.d.	423 (60%)	385 (40%)
1974	822	84%	463 (56%)	359 (44%)
1975	1056	79%	655 (62%)	401 (38%)
1976	1649	70%	861 (52%)	788 (48%)
1977	1934	72%	1022 (53%)	912 (47%)

Source: QPP Annual Reports

The overall rate of success of claimants before the Reconsideration Committee appears to have stabilized at slightly over 50%. A distinction must, however, be made between disability-pension claims and other claims. In the former, applicants' rate of success has typically attained figures as high as 70%. In the vast majority of cases, the reversal of the initial decision is a consequence of new medical evidence concerning the applicant's state of health at the time of his application. For the rest, the Committee's favourable decision on reconsideration is due to an actual deterioration in the applicant's state of health at a period subsequent to the initial application. By contrast to disability pension claims, the rate of success of applicants for other benefits is barely over 10%.

D. Recovery of overpayments

Sections 162 to 163g concern the recovery by the Board of unjustified benefit payments. Equally pertinent to this matter are the penal provisions of section 230.

Benefit overpayments occur most frequently in the case of orphans or disabled contributors' children over the age of 18 who have ceased to attend educational institutions, disabled contributors that have re-entered the labour market, and surviving spouses that have remarried.

On notifying the various categories of claimants of the acceptance of their applications for benefits, the Board reminds them of their obligation to report any change in their status that might have a bearing upon their continued eligibility. Applicants are subsequently reminded of their duty to inform the Board, in a booklet entitled "The Beneficiary's Guide". The booklet stresses that a beneficiary's failure to comply with this provision of the Act constitutes an offence exposing the offender to possible sanctions. A particularly explicit warning is addressed to recipients of disability pensions, who are invited emphatically to contact the Board in order to ascertain whether their earnings are such as to disqualify them from receiving a pension.

The Board may become aware of an overpayment of benefits as a result of the voluntary disclosure of a beneficiary, a check on the income tax return filed, the random sampling of pension recipients, or a demand for proof of school attendance. Occasionally, the Board learns of the overpayment of benefits from a disgruntled applicant who, on finding his own claim refused by the Board, denounces another in the identical situation that is receiving benefits.

As soon as the overpayment is discovered, the further payment of benefits is immediately suspended and the beneficiary is formally called upon to refund the amount paid to him in excess of that to which he was entitled.[473] The notice to the beneficiary accompanies a decision by the Board, rendered by virtue of the revision powers granted by section 26, declaring the beneficiary ineligible. This decision, as any other bearing upon a claimant's entitlement to benefits, is subject to reconsideration and, ultimately, to appeal to the Social Affairs Commission.[474]

Most often, the beneficiary, instead of contesting the Board's claim by availing himself of sections 194 and 196, chooses rather to

submit that the full and immediate repayment of the debt, as required by section 162, would cause him undue financial hardship. The matter is then handed over to the Technical Office, which undertakes, through the agency of the regional office, an investigation of the debtor's financial circumstances. The Technical Office may, if the situation warrants, come to an agreement with the debtor to withhold a portion of the benefits still due to him.[475] The amount so withheld is never in excess of 50% of the benefits payable.

Section 163 authorizes the Board, "having regard to the circumstances", to remit the debt. If the amount of the beneficiary's indebtedness is less than $200, the head of the Technical Office may decide, on his own initiative, to remit it; for amounts in excess of that figure, the decision must be made by the board of directors. The QPB seldom grants a partial remission.

If a debtor has failed to discharge his obligation by the end of the period allowed him for recourse, or after having exhausted all recourses available to him, the Board could apply to the Superior Court or the Provincial Court (depending on the size of the debt) for homologation of the debt to be pronounced against him. In practice, this process has never been resorted to by the Board. Nor has the Board instituted criminal proceedings against any beneficiary under section 230, for fraud practiced for the purpose of obtaining benefits, the wilful negotiation of a cheque drawn in payment of benefits to which the individual was not entitled, or his deliberate failure to return such a cheque.

E. Sanctions

The QPP makes no provision for the imposition of administrative penalties. Sections 230 to 234, however, prescribe criminal sanctions for certain acts in addition to those already enumerated: the use of fraud in obtaining a Social Insurance Number, the securing of more than one Social Insurance Number, and the unauthorized disclosure of privileged information obtained for QPP purposes by an official of the Board. Offenders must be prosecuted under the *Summary Convictions Act*. The penalties provided consist exclusively of fines which, by virtue of section 234, must be paid to the Board.

CHAPTER 4

Procedure before the PAB

The various processes that we have described in preceding parts of this study all culminate in decisions liable to being contested by means of appeals to the PAB. Different as they are in their subject matter and origin, in their mode of elaboration and form, the decisions continue to be governed by distinct procedural rules even at the level of the PAB. As we have explained in chapter 1 of this study, there are, in fact, several distinct regulations on procedure before the PAB, each procedure applying to a different area of the Board's jurisdiction.[476] However, appeals in the sphere of unemployment insurance contributions are not regulated by any text apart from some of the provisions of the *Unemployment Insurance Act*; the procedure used in this area has been taken, with only minor modifications, from that applicable to CPP contributions. Despite the great formal diversity of procedures, there is nevertheless a considerable degree of similarity between the procedural rules governing the PAB's various jurisdictions. Yet, it is necessary to distinguish carefully between certain aspects of appeals in matters of contributions and those in matters of benefits.

The conduct of procedure before the PAB will be accordingly described in this chapter in general terms, features peculiar to specific types of appeals being especially noted wherever they occur. We shall distinguish four phases within this process: the initiation of the appeal, preparations for the hearing, the hearing, and the decision. The chapter will conclude with some observations concerning the question of judicial review of PAB decisions.

Unless otherwise stated, the statistical data presented throughout the present chapter has been based on our sample of 53 cases liquidated by the PAB between July 1, 1975 and December 31, 1976. Of these, 38 concerned CPP benefits, 12 CPP contributions and 3 unemployment insurance contributions.

SECTION I

Initiation of the appeal

It is at this stage of procedure that the distinctions between various types of appeals to the PAB are most marked.

On the one hand, we must evidently differentiate between those jurisdictions wherein the right to appeal is absolute (CPP and QPP contributions) and those wherein the right is contingent upon the leave of the appellate tribunal. The need to secure such leave adds one further step to procedure.

On the other hand, we must distinguish between areas in which the PAB serves as the first level of contentious review (CPP and QPP contributions and, prior to 1975, QPP benefits) and those in which it functions as the second level (following the Review Committee, in the case of CPP benefits, and following the Umpire, in the matter of unemployment insurance contributions). In the former, the appeal must of necessity be initiated by a member of the public, whereas in the latter, the appellant may be the administering authority that handed down the contested decision. In the latter event, we must take into consideration an administrative process that precedes the appeal of the Minister. This is especially the case in matters connected with CPP benefits.

A. The administrative process prior to appeal by the Minister

As we have explained, at the conclusion of the procedure before the Review Committee, the secretary of the Committee makes a report to the Appeals Section of the Department of National Health and Welfare.[477] The report, which is added to the Committee decision and to a copy of all documents produced at the hearing by the appellant, summarizes the arguments presented by the appellant be-

fore the Committee; it identifies the persons whose testimony the appellant submitted in evidence and the individual who pleaded his case before the Committee. The secretary's report is completed by that of the head of the district office who, as the Minister's representative before the Committee, expresses his opinion as to whether the Minister should exercise his right of appealing the decision to the PAB. Needless to say, the Minister's representative usually recommends that such action be taken only when the decision rendered is unfavourable to the Minister. Nevertheless, when, in the representative's view, the decision of the Review Committee was ill-founded, he may propose either that the initial decision be reviewed or that an appeal by the unsatisfied claimant for benefits not be contested before the PAB.

The Appeals Section submits this report to the Disability Assessment Division or the Claims and Benefits Division, as the case may be. The Division concerned then decides whether to lodge an appeal or not, basing its decision not only upon the merits of the case at issue but also upon the usefulness of submitting an as yet unresolved question of interpreting the CPP to the PAB's judgment. If the Division decides that an appeal would be justified, it transmits the file to the Department of Justice, which assumes the task of initiating the appeal. The entire process must obviously take place within the 90-day period following the decision, the time limit allowed for lodging an appeal.

In our description of Review Committee procedure, we have already mentioned that the secretary of the Committee, as a matter of routine, transmits to the Registrar of the PAB a copy of the case file, the documents produced at the hearing and the decision of the Committee, as soon as the hearing is ended.[478] The Registrar keeps the material at least until the time for lodging an appeal has expired or, if appeal proceedings are begun, until the termination of the procedure before the PAB.[479]

B. Leave to appeal

The exercise of the right of appeal is subject to the leave of the PAB in cases concerning unemployment insurance contributions and of the Chairman in cases concerning CPP benefits. The Chairman had also to authorize appeals in cases concerning QPP benefits, as long as the PAB exercised jurisdiction in the field (that is, prior to 1975).

1. In matters of CPP benefits

The party wishing to lodge an appeal against the decision rendered by the Review Committee must apply for leave to do so to the Chairman of the PAB.[480] The application must include a clear indication of the contested decision, a statement by the appellant as to whether he is to be represented by another for purposes of the appeal, and a description of the grounds for both the application for leave to appeal and the appeal itself.[481] The distinction between the grounds for the party's belief that the PAB should permit him to lodge an appeal and the grounds for reversing the contested decision must seem somewhat over-subtle to the average claimant dissatisfied with the judgment of the Review Committee. In fact, it is doubtful whether many appellants are conscious of what the distinction entails. Happily, the *Rules of Procedure of the PAB* contain a provision covering irregularities of procedure, authorizing the Chairman to show considerable latitude in deciding what will amount to an acceptable application for leave to appeal.[482] The appellant may attach to his request all the documents that he may consider useful in substantiating his application.[483]

The application may be presented by the appellant's representative instead of the appellant himself, provided that the former can establish the authority on which he is acting. Where the rights of several claimants to benefits arises by virtue of contributions paid by one and the same contributor, they may present a joint application.[484]

The application must be communicated either in person or by registered mail to the Registrar within the 90-day period provided for lodging an appeal.[485] Judging from the cases constituting our sample, the appellant presented his application for leave to appeal, on the average, 48 days after the decision of the Review Committee had been made.

The Chairman of the PAB rules on the application in light of the file forwarded by the secretary of the Review Committee and the arguments invoked by the appellant. The Chairman may require the production of additional information or documents in substantiation of the request, but in principle he does not give the parties a preliminary hearing.[486] According to our sampling of cases, the Chairman's decision is usually handed down within eleven days of the receipt of the application. The criteria on which the Chairman bases his decision to hear or not to hear an appeal are the same as

those used by a court: he rejects only manifestly futile appeals or those obviously vexatious in intent.[487] In practice, as we have seen in chapter 2, the proportion of applications rejected by the Chairman is about 11%.

Neither the CPP nor the *Rules of Procedure* require the Chairman to give reasons for his refusal to hear an appeal. The Registrar's notification to the claimant, nevertheless, always includes reasons to justify the Chairman's decision.

2. In matters of QPP benefits

Appeals against decisions rendered by the Quebec Pension Board following the reconsideration of an application for benefits used also to be subject to the leave of the Chairman of the PAB.[488] Requests for leave to appeal under the QPP were governed by provisions identical to those still applicable to the CPP.[489] This phase of the procedure, however, gave rise to considerable difficulty and delay. In fact, the QPB did not, as a matter of routine, transmit to the Registrar of the PAB the files on which its Reconsideration Committee had ruled. The Chairman had, accordingly, little more to base his decision on whether to hear the appeal or not than the documentation that the appellant may himself have submitted. Since the appellant had never been advised by the QPB that it was up to him to forward the necessary documentation together with his application for leave to appeal, the PAB was more or less compelled to go in quest of this information to the appellant or to the QPB.[490]

The delays occasioned by this state of affairs caused the PAB to make regular use of the power conferred on it by the *Rules of procedure* to consider the application for leave to appeal as an application for extension of the time limit to lodge an appeal.[491]

As we have noted in chapter 2, the PAB Chairman rejected approximately 16% of the applications presented to him by QPP claimants for leave to appeal their cases to the PAB.

3. In matters of unemployment insurance contributions

Section 86 of the *Unemployment Insurance Act* requires that the PAB authorize any appeal against a decision rendered by the Um-

pire. Like any other decision of the PAB, the decision must be handed down by a quorum of three members.[492] Since, however, in the absence of precisely applicable provisions on this question, the PAB in fact follows the same rules of procedure as in dealing with cases in the sphere of benefits, it does not hold a hearing before ruling on the application. In practice, the PAB has never refused leave to appeal to claimants in the sphere of unemployment insurance contributions.

C. Extension of the time limit for appealing

All the provisions which create a right of appeal to the PAB, with the exception of section 86 of the *Unemployment Insurance Act*, fix the time limit for appealing at 90 days and permit the PAB or one of its members to grant an extension of the time limit. No time limit is specified in appeals in the sphere of unemployment insurance contributions.

The provisions are not uniform, however, as to the time limit within which applications for an extension must be presented. While in cases concerning CPP or QPP contributions, the appellant must request an extension before the expiration of the 90-day period following notification of the challenged decision, section 85 of the CPP is more permissive in allowing the appellant to request to be exempted from complying with the time limit at any time. In practice, our sampling of cases includes only one instance in which the appellant applied for leave to appeal a decision concerning CPP benefits more than five months after the Review Committee had rendered its decision.

Evidently, the PAB insists that there be valid and serious reasons for the appellant's failure to comply with the statutory time limit, and not simply his neglect to act in time. The application for an extension must, indeed, set out these reasons as well as specify the additional time asked for by the appellant.[493] In other respects, the application is subject to the same rules as the application for leave to appeal is. The application is ruled upon by the Chairman, upon its own merits and, in the case of CPP benefits, upon the merits of the case file transmitted by the secretary of the Review Committee.[494] A refusal is invariably accompanied by reasons justifying it, even though no such justification is prescribed by any provision.

D. Notice of appeal

The matter before the PAB is formally opened by means of a notice of appeal. In areas of jurisdiction where no leave to appeal need first be obtained, this notice must be filed with the PAB within the 90 days which follow the rendering of a contested decision. Among the CPP contributions cases included in our sample, there was no case in which this time limit had not been complied with; on the average, appellants had lodged their appeals 65 days after the Department of National Revenue had handed down its unfavourable decision. In other types of cases, applications for leave to appeal are considered as tantamount to notices of appeal.[495]

The notice of appeal must identify the date, nature and subject of the challenged decision, as well as the arguments of fact and law invoked by the appellant in support of his contention.[496] Needless to say, the PAB must frequently practice considerable flexibility to acknowledge as sufficient and acceptable notices of appeal which do not in fact fully meet these requirements.[497]

Upon receipt of the notice of appeal, the Registrar of the PAB notifies the other party to the litigation accordingly.

Where the other party is the Minister of Revenue (whether federal or of Quebec), the latter must forthwith transmit to the Registrar a copy of the document that initiated the process leading to the contested decision: the application for a determination or appeal against an assessment in federal law, or the application for a decision or objection to an assessment in Quebec law. He must also provide the Registrar with a list of the parties who were notified of the contested decision, so as to enable the Registrar to advise them of the fact that an appeal has been lodged and that they have the right to intervene in the appeal, if they so wish.[498]

Where the defendant in the appeal is the Minister of National Health and Welfare, the latter must likewise inform the Registrar as to the identity of the persons who, to the best of the Minister's knowledge, have an interest in the case. This provision is primarily intended to cover cases wherein two persons have applied, or are likely to apply, for a surviving spouse's pension in consequence of the same contributor's death. Where each of these persons has indeed filed an application, the Registrar, as soon as he has been informed by the Minister, must serve notice upon the party other than the appellant, concerning the appeal.[499]

If the Minister is the appellant in the case, he furnishes this information to the Registrar at the same time as he files his notice of appeal.

It is at this stage that the Registrar transmits to the member of the public that is a party to the proceedings either in the role of appellant or defendant, a copy of the rules of procedure applicable to the particular case.

E. Withdrawal of the appeal

No provision is made for the possible withdrawal of an appeal in the area of contributions. In the area of benefits, the rules of procedure specify merely the manner in which the appellant must express his intention of withdrawing the appeal; they are silent as to the legal effects of such a withdrawal.[500] The PAB's uniform practice in all cases authorizes the Registrar, however, to issue an order in the name of the Board, declaring that the appellant has manifested his intention to withdraw the appeal, thus effectively putting an end to the proceedings.

As we have observed in chapter 2, significant numbers of appeals are in fact withdrawn before they come to a hearing: 10% of those concerning unemployment insurance contributions, 12% of those dealing with QPP contributions, and 17% and 37% of those in the area of CPP benefits and CPP contributions, respectively. Our own sampling of cases fully corroborates this finding: of 53 cases liquidated by the PAB, 9 were disposed of as a result of the appeal having been withdrawn. Our explanation for this phenomenon in the context of appeals to the Umpire applies undoubtedly in the present context as well.[501] Many appellants, especially in the area of benefits, are rather hasty in lodging an appeal; they do so without serenely reflecting on the nature of the tribunal that is to adjudicate their case or on their chances of success. With the lapse of time, many of them lose interest in the case or are intimidated by the prospect of having to appear before the PAB; others no doubt recognize the weakness of their arguments.

SECTION II

Preparations for the hearing

In the second phase of proceedings, the litigants — who may be quite numerous in contributions cases — declare their claims, make allegations of fact, join issue with their opponents, and progressively prepare the case for adjudication by the PAB. In all this, the Registrar plays an essential and delicate role, not only by seeing to it that the written submissions of the parties conform to the rules but also by affording them guidance through the intricacies of administrative procedure and by inciting them to active participation.

To measure the duration of this part of procedure, we have considered as the point of departure the date on which notice of appeal is served (in the case of benefit-related appeals, the date on which the PAB Chairman gives leave to appeal) and have taken as the terminal date the day on which the Registrar enters the case on the rolls of the PAB, having previously determined the time and place of the hearing. In the two categories of appeals arising out of the CPP (by far the largest portion of the PAB's business), the interval amounts, on the average, to 312 days in benefit-related cases and to 342 days in contribution-related cases, according to our sampling of cases.[502]

The first documents placed on file during this phase of procedure are either the interventions of the parties concerned in the case or the reply to the notice of appeal. The last is a communication whereby the Registrar serves notice on the parties of the time and place set aside for the hearing. A number of intermediate events may take place between these two points.

A. Interventions

Any person having an interest in the case whom the Registrar has informed of the receipt of a notice of appeal has the right to intervene before the PAB or to file a cross-appeal.[503]

In questions of contributions, the number of intervenors is predetermined. They may include only those persons whom the Registrar has notified concerning the receipt of a notice of appeal, that is to say, only those whom the Minister had invited to take part in the proceedings that led to the formulation of his decision. In these cases, the circle of participants remains, therefore, the same as it was in the antecedent phases of the procedure. The intervenors may, in interventions filed with the Registrar and transmitted by him to all other parties, appropriate for their own use any of the arguments invoked by the appellant or by another intervenor, or set forth their own arguments. In the event of a duplication of interventions, the PAB can require that the parties join in presenting a single consolidated intervention so as to abbreviate proceedings at the time of the hearing.

In benefit-related appeals, the most frequent occasion for intervention is in cases where two individuals have applied for the surviving spouse's pension following the death of one and the same contributor. In such cases, the Minister is obliged by section 85 (5.1) of the CPP to inform the PAB accordingly, so that the latter may make them parties to the case. The QPP does not include and has never included an analogous provision. In other cases likely to give rise to interventions (as for example in the case of orphans or the children of disabled contributors, to the extent that they do not themselves appeal), the *Rules of Procedure of the PAB* oblige the Minister to inform the Registrar of the names of all interested parties. The rules, moreover, provide for the possibility of intervention by a third party not involved in the case up to this time, upon condition that the party's intervention is authorized by the Chairman of the PAB.

In notifying potential intervenors of the receipt of a notice of appeal, the Registrar transmits to them as a matter of routine a copy of the rules of procedure applicable to the case at issue.

The *Rules of Procedure of the PAB* prescribe a time limit for the filing of interventions. The period allowed is 30 days for appeals concerning contributions and 20 days for appeals concerning benefits, running from the time that the Registrar notifies the parties of the receipt of a notice of appeal.

B. Reply to the notice of appeal

In his reply to the notice of appeal, the respondent in the appeal declares his position with regard to the facts alleged by the appellant

and indicates the arguments upon which he intends to rely in defence of his own position at the hearing.[504] The reply marks the termination of written exchanges between the litigants; once filed, the case is presumed to be ready for adjudication by the PAB.

The rules of procedure specify a definite time limit for the filing of a reply to the notice of appeal, as they do for the filing of interventions. In contributions cases, the Minister must file his reply within the 30 days following the expiry of the time allowed for interventions, at the end of which time the Registrar transmitted to the Minister the interventions that he had received or advised him of not having received any intervention. In benefits cases, the time limit is 20 days from the date on which the Registrar notified the defendant of the fact that a notice of appeal had been filed.

If no reply has been filed by the end of the prescribed period, the appellant has the right to request that the PAB hear and determine the appeal *ex parte*. Until the appellant exercises this right, however, the defendant remains free to file a reply belatedly. In appeals involving benefits, he may even do so after the appellant's exercise of his right, provided that the PAB authorize him to do so.

As the figures previously cited would intimate, however, in practice matters are not quite so speedily settled as the rules of procedure would appear to imply. For a variety of reasons, including administrative delays, the negligence or ignorance of the individual parties and time-consuming exchanges between the administration and the parties, the time limits fixed by the rules of procedure acquire a considerable degree of elasticity. The relatively informal spirit of the rules, on the other hand, makes it logically inconsistent for the PAB to insist too rigidly on a strict compliance with regulations under this head.

C. Settlement before the hearing

In certain cases, the exchanges which take place between the parties at this stage of the proceedings enables them to come to an understanding on the litigated issue before the hearing. This is especially common in appeals in the sphere of disability pensions. Litigation in these cases very frequently hinges upon the question of the date when the beneficiary became disabled. In view of the medical information submitted by the beneficiary in support of his appeal, the Minister may come to the conclusion that a change in his previ-

ous decision, regarding the date of onset of the beneficiary's disability, is warranted. If this change is to the beneficiary's satisfaction, it would of course have the effect of rendering any further action in the appeal superfluous. Depending upon whether the new date agreed on by the litigants is prior or subsequent to that fixed by the Review Committee, one could consider that the appellant or the Minister has won the appeal. Not infrequently, the disability date settled on by the parties antedates briefly the sitting of the Review Committee, a settlement which retrospectively validates the Minister's initial decision to refuse the pension and also explains the favourable reception of the appellant's claim by the Review Committee: since the Review Committee in fact had a disabled claimant before it, one can readily understand the Committee's willingness to believe that the claimant's condition had been the same at the time of his initial application for benefits.

The settlement of the litigated question by agreement of the parties does not, as such, terminate the procedure. A PAB judgment is necessary to reverse the decision of the Review Committee. The matter is, accordingly, entered on the rolls of the next series of PAB hearings. The Minister's legal representative then submits the terms of the settlement to the PAB for ratification, which is delivered by way of summary decision.

These decisions, unlike the PAB's rulings on cases actually adjudicated by it, are not published. It is consequently difficult to ascertain precisely what proportion of cases is liquidated in this way. We would estimate that during the 1967-1976 period, approximately 15% of the cases appealed to the PAB in the four areas of the Board's present jurisdiction were settled by the parties before the hearing.[505] A somewhat higher proportion of out-of-court settlements is suggested by our sample where, out of 53 cases, 14 were settled prior to the hearing, 11 of them disability pension claims. The frequent use of out-of-court settlements is one more indication of the importance of changing health conditions in this type of cases.

D. Other incidents

Among other incidents likely to arise before a case is entered on the PAB's rolls may be mentioned the examination for the purpose of discovery of any party to the appeal by any other, with the authorization of the Chairman, a member of the PAB or the Regis-

trar.[506] In fact, this means of clarifying a matter — a borrowing from regular judicial procedure — is seldom used.

The device of consolidating appeals is more often resorted to.[507] It enables the PAB to bring together for purposes of convenience and expeditiousness the appeals of several parties, to hear them simultaneously or consecutively, or to suspend its judgment until all parties will have presented their case. The PAB can justify its decision to consolidate the appeals on the grounds of there existing a common question of law or fact in them all, or, more generally, on the grounds that consolidation is desirable in "the interests of justice". Consolidated appeals may involve the same Act,[508] or both the CPP and the QPP,[509] or again the CPP and the *Unemployment Insurance Act*.[510]

E. Determination of the time and place of the hearing

Is the PAB obliged to reserve judgment on a case until after the hearing, that is, until it has given the parties a chance to submit their arguments verbally at one of its sittings? The various Acts conferring jurisdiction on the PAB appear to take it for granted that the PAB must give a hearing to the parties. The CPP, the most explicit of all on the subject, goes so far as to allude, in section 85(5), to the presence of PAB members at the hearing, an allusion which assumes at least a meeting in a particular place by a quorum of Board members. By contrast, the QPP and the *Unemployment Insurance Act* do not preclude the possibility of a decision based exclusively on an examination of the file and of the written pleas of the parties. Indeed, neither Act gives any specification at all as to the manner in which appeals under it will be adjudicated.

In matters of contribution, however, all uncertainty on the question is dissipated by the *Rules of Procedure*, which prescribe that appeals will be ruled on following a hearing.[511] Needless to say, the practice of the PAB demonstrates that despite the number of appeals submitted to it the Board has always believed itself obliged to give the parties an actual hearing, as long as they acted with due diligence in availing themselves of this opportunity.

The responsibility for determining the time and place of the hearing devolves, according to the *Rules of Procedure*, collectively

on the PAB,[512] due account being taken of the role of leadership assigned to the Chairman by section 85(4) of the CPP. In practice, the date fixed upon for the hearing is inevitably the outcome of an accommodation between the members of the PAB, the parties and their representatives. The difficult task of organizing the rounds of hearings falls on the Registrar who, despite constraints on the time of the members of the PAB and of the parties to the proceedings, must arrange for sittings at frequent and regular intervals in the various regions of the country. The practical hardship of this task is of the same order as that confronted by the Registrar of the unemployment insurance Umpires, further aggravated by the dispersion of PAB members throughout the territory of Canada and the multiplicity of the administrative authorities involved. The slowness of the PAB's functioning, statistical evidence of which will be presented later on in this study, testifies to the magnitude of these difficulties.

As soon as a case appears to be ready for adjudication, all the parties having submitted their arguments in writing, or as soon after the expiry of the time limit allowed for filing a reply to the notice of appeal as a party requests it, the Registrar consults the members of the PAB and the parties as to the date of the hearing. As for the choice of a location, suffice it to say that the PAB makes an effort, so as to save time, to arrange its sittings in large urban centres which offer the advantages, at once, of easier access to all parties and of a greater choice of convenient premises. For the rest, it may be pointed out that, by virtue of section 88(1) of the CPP, persons involved in a benefits-related appeal may be reimbursed for their travel expenses if they take part in a hearing at the PAB's request. In the absence of similar provisions in favour of participants in QPP appeals, the PAB, prior to 1975, used to seek to minimize the financial burdens of attendance by arranging its sittings as close as possible to the place of domicile of appellants.

The Registrar must give the parties at least 20 days' notice of the time and place of the hearing. This notice is given both by letter and by telephone.

SECTION III

The hearing

Given the PAB's conception of its own role, it is hardly surprising that the hearing of an appeal assumes much of the character of a court trial. In the course of this process, the case is examined in depth in the light of the evidence, both written and verbal, produced before the Board by the various parties.[513] The case file as it has been prepared for the hearing contains in it the following documents:

- the original communication of the applicant, which initiated the procedure in the first place, that is, as the case may be:
    - the application for benefits
    - the application for a determination or a decision,
- the initial administrative decision, that is, as the case may be:
    - the decision refusing benefits, together with the reasons for the refusal
    - the determination or the decision
    - the assessment,
- the communication which initiated internal review, that is, as the case may be:
    - the appeal to the Minister under section 83 of the CPP
    - the application for reconsideration under section 194 of the QPP
    - the appeal against the assessment,
- the decision rendered following internal review, that is, as the case may be:
    - the decision of the Minister dismissing the appeal lodged under section 83 of the CPP, together with the reasons for the dismissal

- the decision of the Reconsideration Committee dismissing the application made under section 194 of the QPP, together with the reasons for the dismissal,

- the communication which initiated contentious review, that is, as the case may be:
  - the notice of appeal to the Review Committee
  - the notice of appeal to the Umpire,

- the reply filed by the administrative authority and, in the case of an appeal to the Umpire, the interventions filed,

- the documents produced by the parties before the lower appeal authority,

- in the case of an appeal to the Umpire, the minutes of the proceedings,

- the decision rendered by the lower appeal authority, together with the reasons for the decision, that is, as the case may be:
  - the decision of the Review Committee
  - the decision of the Umpire,

- the communication which initiated the appeal to the PAB and the interventions filed in connection with it,

- the documents placed on file by the parties before the hearing.

The case file frequently has further documents added to it in the course of the hearing, particularly in disability-pension cases. If, as it is by no means unusual, the claimant undergoes a medical examination shortly before appearing before the PAB, the report of his examination, produced before the tribunal, will also find its way into the case file.

The hearing generally takes place approximately one month after the case is entered on the rolls of the PAB.

The description of the proceedings that follows is based in part on our personal observation of some twelve hearings before the PAB. In it, we shall first describe the participants in the hearing; then, the conduct of the procedure.

A. Participants in the hearing

The hearings of the PAB are public, at least in benefits cases. A party to the proceedings may, however, request by reason of special circumstances that the case be heard *in camera*.[514] In matters concerning contributions, the publicity of the hearings is not laid down as a principle, no doubt to protect the privacy of business transactions; in practice, however, the PAB follows the same rule.

Participation by members of the public in PAB hearings takes different forms depending upon whether the case being heard concerns benefits or contributions. When the issue relates to benefits, the case usually is of direct concern only to the beneficiary. He is often present in person, especially when his attendance is likely to enhance his chances of success, as is the case with disability claims. More and more frequently, beneficiaries, however, make use of the services of a lawyer or a person of trust (whether union official, social worker or relative) to protect their interests. Table XXIII presents our findings in this regard, based on our sample of 38 benefits cases. The proportion of hearings not attended by the beneficiary personally (9 out of 38) may appear rather high at first glance. But in fact in 8 out of the 9 cases, either an out-of-court settlement was agreed upon by the parties shortly before the hearing or else the Minister had withdrawn his appeal; in either event, the presence of the claimant would have been to no purpose. The same thing may be said of 8 out of the 12 cases in which the claimant, although personally not present, had commissioned someone to represent him at the hearing. One may accordingly conclude that when a benefits-related appeal is contested, the beneficiary himself either makes a point of being present or sees to it that someone else will represent him: this, in effect, is what happened in 21 out of the 22 cases included in our sample. In the event that the PAB is satisfied that the beneficiary has been duly notified of the hearing and has expressed his intention to participate in it to the Registrar, his failure to appear without excuse or justification will lead the PAB to proceed *ex parte* without hesitation.[515]

It is also noteworthy that, in contrast to the usual practice of only a few years ago, beneficiaries today make fairly frequent use of lawyers to defend their case before the PAB. Our sample shows 25 instances in which the beneficiary used the services of a representative; in 20 out of these 25 cases, the representative was a lawyer.

TABLE XXIII

PARTICIPATION BY BENEFICIARIES – SAMPLE OF APPEALS TO THE PAB (CPP BENEFITS)

Participation	Appellant beneficiary	Respondent beneficiary	Total
Absent	4	5	9
Present unassisted		4	4
Present assisted	2	11	13
Represented	2	10	12
Total	8	30	38

Beneficiaries, however, are subject to certain restrictions in the choice of a representative to act on their behalf before the PAB. The Board will not, in fact, permit a person who has previously acted on the Review Committee whose decision is being challenged to plead the beneficiary's case before the PAB.[516] To tolerate such a practice would amount to calling in doubt retrospectively the impartiality to which not only the Committee as a whole but also each one of its members is bound.[517]

In contributions cases the rate of participation by members of the public at PAB hearings has always been high. Since appeals in this field of jurisdiction are of particular interest to business firms, they are usually represented at hearings by lawyers. Participation by workers is also relatively high, except in cases where their part in the proceedings is limited to the filing of interventions. Thus, in our sample of 15 appeals concerning CPP or unemployment insurance contributions, there was only one case in which both employer and employee were absent from the hearing, the case being one in which the employee had previously withdrawn his appeal.

The administrative authorities, for their part, are invariably represented at hearings by a lawyer.

A party to the proceedings may ask for an adjournment of the hearing, and the PAB may order the hearing adjourned on its own initiative.[518] Given the low frequency of hearings, the request for an adjournment should not be lightly made; even if it is made for imperative reasons, it is in the party's interest to ask for adjournment before the PAB has begun to examine the case for otherwise

the hearing may not be resumed until the same members should find themselves sitting together again — an eventuality which the functioning of the PAB renders extremely problematical.

B. Examination of the appeal

Generally speaking, the PAB maintains a fairly flexible attitude as to the nature of the proof to be offered in the course of its hearing.[519] In principle, however, the proof offered at hearings must be oral evidence, even though the PAB may authorize a party to present other types of proof.[520] The PAB has the power to summon witnesses[521]; witnesses testify under oath. A member of the Review Committee whose decision is being challenged is ineligible to testify before the PAB, just as his prior membership in a presumably impartial tribunal renders him incapable of pleading the case of either one of the litigants. By contrast, the secretary of the Review Committee is not subject to this disqualification, and may be called upon to testify before the PAB — a questionable exception, since the secretary was present at, and in a position to contribute to, the deliberations of the Committee.[522]

The primacy of testimonial evidence at the hearing works, on the whole, to the detriment of beneficiaries in cases where medical questions are at issue. Indeed, beneficiaries very seldom produce their attending physicians as witnesses — either because they are afraid to ask them to testify or because practitioners find it inconvenient to leave their work in order to appear before the Board. The testimony of the physician, nonetheless, could in most cases add considerable force to the written medical report, which is often elliptical and somewhat suspect of being inclined in favour of the patient. The PAB, in fact, has repeatedly affirmed that it could hardly attach the same weight to a certificate simply signed by the beneficiary's family doctor as to one supported by the physician's oral evidence.[523] By contrast, the Minister of National Health and Welfare invariably has a physician attached to the Disability Assessment Division in attendance at the hearing: if possible, one of the Division physicians who took part in the examination of the case in the first place.[524] The Minister is, accordingly, in a position to offer expert evidence in support of his interpretation of the medical findings. Indeed, we have even noted that occasionally the Minister might produce as a witness the medical specialist who had examined the patient at the Minister's request. As a matter of fact, it is by no means unusual to see at the hearing, on the one hand, the ben-

eficiary accompanied by a relative and perhaps by his lawyer, and on the other, a veritable array of lawyers, physicians and counsellors in occupational rehabilitation. The spectacle is bound to inspire a sense of uneasiness in the observer, an uneasiness hopefully dispelled by the attitude of the PAB members and, to some extent, by that of the Department lawyers and officials.

Another impediment that the beneficiary must sometimes overcome in arguing his side of the case concerns language. We are not referring here to the use of the official languages as such, since the members of the PAB are quite capable of hearing appeals in either of the two languages. We are alluding, rather, to the difficulty that some beneficiaries, recent immigrants to the country, experience in expressing themselves adequately. The problem is by no means uncommon: it is typically the plight of construction workers claiming a disability pension following a crippling work accident. The PAB has held that in appeals lodged by the Minister, if the defendant or a third party is obviously incapable of testifying either in English or in French, it is up to the Minister to provide, at his own expense, the services of an interpreter. The costs incidental to interpretation are to be charged to the beneficiary, however, when the appeal is initiated by him.[525]

The question of the interpreter's fee is, by the way, only one aspect of the larger problem of reimbursing parties for expenses incurred in order to appear before the PAB. No provision is made for such compensation, except in matters relating to benefits, by section 88 of the CPP. The section differentiates between two types of expenses. On the one hand, a party is "entitled to be paid ... travelling and other allowances, including compensation for loss of remuneration", if, being implicated in an appeal and requested by the PAB to take part in the proceedings, he does in fact do so. This form of compensation is thus available to any beneficiary, whether he is the originator of the appeal or not, provided of course he can establish that he has incurred travel expenses or suffered a loss of income as a result of his participation in the hearing. On the other hand, section 88(2) provides for the repayment of legal expenses — that is to say, of lawyer's fees — to a "respondent" beneficiary or to the second claimant for a surviving spouse's pension summoned to appear in an appeal concerning the first claimant. The costs are not subject to reimbursement unless the party concerned is in fact represented by a lawyer at the hearing. The Registrar draws the existence of these provisions to the attention of the parties likely to benefit from them as soon as the date of the hearing has been set.

SECTION IV

The decision

Following a description of the manner in which the decision is formulated after the hearing, we shall present a statistical survey of the result of the PAB's adjudicative activities.

A. Rendering the decision

The Acts conferring jurisdiction on the PAB, with the exception of the *Unemployment Insurance Act*, require that the decisions rendered by the Board shall be in writing, have reasons assigned to them, and be communicated to the parties.[526]

The PAB very seldom hands down decisions at the time of the hearing. When it does, the Registrar formulates the judgment immediately after the hearing for the three judges to sign forthwith. The more usual practice of the PAB is to render judgment only after a period of deliberation. At the end of a day of hearings, the members of the Board attempt to reach an agreement on the solutions to the various cases brought before them. Whether they are successful or not, they request one of their number to prepare a draft decision outlining the reasons for which the judgment should be so rendered. Once the draft is complete, the judge who was its author transmits it to his two colleagues for their approval and signature. The opinion of the majority of the members constitutes the decision of the PAB.[527] Apparently it has never happened in the history of the PAB that one of the judges should have dissociated himself from the judgment of his two colleagues.

The signed draft decision specifying the reasons for which it was taken is then handed to the Registrar, who prepares the formal judgment and forwards it, with a description of the reasons underlying it, to each of the parties.[528] According to our sample, the average

length of time to elapse between the hearing and the delivery of the Board's formal judgment is 30 days in cases related to benefits and 80 days in cases related to contributions. Indeed, contributions-related cases usually call for more elaborate decisions in view of the greater complexity of the questions of fact and law that must be resolved. The PAB makes fairly abundant use of caselaw in its decisions: not only of its own but also of that developed by the regular courts, especially in connection with the characterization of work relations.

B. Statistics on PAB decisions

The PAB is empowered to affirm, vacate or vary the decision challenged by appeal.[529] It also claims the power to refer certain questions it does not consider to be its own responsibility to resolve to subordinate authorities for disposal.[530] Table XXIV summarizes the outcome of the 38 appeals constituting our sample of appeals heard in matters of benefits. The Table includes not only those cases resolved by a judgment of the PAB (either following a hearing or in ratification of an out-of-court settlement) but also those liquidated by withdrawal of the appeal.

One conclusion that emerges from an examination of the Table is that, all in all, beneficiaries tend to win their cases, at least in part, almost as often as the Minister. We might add by way of an aside that four out of the eight beneficiaries that challenged before the PAB a decision rendered by a Review Committee received a favourable judgment at the hands of the PAB; yet, given the generally sympathetic attitude of Review Committees to benefits claimants, we may assume, that an applicant whose claim is rejected at that level would, as a rule, have little hope of seeing it vindicated before the PAB.

Judging from the Table, the relatively high success rate of beneficiaries may largely be due to the Minister's withdrawal of some of his appeals, in the light of new facts, or to his willingness to settle the matter before the hearing. Only in the area of the surviving spouse's pension do we find beneficiaries victoriously defending the favourable judgment of the Review Committee. As for what we have qualified as "split decisions", these concern cases in which the date of the onset of disability was fixed by the PAB more or less mid-way between those claimed by the Minister and the beneficiary.

TABLE XXIV

OUTCOME OF APPEALS – SAMPLE OF APPEALS TO THE PAB (CPP BENEFITS)

	Disability	Surviving spouse	Retirement	Orphan	TOTAL	%
ORIGIN OF APPEAL						
Appeal lodged by the Minister	21	6	2	1	30	79%
Appeal lodged by beneficiary	8	0	0	0	8	21%
OUTCOME OF APPEAL						
Outcome favourable to beneficiary	11	4			15	40%
• PAB decision following hearing	2	4			6	
• settlement prior to hearing	5				5	
• withdrawal of appeal by the Minister	4				4	
Outcome favourable to the Minister	15	2	2	1	20	53%
• PAB decision following hearing	9	2	2	1	14	
• settlement prior to hearing	5				5	
• withdrawal of appeal by beneficiary	1				1	
Split decision	3				3	7%
• PAB decision following hearing	2				2	
• settlement prior to hearing	1				1	
TOTAL	29	6	2	1	38	100%
%	76%	11%	4%	2%	100%	

In an effort to place these figures into historical perspective, we have prepared a compilation of analogous data collected from decisions published in the CCH Digest prior to December 31, 1976. The compilation does not therefore take into account decisions providing merely formal ratification of out-of-court settlements; similarly, it does not include appeals withdrawn. The survey shows that, in appeals concerning CPP contributions, the success rate of appellants to the PAB was approximately 20% (6 out of 29 cases). The results of the compilation with reference to appeals in the area of CPP benefits are given on Table XXV. A comparison of this Table with the one preceding it, covering the last eighteen months of the period covered in Table XXV, brings to light two recent trends in the activity of the PAB. On the one hand, it shows an increase in litigation concerning the surviving spouse's pension; this tendency will probably moderate somewhat starting with 1978 as a result of the simplification in the law effected by the amendment of section 63 of the CPP. On the other hand, the Table reveals a growth in the success rate of beneficiaries before the PAB, a phenomenon coinciding with the gradual evolution in the attitudes of Review Committees, which have become increasingly critical in their treatment of beneficiaries' claims.

One last statistical observation drawn from our sample deserves special notice, since it has direct relevance to the effectiveness of the entire decision-making process, and in particular to that of the PAB as an appeal tribunal. For each of the files constituting our sample, we have determined the various time intervals intervening between successive phases of procedure. Table XXVI summarizes the results of our survey. In dealing with the PAB, only those appeals were taken into account which had been resolved following a hearing — that is to say, those contested by the respondent. The rather sobering conclusion that comes to light is that litigation concerning CPP benefits may drag on for little less than three years. Further, even if litigation on questions of CPP contributions has fewer levels of appeal to pass through before receiving final and definitive judgment from the PAB, any gain in efficiency is all but offset by the lengthier waiting periods between successive phases of the process. Less surprisingly, the speedy disposal of benefit-related appeals seems to be hampered by the multiplicity of appeal authorities, each of which requires a longer interval to liquidate cases than the one preceding it within the procedural sequence.

TABLE XXV

OUTCOME OF APPEALS TO THE PAB, CLASSIFIED ACCORDING TO TYPE — CPP BENEFITS, 1971-1976

	Disability	Surviving spouse	Retirement	Orphan	TOTAL	%
Decision in favour of Minister	72	8	5	2	87	72%
Decision in favour of beneficiary	21	3			24	20%
Split decision	8				8	6%
Reference to the Minister		2			2	2%
TOTAL	101	13	5	2	121	100%
%	83%	11%	4%	2%	100%	

TABLE XXVI

AVERAGE PROCESSING TIME — SAMPLE OF APPEALS TO THE PAB
(CPP BENEFITS AND CONTRIBUTIONS)

CPP BENEFITS			
• Average interval between application for benefits and initial decision	124 days	(4 months)	(12%)
• Average interval between initial decision and Minister's decision on appeal	156 days	(5 months)	(15%)
• Average interval between Minister's decision and Review Committee decision	276 days	(9 months)	(27%)
• Average interval between Review Committee decision and PAB decision	478 days	(16 months)	(46%)
• Average total duration of procedure	1034 days	(2 years 10 months)	(100%)
CPP CONTRIBUTIONS			
• Average interval between application for determination and determination, or between assessment and Minister's decision on appeal	199 days	(6½ months)	(22%)
• Average interval between determination or decision by Minister and PAB decision	698 days	(1 year 11 months)	(78%)
• Average total duration of procedure	897 days	(2 years 5½ months)	(100%)

SECTION V

The PAB and judicial review

The situation of the PAB with regard to the powers conferred on the Federal Court by the *Federal Court Act*, to review the legality of the acts of federal administrative tribunals, is somewhat singular.

One must first of all ask whether the PAB falls within the terms of the definition of a "federal board, commission or other tribunal", since "persons appointed ... under section 96" of the BNA Act are expressly excluded from the purview of the *Federal Court Act*. The "persons" referred to are the judges of the superior courts, district courts and county courts of the provinces — the very individuals from whose numbers the members of the PAB are appointed, in accordance with section 85(2) of the CPP.[531] The caselaw of the Federal Court and of the Supreme Court of Canada has clearly established the doctrine, however, that when one of these judges exercises a function by virtue of a federal statute — except one relating to his usual functions, civil or criminal, as a member of the judiciary — he is regarded not as the judge of a provincial court but rather as a *persona designata* constituting, for the occasion, a federal tribunal.[532] In this capacity, he is consequently subject to the exercise of judicial review and supervision by the Federal Court.

That the federal legislator considered the PAB to be a "federal tribunal" becomes, furthermore, evident from the fact that the legislator saw fit to exempt it, in express terms, from the judicial review authority of the Federal Court of Appeal, under section 28. In fact, subsection (6) of the section declares that no proceeding may be taken on an application to review and set aside a decision of the PAB, by invoking subsection (1). Were it not for this exception, it is clear that the decisions of the PAB, which are obviously "made on a judicial or quasi-judicial basis", would be subject to the Federal Court's power to review and set aside.

The reasons for the exception are hard to divine. Section 28(6) confers the same privileged status not only on the PAB but also on administrative authorities whose decisions are highly political in character, such as "the Governor in Council and the Treasury Board", the superior courts of the provinces (which in any case would not fall within the terms of the definition of a "federal tribunal") and the disciplinary authorities of the armed forces. Altogether, it makes for a motley assortment. The PAB has no characteristics in common with any of the exempted authorities except the superior courts, since it is, in effect, itself constituted of judges from the superior courts and from the district and county courts of the provinces. Might this have been the reason for the federal legislator's reluctance to subject the PAB to judicial review by the Federal Court of Appeal? The explanation seems highly unlikely. Had it been the legislator's intention to exempt from judicial review all federal administrative authorities made up of judges from provincial courts, he would have designated other bodies as well as the PAB or he would have formulated the definition of a "federal tribunal" otherwise than he did.

The presence of judges from the Federal Court among the members of the PAB (a possibility under the terms of section 85(2) of the CPP) is no reason either for exempting the PAB from judicial review by the Federal Court of Appeal. The latter does, indeed, exercise review jurisdiction over the decisions of unemployment insurance Umpires who are all judges of the Federal Court.[533]

One might assume that the PAB operates, in a sense, at the same hierarchical level as the Federal Court of Appeal and that, consequently, its being brought under the review jurisdiction of the latter would amount to a violation of its recognized status within the judicial system. Indeed, in questions of unemployment insurance contributions, the PAB rules on appeals from decisions handed down by the Umpires in the same way as the Federal Court of Appeal does in reviewing the decisions of the same judges when acting in their capacity as members of the Trial Division of the Federal Court. In the sphere of CPP contributions, moreover, the PAB occupies a level subordinate only to the Supreme Court of Canada,[534] exactly like the Federal Court of Appeal. Nevertheless, it is much to be doubted that these two considerations weighed heavily with the legislator in deciding to place the PAB outside the jurisdiction of the Federal Court of Appeal. The first consideration, at any rate, could not even arise at the time that the *Federal Court Act* was passed.[535] Regardless of its rank among the administrative tribunals, the PAB

could never, indeed, be placed on an equal footing with a regular court, such as the Federal Court, exercising a power characteristic of an ordinary court of general jurisdiction.

Whatever the reason may have been for the statutory exclusion of the PAB from the Federal Court's review jurisdiction — and we are compelled to admit that it is anything but conspicuous — the fact remains that the PAB is not subject to judicial review exercised under section 28 of the *Federal Court Act*. The PAB is not, however, exempt from the review jurisdiction of the Federal Court under section 18 of the Act, even though one may question the extent of the power wielded by the Trial Division over a tribunal expressly excluded from the application of section 28.

Since the latter section has the appearance of an exception to the primary jurisdiction conferred by section 18 ("Notwithstanding section 18 ..."), it may be argued that in cases where section 28(6) precludes the possibility of proceeding on an application to review and set aside the decisions of certain bodies, this primary jurisdiction is revived, and the Court can proceed against the PAB through the avenues of recourse enumerated under section 18. The thesis may rely on the decision rendered in the case of *Desjardins v. National Parole Board*,[536] where the existence of these avenues of recourse against the Governor in Council — another authority protected by section 28(6) — was the issue.[537]

Conversely, it may be maintained that the internal logic of section 28 dictates another solution. It may be argued that, having made an exception to the primary jurisdiction of the Trial Division, in subsection (1), the legislator intended subsection (3) to exclude the entire sector alluded to in the exception from the jurisdiction of that Division. Such a provision would no doubt make it possible to avoid, from a strictly procedural point of view, the duplication of remedies against certain decisions. But it may be suggested further that the provision concerns the substantive law and is aimed at delimiting clearly, with reference to the activity of federal administrative authorities, two areas, each of them reserved for the judicial review jurisdiction of one of the Divisions of the Federal Court. In terms of this logic, a decision which, by its "nature", falls within the area reserved for the Court of Appeal could never consequently be subject to the jurisdiction of the Trial Division. Now a decision made by the PAB clearly pertains to the area within the Court of Appeal's review jurisdiction.[538] The fact that such review jurisdiction is expressly and by way of exception excluded by subsection (6), in

no way changes the nature of the decision in question, and therefore does not make it subject to judicial review by the Trial Division. To put it otherwise: the areas in which the Trial Division may intervene would not be enlarged by subsection (6) beyond what they would be, had the Court of Appeal retained jurisdiction over the decisions of the PAB. Thus, to adduce a hypothetical instance, it is not inconceivable that the Trial Division may be asked to issue a writ prohibiting the PAB from proceeding with the examination of a case on the grounds of bias of its members. But it could not use the remedy of *certiorari* to quash a PAB decision, since the means of applying that remedy are among those enumerated by section 28(1).[539]

Up to the present time, no attempt appears to have been made to contest a decision of the PAB by means of the remedies enumerated in section 18. The status of the PAB with reference to the judicial review of its acts remains, therefore, for the time being, uncertain.

CHAPTER 5

An alternative model: the Social Affairs Commission of Quebec

In the course of this study we have had repeated occasion to allude to the Social Affairs Commission, established in Quebec in 1975. Ever since its establishment, the Commission has acted in the role previously assumed by the PAB, as the tribunal of last resort in the sphere of QPP benefits. The analogous role played by the two bodies has prompted us to undertake a comparative study of their organization and procedure, a study all the more relevant for the fact that each tribunal has been called upon to deal with the identical area of litigation in turn. Indeed, an examination of the statute constituting the SAC[540] and of its manner of functioning brings to light various elements well worth our attention, especially with a view to the eventual reform of social security litigation under federal law.

The arguments adduced in support of creating the SAC, during the parliamentary debates that preceded its establishment, are not without interest.[541] The Bill as initially formulated[542] was based on four considerations. It appeared desirable, first of all, to concentrate in the hands of a single tribunal all appeals against administrative decisions within the sector directly or indirectly served by the Department of Social Affairs. Thus, from the outset the area of jurisdiction of the new Commission was not to be restricted to social security in the strict sense of the term. The second objective that the sponsors of the Bill had in mind was to broaden some of the remedies available against these decisions, while creating at the same time to hear these remedies a new administrative authority of

the highest possible degree of accessibility. Thirdly, the authors of the Bill sought to introduce a measure of uniformity into the procedures applicable to the various types of remedy. Last of all, they wished to entrust to the Commission the urgent task of working out a coherent and accessible caselaw in the social security sector, a field of law that had undergone tremendous growth during the preceding decade.

It should be noted that in its first draft the Bill did not include any provisions with regard to litigation arising out of the QPP. It was not until the Bill was debated that the Minister of Social Affairs introduced proposals for provisions, to be reviewed in some detail later on in this study, whereby litigation in the sphere of QPP benefits should be transferred from the PAB's jurisdiction to that of the new Commission. The Minister's argument in justification of this belated enlargement of the original Bill was that the accumulation of appeals pending before the PAB was such as to compromise seriously beneficiaries' access to the Board and to diminish the practical effectiveness of the appeal process.[543] It seemed logical to the Minister that a statute enacted by the Quebec legislature should be applied by a Quebec, rather than by a federal, tribunal. The parliamentary debates provide no indication as to why the same reasoning was not extended to QPP contributions as well, although it is true that the PAB had never been overloaded with litigation in this field.

Our analysis of the constitutive statute of the SAC will be both brief and selective, for the reason, on the one hand, that it is in some ways tangential to the subject of our study and, on the other, that the SAC itself is part of a very complex legislative network which it is neither necessary nor possible to examine in detail here. Our observations will be presented under five headings: the jurisdiction of the SAC; its composition and organization; its procedure; its activity; and its caselaw.

SECTION I

Jurisdiction of the SAC

The jurisdiction of the SAC is completely mapped out in section 20 of its constitutive statute, which enumerates 22 areas of authority relating to twelve different Acts.[544] Each of these Acts contains provisions authorizing appeals to the SAC and referring to the *SAC Act* for a definition of the conditions for the exercise of this right. The advantages inherent in the use of a constitutive statute to create an administrative body are obvious: however numerous the areas of its jurisdiction may be, a complete and consistent picture of its organization and mode of functioning in any one of these areas can be found in the Act. This legislative method is unquestionably preferable to that resorted to to establish the PAB.[545]

In addition to the already wide spectrum of powers conferred upon it at its establishment, the SAC received yet further areas of jurisdiction in 1977. In consequence of this accumulation of powers, it has come to be something of a super-tribunal, responsible for dispensing administrative justice in a very extensive sector of Quebec public administration. Its authority is no longer limited to areas directly or indirectly within the purview of the Minister of Social Affairs, but includes also others under the responsibility of the Minister of Labour, the Minister of Consumer Affairs, Cooperatives and Financial Institutions, and the Minister of Public Service.

The multiple jurisdictions of the SAC fall within a great variety of domains. Eight broad categories of decisions may be appealed to the SAC:

- decisions concerning the allocation of monetary benefits,
- decisions concerning the allocation of benefits in kind,
- decisions concerning the authorization to exercise an occupation or to carry on a business,
- decisions concerning the access that members of the public may have to their welfare or health files,

- decisions concerning personal freedom,
- complaints concerning the quality of services provided by certain public establishments,
- decisions concerning the payment of professional services, and
- elections or appointments to managing bodies.

The first category is by far the most extensive of all. The SAC, in fact, hears appeals concerning the allocation of monetary benefits by virtue of the *Social Aid Act*[546], the *Quebec Family Allowances Plan*[547], the *Quebec Pension Plan*[548], the *Workmen's Compensation Act*[549], the *Act respecting indemnities for victims of asbestosis and silicosis in mines and quarries*[550], the *Civil Service Superannuation Plan*[551], the *Teachers Pension Plan*[552], and the *Automobile Insurance Act*.[553] The appeal jurisdiction of the SAC covers, accordingly, the full range of social security programmes created under Quebec law; even the professional retirement schemes designed for Quebec civil servants and state employees come within the SAC's review authority. The decisions which may be the subject of these appeals are those rendered either by the Department of Social Affairs, in cases of social aid, or by some autonomous agency, in connection with other types of benefits: the Pension Board, the Workmen's Compensation Commission, the Civil Service and Teachers Pension Commission, the Automobile Insurance Board.

The second category of matters includes decisions refusing or withdrawing from an individual certain benefits in kind to which he might be entitled. Among these are decisions by the Department of Social Affairs regarding the exemption of individuals from paying a financial contribution when receiving shelter, care from a foster family or child care from a day care centre.[554] Decisions made by the recently-created *Office des handicapés* fall under this category too, concerning the designation of persons as handicapped or their eligibility for services or material assistance provided by the *Office*.[555]

The third category includes decisions withholding or withdrawing from an individual a permit to exercise certain occupational activities, to maintain a public establishment or to operate a business enterprise of a public service type. Decisions of this kind may emanate from the committee of examination in a health or social services establishment and involve the refusal of an application for appointment to the council of physicians and dentists of the establishment, the refusal to renew such an appointment, the dismissal of a physician or dentist from the establishment or the change of his

status or privileges.[556] The category also includes analogous decisions by the Minister of Social Affairs, suspending, revoking or refusing to renew a permit to operate a health or social services establishment,[557] a laboratory, a vacationers' camp, an ambulance service or a mortuary or funeral service,[558] as well as decisions by the *Office des handicapés* concerning the issuance of a certificate to a sheltered workshop or rehabilitation centre.[559]

The fourth category comprises decisions by a health or social services establishment or by the *Office des handicapés* refusing to give one of its users access to his social or medical record.[560] Unlike all the other fields in which the SAC exercises jurisdiction, its authority to hear appeals by persons denied access to information concerning themselves in the records of establishments is one that it shares with various ordinary courts.

The fifth general sector of the SAC's jurisdiction relates to close treatment orders made by a court in respect of mentally ill persons; the SAC is charged with maintaining control over the application of close treatment orders and may also be appealed to by those concerned to review such orders.[561] It may be mentioned in passing that members of the SAC may also belong to a board of review charged, under section 547 of the *Criminal Code*, with examining the mental state of accused persons.[562]

The sixth category of appeals within the SAC's jurisdiction concerns recommendations made to a health or social services establishment by a regional council, following a complaint against the establishment by a user. If the regional council believes that the establishment's attitude is prejudicial to the complainant's rights or to those of other eventual users of its services, it may request the SAC to rule upon the matter.[563]

The seventh category of decisions that may be appealed to the SAC are those of the Quebec Health Insurance Board concerning the payment of professional services rendered to patients by a physician, dental surgeon or optometrist.[564]

Elections and appointments whose legality may be contested before the SAC include those of members to the regional councils of health and social services and those of members to the boards of directors of establishments under the supervision of the regional councils.[565]

As the preceding enumeration shows, the decisions that may be appealed to the SAC are not only extremely varied in nature, emanating as they do from a variety of administrative authorities, but their settlement also calls for very diverse forms of expertise. Inevitably, the exercise of such multifarious powers demands a correspondingly high degree of versatility of SAC members. The composition and organization of the Commission are intended precisely to ensure this versatility.

SECTION II

Composition and organization

The staff of the SAC has grown considerably to keep pace with increased demands made upon the Commission; indeed, what is more, its composition has also undergone significant changes.

The initial Bill, which conferred on the SAC a mere fraction of the powers it now exercises (chiefly, litigation arising out of social welfare), provided for a membership of no more than nine. The need for versatility even at that time was met by the appointment of at least two physicians (one of them a psychiatrist) and of one lawyer to the Commission.[566]

With the extension of the SAC's jurisdiction to include litigation connected with QPP benefits, the number of members was increased to eleven, of whom at least three were to be lawyers.[567] The composition of the SAC did not, however, command a great deal of attention during the initial parliamentary debates preceding its establishment.

The institution of the SAC following the enactment of the first version of its constitutive legislation ran headlong into several obstacles, including the difficulty of finding qualified staff members to fill the positions on the Commission in accordance with the provisions of the Act. At the same time, the Bar of Quebec expressed its disapproval of the intended composition of the SAC, maintaining that it was improper for an administrative tribunal to consist of persons other than jurists. Conscious, at once, of the need for a wide range of technical expertise for the SAC to be able to draw on, and in response to the arguments of the Bar, the Minister of Social Affairs proposed to the National Assembly, even before the constitutive Act came into effect in 1974, a series of amendments modifying the composition of the SAC.[568] According to the amended version, the Act distinguished between SAC members, properly so called, of

whose number the president and vice-president were to be chosen, and the assessors.

The members of the SAC, eight in number, were all to be lawyers, while the president himself might also be a judge. Their presence was meant to guarantee the fairness of procedure and the effectiveness of the properly legal work of the SAC in hearing the cases appealed to it. The president, vice-president and at least one other member were to devote themselves exclusively to their duties with the Commission.[569] No member of the SAC could hold office for a term exceeding ten years.

The maximum number of assessors was originally to be fixed at twelve. Six of them were to be physicians (and four of the six, psychiatrists), and two social workers.[570] The choice of the assessors' professional qualifications was obviously motivated by the wish to place at the Commission's disposal the kind of technical expertise that the treatment of appeals brought before it required (applications for social aid, the review of orders of commitment, applications for disability pensions and applications for appointment to the medical board of a health establishment). No assessor of the SAC could hold office for a term exceeding five years.

The distinction between members and assessors, on the one hand, and the professional qualifications required of either, on the other, have been maintained despite successive changes effected in the *SAC Act* since its enactment. Following the enlargement of the SAC's jurisdiction to include litigation arising out of workmen's compensation, the number of members was increased to twelve and the number of medical assessors to eight.[571] Finally, with the adoption of the new automobile insurance plan, appeal jurisdiction over which was likewise entrusted to the SAC, the number of assessors was increased to seventeen, ten of them members of the medical profession.[572] The total maximum staff of the SAC thus stands at 29 persons at present, though only Commission members devote themselves to their duties on a full-time basis. The various assessors associated with the Commission pursue, to varying degrees, their private professional activities, participating in the business of the SAC only part time.

In staffing the SAC, it was not enough merely to marshall the necessary technical expertise; equally important, the various specialists (whether in law, medicine, psychiatry or social work) had to be assigned to the particular areas of litigation where their skills

would be required. To this end, the SAC was, from the beginning, structured into specialized divisions, each of them called upon to rule on a specific category of appeals on the Commission's behalf. Originally four, the number of divisions was subsequently raised to six:

- the social aid and allowances division;
- the mental patients protection division;
- the health services and social services division;
- the pension plan division;
- the workmen's compensation division; and
- the automobile insurance division.[573]

The jurisdiction of each of the divisions is defined in the Act.[574] No case may be transferred from one division to another. As for the mental patients protection, the workmen's compensation and automobile insurance divisions, their name suffices to describe accurately the respective sphere of jurisdiction of each. The pension plan division, which succeeded the PAB in adjudicating appeals in the area of QPP benefits, is also responsible for litigation arising out of the civil servants' and teachers' retirement pension plans. The social aid and allowances division, chiefly active in the field of social welfare, also hears appeals in the area of family allowances, exemptions from contributions to the cost of certain social services, and benefits in kind administered by the *Office des handicapés*. The remaining powers of the SAC are entrusted to the health services and social services division which consequently has the most heterogeneous jurisdiction of all. In practice, the division concerns itself primarily with contested elections to the boards of directors of health and social services establishments, as well as with appeals regarding the admission of physicians to practice in hospitals.

The quorum of each division and the conditions of constituting a quorum were established in the light of the technical needs of each specific type of litigation handled. One principle universally applied in all divisions, however, is that the quorum must always include at least one Commission member (by definition, a jurist), as provided in the Act. The task of chairing sittings is always entrusted to a member appointed by the president of the SAC.

Thus, one member and one assessor (often a social worker by profession) will constitute a quorum of the social aid and allowances division. In the event of a tie, the president or vice-president of the SAC has the casting vote.[575]

The quorum of the mental patients protection division consists of one member and two assessors (both psychiatrists).

Both the workmen's compensation division and the automobile insurance division call for a quorum composed of two members and one medical assessor.

In view of the crucial importance of medical questions in the determination of disability-related appeals, one might have expected the legislator to prescribe the same composition for the pension plan division.[576] For reasons that are not entirely clear, however, the quorum of this division was set at three members. The SAC itself has not seen fit to request a change in this state of affairs; in any event, no recommendation to that effect has been made, despite the Commission's power to make such a recommendation.[577]

The health services and social services division may be variously constituted depending upon the nature of the subject matter in question. Its quorum may be one member,[578] two members,[579] or two members and a medical assessor.[580]

The quorum, of course, is merely the minimum number of individuals who must participate in a sitting to give its decisions legal force. A division may, and in especially difficult cases often will, sit with additional members or assessors present.[581]

Despite the fractioning of the SAC into six divisions, the activities of its members and assessors have not been confined to a single field. Indeed, the members as such are not assigned specifically to any one division; even though certain specializations have arisen in the course of the SAC's development, no member participates in fewer than two divisions and most take part in the work of all divisions. Conversely, the assessors are assigned by the Cabinet to one or more specific divisions at the time of their appointment; thus, even in their case there is a certain degree of versatility.

SECTION III

Procedure before the SAC

The procedure governing the treatment of appeals to the SAC reflects neither the multiplicity of the areas in which it has jurisdiction nor the sharing of these areas among six specialized divisions. Indeed, the procedure utilized by the SAC is uniform in principle, so that no distinction need be made between that applying, for example, to appeals under section 196 of the QPP and that governing any other sphere of action. As a matter of fact, as we have already remarked, standardization in procedure was precisely one of the objectives contemplated by the government in creating the SAC in the first place. Admittedly, the constitutive statute of the SAC authorizes a general meeting of its members (but not of its assessors) to lay down rules of evidence, procedure or practice for the regulation of any one of the Commission's divisions.[582] But the SAC has not hither-to availed itself of this power; all internal regulations that it has adopted so far are of a general nature, applying to all divisions of the Commission.[583]

In its general characteristics as well as in some of its particular regulations, SAC procedure closely resembles that used by the PAB. Thus in appeals relating to pensions, the SAC considers all cases before it as new applications for benefits. This enables the Commission to evaluate the situation of applicants as of the day of the hearing rather than merely retrospectively, with reference to the validity of the original decision.[584] In other words, the SAC, as the PAB, considers its hearings as of the nature of a new trial. As with the PAB, the SAC's rules of procedure provide for considerable latitude in matters of form, no proceedings being susceptible of being declared null and void because of a defect of form or procedure.[585] Without embarking upon a detailed description of the provisions governing SAC procedure, it may be of some interest to summarize here the most relevant.

The use of a constitutive statute to establish an administrative tribunal makes it theoretically possible to lay down the fundamental rules of procedure to be followed before the tribunal at the same time as defining its structure and jurisdiction. Such is in fact the case with the *SAC Act*.

The Act declares the duty of all members and assessors of the SAC to be impartial, and allows the invocation against them of provisions in the *Code of Civil Procedure* relative to the recusation of judges.[586]

It likewise imposes an obligation on the SAC to hear the parties before ruling on an appeal, or, to be more exact, to afford an opportunity to the parties to be heard. The formulation of the Act leaves no doubt that its provision in this regard contemplates the parties being physically present at the hearing before the SAC.[587] A party is free, however, to waive his right to the verbal presentation of his case at a hearing; indeed, the SAC asks every appellant to indicate in his declaration (the notice he serves of his intent to appeal) whether he proposes to avail himself of his right to appear before the Commission when his appeal is being heard.[588]

The same section also guarantees the parties' right to be represented by counsel. In filing his initial declaration, the appellant must specify also whether he wishes to be so represented or not.

The Act obliges the SAC to render its decision and to transmit it, together with the reasons therefor, to the parties in writing.[589] The rules of procedure, moreover, specify that this obligation is binding whether the appellant appeared at the SAC hearing or not.[590]

Thus, the constitutive statute itself lays down three of the fundamental principles of all equitable administrative procedure: the duty of impartiality, the right to be heard, and the obligation to justify the decision in writing.

The Act, incidentally, makes a fortunate simplification in procedure possible by applying to all remedies that may be taken under it and that are known by such various names as application, request, appeal, and so forth, a common procedural formula, the declaration.[591] The declaration must indicate with sufficient clarity and precision the event which gave rise to it (that is to say, the decision being challenged) as well as the reasons for the appellant's refusal to acquiesce in the decision. It must also, as we have seen, state the

appellant's intention to appear in person or to be represented at the hearing, or declare his willingness to forego the right to be actually heard by the SAC. A declaration form is placed at the appellant's disposal upon request addressed to the secretariat of the SAC either in Quebec or in Montreal; the use of the form is not prescribed, however.[592] Drafted in extremely simple language, the form is adaptable to all situations liable to give rise to an appeal; the reverse side of the document includes a list to which the appellant is invited to refer to describe the decision that he wishes to contest.

The reform of 1974-1975 has simplified procedure in another extremely important respect, by eliminating the need for the appellant to obtain leave to appeal to the SAC. Section 196 of the QPP, in effect, now confers an absolute right on members of the public to appeal to the Commission any decision by a Reconsideration Committee of the Pension Board, within the time limit prescribed for such appeals.

The time limit prescribed by the Act for the lodging of any appeal, regardless of its subject matter, is 90 days from the date on which the contested decision was rendered. Two exceptions are, however, provided to the rule, with reference to certain types of actions. The Act, moreover, authorizes the SAC to entertain an appeal belatedly lodged if the appellant can demonstrate to the Commission's satisfaction that circumstances impeded him from acting sooner.[593] The SAC rules on applications for extension on the merits of the applications themselves and on the basis of documents submitted in support of the applications either voluntarily or at the request of the SAC.[594]

The Act specifies the effect of appeal on the contested decision. It declares that, as a matter of principle, the initiation of appeal proceedings does not suspend the execution of the decision.[595] This rule has significant practical consequences when the challenged decision entails the cessation of benefit payments. In cases of undue hardship — that is, where the recipient depends on the benefits for his subsistence — a member of the SAC may nonetheless rule that the appeal will suspend the execution of the decision. This provision has given rise to numerous precedents in the sphere of social aid, though it has not hitherto been invoked to suspend the execution of a decision by the Quebec Pension Board.

In hearing appeals, the SAC may use all the powers at the disposal of a commission of enquiry, notably that of compelling

witnesses to give testimony.[596] It is free to admit any species of evidence it deems acceptable in the interest of justice; in this sense, it is therefore not bound by the rules of evidence applicable to regular courts of law.[597]

Even though its decisions are final and without further appeal, the SAC is obliged to produce minutes of its hearings detailing, particularly, the names of the witnesses heard and the nature of the documents submitted at the hearing.[598]

The SAC has the power of revising its own decisions "for cause". Although the Act provides that the quorum for the revision of decisions is the same as for the decisions to be revised, it does not specify whether the revising quorum must be composed of the same persons as the quorum that formulated the initial decision. Such would certainly be the case, however, if the revision were preceded by a reopening of the hearing.[599] At any rate, the organization of the SAC and the continued availability of its members greatly facilitate the use of that procedure.

When, in the context of an appeal against a decision by a Reconsideration Committee of the QPB, there arises a question involving the payment of contributions, the SAC is obliged to refer the matter to the PAB.[600] At the time when the PAB still had jurisdiction in the sphere of QPP benefits, it used to refer precedent or concomitant questions connected with contributions to the Quebec Minister of Revenue. The solution opted for by the legislator in 1974 short-circuits the need for a possible appeal to the PAB against the Minister's decision.

All in all, one is led to conclude that the procedure used by the SAC places at the service of justice a simple, accessible and flexible system based on certain fundamental principles of procedure clearly laid down in the Act. The progressive extension of the SAC's sphere of authority is visible proof of its success in realizing the ideal of administrative justice: to define a procedure which, while serving the ends of equity, is devoid of formalism.

The SAC has taken the opportunity of its annual reports to convey some of its ideas on procedural matters. It has commented in this context on the role of lawyers at the Commission hearings, noting that (particularly in appeals relating to pensions) the lack of legal counsel often leaves the appellant rather helpless in the face of the ample and pertinent evidence presented on behalf of the Pension

Board by lawyers and specialists.[601] Observing in its next annual report the increasing tendency of citizens to be represented before the Commission by lawyers, especially those of the legal aid services, the SAC expressed its eagerness to keep its hearings free from an atmosphere of confrontation that would take into account neither the respective means of the parties, nor the magnitude of the problems to be resolved, nor, ultimately, the persons involved in the appeal.[602] To this end, the SAC invited lawyers pleading before the Commission to remain mindful of the intentionally less formal climate prevailing at hearings, a climate indispensable to the pursuit of administrative justice in its sector of activity. For its own part, the SAC pledged to facilitate matters for the benefit of those appearing before it without legal counsel, and particularly to take an active role in conducting the examination so as to direct the debate and to steer clear of legalistic confrontations.

SECTION IV

Activity of the SAC

When the SAC began its operations on August 1, 1975, it inherited all the appeals then outstanding before the bodies to whose jurisdiction it succeeded. In the specific area of pension appeals, all business not already taken under advisement by the PAB was automatically transferred to the SAC. To cases awaiting a hearing were to be added the applications that had been addressed to the PAB for leave to appeal — applications which, under the revised QPP section 196, were all considered as amounting to valid notices of appeal.[603] In all, 354 case files were transferred to the SAC in August 1975, many of them already several years outstanding.

The liquidation of this heavy backlog of work was all but complete by the end of March, 1977, though it has considerably slowed down the processing of new appeals lodged since the establishment of the SAC. This tendency has been further aggravated by the reform of 1974-1975, as a consequence of which the number of appeals has increased substantially. It is not until the period of transition is ended, and the massive backlog of cases is finally disposed of, that the efficiency with which the SAC handles appeals will be measurable with any degree of reliability.

Table XXVII summarizes the activity of the SAC up until March 31, 1977. During its first eight months of existence, the SAC accorded priority to the treatment of cases involving social aid and the protection of mental patients — areas in which it deemed the needs of the public to be the most pressing. It could hardly broach the accumulation of appeals in the area of pensions before the 1976-1977 fiscal year. In the course of that year, the pension plan division held sittings one out of every two weeks. This means that three of the eight members of the SAC at that period devoted half their time to hearings of the pension plan division. This accelerated pace of activity enabled the SAC to dispose, by decision, of some 200 appeals in one year, whereas the PAB had not managed to render more than 85 decisions in five years.[604] The upsurge in the number of new appeals submitted made up, by and large, however,

TABLE XXVII

SUMMARY OF ACTIVITIES OF THE SOCIAL AFFAIRS COMMISSION (AS OF MARCH 31, 1977)

	Cases to be processed		Cases liquidated		
	Balance at beginning of period	Declarations received	Appeals discontinued	Decisions	Balance at end of period
From August 1, 1975 to March 31, 1976:					
• Social assistance and allowances	164	677	41	414	386
• Mental patients protection	—	51	30	21	—
• Health and social services	—	12	—	12	—
• Pension plan	354	132	—	25	461
From April 1, 1976 to March 31, 1977:					
• Social assistance and allowances	386	1012	137	872	389
• Mental patients protection	—	88	43	41	4
• Health and social services	—	44	7	18	19
• Pension plan	461	344	192	199	414

Source: SAC annual reports

for the ground that had been gained, despite the discontinuance of some 200 further appeals for reasons of the appellants' death, their withdrawal (two plausible hypotheses, given the length of time some of the cases had been outstanding), or a revision of the decision by the QPB.

Examined in the context of the multiple jurisdictions of the SAC, the data recorded on Table XXVII already reveal that pension-related appeals are by no means the most prolific area of litigation dealt with by the SAC. It may be confidently forecast that in the years to come both social aid and workmen's compensation will account for a much greater number of appeals than the QPP does. Since by their very nature these two branches of social security require speedy decisions, it seems reasonable to suppose that they will be given a certain priority in the utilization of the Commission's resources.

The SAC's contribution to the equity and efficiency of administrative action as well as to the development of the law is not limited to its activities as a tribunal. The constitutive statute of the SAC contains, as one of its innovative features, the provision authorizing the Commission to make recommendations in its annual report to the Minister of Social Affairs and, through him, to the National Assembly, concerning the statutes, regulations, directives and administrative practices governing its various spheres of jurisdiction.[605] In fact, the SAC devoted about two-thirds of its 1976-1977 annual report to precisely such recommendations. Among other things, it has proposed amendments to Acts that it has the responsibility of applying; it has drawn attention to instances of poor coordination between statutes and regulations; it has pointed out the inconvenience of certain administrative practices for members of the public and has suggested ways of improving upon them. We have already alluded to its proposals for the simplification and liberalization of sections of the QPP dealing with the surviving spouse's pension[606] and for changes in the medical reports required in support of disability pension claims.[607] Although one may presume that the Commission's recommendations are not without considerable weight to the legislator, a few years will have to pass before the real effects of this interesting innovation may be objectively assessed in terms of the directives and practices of administrative authorities in the field of social security. It appears to us that considerable benefits may accrue from this collegial exercise of reflection, carried on as it is from a perspective affording a comprehensive overview of the Quebec social security system and in the light of an ever richer and more varied experience of its functioning.

SECTION V

The SAC's caselaw

The SAC is obliged by its constitutive Act to publish its decisions.[608] In practice, this obligation has been construed as amounting to an obligation to publish a digest of its most important rulings, since the publication of all the Commission's decisions *in extenso* would make for a work of colossal proportions. As we have already remarked, the establishment of a systematic jurisprudence in social law was one of the fundamental objectives contemplated by the legislator in instituting the SAC. This task has been pursued with exemplary energy: indeed, the Commission has already published a 144-page digest of its 1975 decisions and a 771-page digest (in three volumes) of its 1976 decisions. In all probability, the 1977 digest will be even more impressive in size. With regard to the pension plan division alone, the SAC has published 6 decisions in 1975 and 53 in 1976. The Commission assumes the responsibility of selecting the decisions to be published. Each volume of the digest includes a table of the acts and regulations cited, a table of caselaw cited and an analytical index by subject matter drawn up on the basis of the case headnotes.

The SAC does not consider itself bound by PAB precedent. In fact, unlike the common law provinces of Canada, Quebec does not subscribe to the principle of *stare decisis*. Besides, decisions handed down by the PAB are seldom invoked in arguments before the Commission. In one point in particular (we are referring to sections 105, 107 and 119 of the QPP), the SAC has utterly departed from PAB caselaw. Mention has already been made of this break with precedent with regard to the conditions for the allocation of the surviving spouse's pension.[609] It will be useful to come back to the question here, for it was on the occasion of the debate on the meaning of these provisions that the SAC declared most explicitly its perception of its own role, a perception considerably at variance with that entertained by the PAB of itself.[610]

In accordance with PAB caselaw concerning the interpretation of these three sections of the QPP[611] — and concerning the interpretation of the analogous section, section 63, of the CPP —, the Quebec Pension Board held that the legal spouse of a deceased contributor had, by virtue of section 119, prior claim to the surviving spouse's pension; that the *de facto* spouse could only lay claim to the pension if the legal spouse could be presumed to be predeceased by virtue of section 107 and if the *de facto* spouse could prove that he met the requirements of section 105; and, finally, that the decision to apply the presumption of predecease first to the legal spouse and to grant subsequently the *de facto* spouse's application for the pension lay entirely within the discretionary power of the Pension Board, even where the conditions precedent specified in sections 107 and 105 were shown to have been met. On this last point, the Pension Board concluded that the SAC could not substitute its own judgment for that of the Board, unless the latter had exercised its discretionary power in an irregular manner. In the event of an error in determining the existence of a condition precedent to the exercise of this power, the Board was of the opinion that the SAC had no alternative but to refer the matter back to the Board.

The SAC categorically rejected this interpretation, which would evidently have had the effect of curtailing its appellate powers over the Board's decision whether to grant the pension to the legal spouse or to the *de facto* spouse. In doing so, the Commission based itself on the distinction between the powers of judicial review exercised by higher courts over the decisions of lower courts and of administrative authorities, on the one hand, and the broad powers of substantive review exercised by appellate administrative tribunals over the decisions of administrative authorities. Whereas the former, the Commission maintained, rule merely on the legality of the inferior courts' decisions, the latter exercise their appellate powers over both the legality and the merits of the administrative authorities' decisions.[612] Citing section 23 of its constitutive Act, which authorizes the Commission to substitute its own judgment for that of the authority whose decision is being contested, the SAC implicitly dismissed the argument that the discretionary nature of a decision sufficed to place it beyond the SAC's jurisdiction.[613]

The SAC subsequently reaffirmed its ruling on this point of law in several other decisions.[614]

The Commission thus expressed its perception of its own nature and of the powers conferred upon it unequivocally — a perception which, though it makes no explicit reference to PAB caselaw, has

the effect of drastically changing the scope and extent of the power of judicial review conferred on the SAC by section 196 of the QPP:

> La Commission a donc le devoir de rendre la décision qui aurait dû être rendue en premier lieu. Nier à la Commission des affaires sociales le droit d'intervenir dans une décision quasi judiciaire d'un fonctionnaire ou d'un organisme, ne lui reconnaître seulement qu'un rôle de surveillance, c'est à toutes fins pratiques l'assimiler à une Cour supérieure exerçant un pouvoir de surveillance sur les tribunaux inférieurs. Or le texte de l'article 23 de la *Loi de la Commission des affaires sociales* ne peut nous conduire à une telle interprétation. La Commission est un tribunal d'appel en matière administrative exerçant des pouvoirs judiciaires ou quasi judiciaires dépendant des pouvoirs confiés aux fonctionnaires ou à l'organisme administratif. Si la Commission *doit rendre* la décision «qui aurait dû être rendue en premier lieu», c'est qu'elle peut intervenir et substituer sa décision à la décision d'un fonctionnaire ou organisme même si cette décision est prise à l'occasion de l'exercice d'un pouvoir quasi judiciaire ou discrétionnaire[615].

Although the statement is not above criticism from the point of view of terminological accuracy, since it blurs the distinction between judicial power and discretionary power, two concepts with partly contradictory implications for the possibility of judicial review, it is quite clear in declaring that the authority of the SAC is precisely coextensive with that of the administrative bodies whose decisions are appealed to it. Consequently, the SAC is justified in over-ruling decisions taken by these administrative authorities in the exercise of a discretionary power, in the light of its own interpretation of the purposes of the Act that it is called upon to apply.

Another point upon which it will be interesting to see whether the SAC will comply with PAB caselaw is the question of what relationship need exist between the evaluation of disability and the claimant's actual chances of obtaining employment. The question arises at two levels. First, with regard to substance: to what extent should the actual chances of a claimant of finding employment in the area where he lives be taken into account in evaluating his disability, given the limitations that his state of health and personal situation place not only on his ability to pursue an employment but also on his capacity for travel in search of employment? Secondly, with regard to procedure: with what degree of certainty must the Pension Board demonstrate the claimant's capability of pursuing an employment, and to what extent must the Board establish the existence of possible employment *accessible* to the claimant?

PAB caselaw on this point is quite categorical. The availability of suitable employment in the vicinity of the claimant's domicile has

absolutely no bearing upon the evaluation of his disability.[616] One might have expected the SAC to call in question, if not this interpretation itself, at least its consequences at the level of proof. In one of its first decisions on the subject of pensions, the Commission rejected the employment possibilities put forward by the Pension Board to illustrate the theoretical capacity of a claimant regularly to pursue a substantially gainful occupation, on the grounds that they did not correspond to the claimant's aptitudes, given his schooling, professional experience and personal situation.[617] At the same time, the Commission did not take exception to the employment possibilities on the grounds that they were unrealistic in view of the existing opportunities for employment in the claimant's area of residence. More recent decisions of the SAC have shown its adherence to the accepted interpretation of what amounts to "severe disability".[618] Yet, the Commission thus far has hardly had an opportunity to resolve the question in a definitive fashion, either at the level of the substantive law or with regard to the problem of proof.

CHAPTER 6

Comments and proposals

As we announced at the beginning of our study, the purpose of the present chapter is two-fold. On the one hand, we shall attempt to show how the fundamental objectives of administrative procedure find application in the sector of administrative action falling within the PAB's jurisdiction. On the other hand, we shall propose adjustments and corrections wherever the present state of procedure appears to us to fall short of these objectives. The two operations are, in our opinion, inseparable and will, for that reason, be carried on concurrently in this chapter.

Before embarking on this phase of our study, it will be essential, however, to declare the principles that guide our reflections. We must specify, in particular, what we consider to be the objectives of administrative procedure, only briefly hinted at in our introduction. We shall also describe the six domains into which our proposals fall. Each of the domains will be treated in an individual section, with a final section devoted to a brief summary of our observations.

SECTION I

Principles

The existence of procedural rules to govern administrative action within the modern State is in answer to two categories of imperatives. On the one hand, the rules, as indeed public administration itself, have the purpose of serving the public interest. They play a part in the formulation and execution of decisions in accordance with the public interest — the public interest which the administrative authorities themselves are there to promote. On the other hand, the rules, as aspects of law or as elements derived from legal norms, are intended also to serve the idea of justice. They contribute in this sense to protecting the legitimate rights and interests of individuals, relatively powerless in the face of the various means of action and of constraint available to the public authorities.

The two ends of administrative action presuppose, each a set of special requirements, the one related to the imperative of efficiency and the other to that of equity. We shall briefly recall these requirements, applicable as they are to all administrative procedure in whatever sector of state activity.

A number of particular factors intervene, however, in the social security sector, giving a peculiar colouring of their own to procedure. We shall enumerate these particular factors insofar as they appear to us characteristic of those aspects of social security falling within the jurisdiction of the PAB.

Finally, our observations on the conduct of administrative procedure in the field of social security, gathered, in part, in the course of a previous study on unemployment insurance benefits and, in part, in preparing the present study, have convinced us that the time has come to envisage the creation of a single administrative tribunal to deal with litigation arising out of federal social security schemes. This conviction will to some extent colour all our proposals; hence it has seemed useful to us to declare it at the outset and to leave its development in greater detail to a later part of this chapter.

A. The basic objectives of administrative procedure

The essential purpose of administrative procedure derives from the two fundamental imperatives that we have briefly alluded to: to reconcile the requirements of the public interest with the necessary safeguards for individual interests.

1. Requirements of the public interest

Is the existence of rules of procedure for the administrative decision-making process compatible with the pursuit of the public interest by administrative authorities? Rules imply restraint, and it may well be argued that the very weight of procedure merely deprives administrative authorities of a freedom of conception and action that is desirable. In principle, however, rules of procedure ought to contribute to bringing administrative action in line with the public interest.

By promoting the deliberate consideration of issues and by ensuring that decisions are taken on an adequate factual basis, rules of procedure tend to eliminate arbitrariness and hasty approximations, partiality and excessive delay. Thanks to their use, the administrative authority is in a better position to decide what the public interest, as defined by the statute that it has been charged with applying, requires in a particular case.

Further, rules of procedure present certain technical advantages to the administrative authorities themselves. Thus, by establishing uniform methods for the treatment of individual cases, the rules facilitate and accelerate the work of administrative authorities, make the planning of future activities possible and simplify relations with the public at large. The existence, in large bureaucratic organizations, of procedural handbooks for the use of employees attests to the practical usefulness of set regulations in fostering administrative efficiency.

From the point of view of the administrative authorities, the efficiency of their action in the service of the public interest presupposes three elements.

The quality, practical value and factual soundness of decisions require, first of all, that the decision-maker be correctly and fully

informed. The administrative authority must be in possession of all the facts relevant to the problem. The necessary data are derived primarily from the persons affected by the decision to be taken; hence the importance of adequate contact between these individuals and the administrative authority. Secondly, the required facts may be learned from third party informants, who may be either disinterested persons or other administrative authorities or agents. Finally, certain data originate with the administrative authority itself: these include the standards to be used for evaluating the facts, whether derived from law or from the administrative authority's own practice. The process of *informing the decision-maker*, to be discussed at greater length in section III of this chapter, includes therefore the gathering, finding and evaluation of facts by the initial decision-maker, as well as the transmission of the results of these operations to the subsequent decision-making authorities. Briefly put, its purpose is to enable the various authorities to rule on a question.

Secondly, efficient administrative action often requires that a decision be *speedily* taken. Admittedly, it is on this score that the usefulness of rules of procedure is most readily called in doubt. The mention of administrative procedure is enough to call to mind judicial procedure. The analogy awakens in public administrators an ingrained distrust for all those lawyer's artifices whose sole object seems to be to postpone any decision on the problem at issue or to neutralize in advance its effects. But administration is not adjudication: the concept of procedure neither implies the same content nor serves the same purpose in the two cases. Administrative procedure, far from delaying the settlement of matters, ought indeed to contribute to expediting their treatment. On this point, the usual opposition between the public interest and individual interests vanishes in the domain of social security. Whether the question concerns the assessment of contributions or the payment of benefits, both the administrative authority and the individuals concerned have the best of reasons for wishing for a speedy determination of their respective obligations. *Speed in decision-making* will be the subject of further observations to be made in section V of this chapter.

Last of all, in order to be truly effective, administrative decisions must be assured of being actually *put into execution* by those concerned. In the sphere of contributions, this means that the amounts assessed as payable to support the financing of social security schemes shall indeed be collected and transmitted to the appropriate administrative authority. In the sphere of benefits, the

guarantees of execution concern decisions declaring certain payments to have been illegal. Where such is the case, the administrative authority must have the necessary means to effect recovery of the sums due from the contributor or illegally paid. When the contributor's failure to pay contributions or the beneficiary's unjustified collection of benefits results from the wilful misconduct of either, the administrative authorities may deploy particular sanctions against the offender. In either event, the individual becomes the target of special constraints, involving procedural problems of their own kind. These aspects of the *enforcement of decisions* will be discussed at greater length in section VII.

2. Safeguards for individual interests

The usefulness of rules of procedure as safeguards for the protection of individual interests is almost self-evident. The history of public law, above all in countries belonging to the British legal tradition, reveals that the reinforcement of personal freedoms and rights in the face of state prerogative has customarily and consistently taken the form of procedural means. The multiplicity of ways in which the modern State intervenes in the economic and social life of the individual, posing an ever-increasing threat to his essential rights and interests, has, if anything, made his dependence upon procedural safeguards greater than ever before. Yet the citizen of the modern State, in his numerous day-to-day contacts with administrative action, has largely transcended the purely defensive conception of his right to "due process". More conscious than his forebears of his own social obligations and of the benefits he derives from social solidarity, he sees himself less in the role of a David confronting by himself the overpowering Goliath of the State than as a participant in the social process with a voice of his own. Political democracy enables him to participate through elections, in the choice of those that wield power over him; and he looks to administrative democracy to secure for him the right to share in the daily exercise of power, through cooperation, consultation and participation.

The new safeguards that the individual seeks in the face of administrative action involve three principal elements.

First, the contemporary citizen wishes to *understand*. He wants to know the reasons for the administrative actions taken concerning him, and to be informed of his rights and recourses, of his means of redress and the scope of his obligations. Long before he becomes

personally involved in the process of administrative decision-making, he insists that the administrative authorities give him access to this information. This insistence takes on special significance in areas of administrative action likely to affect great numbers of citizens, such as social security. Once the procedure is begun, the individual wishes to have its conduct explained to him. He wants to know what is expected of him and what the meaning of the decisions with which he is confronted is. Hence the importance of the initial contacts between him and the administrative authority, of his relations with the staff of the administrative body in the course of the procedure, and of the giving of written reasons in support of decisions affecting him. Lastly, in the event of litigation between the administration and the citizen, the latter wishes to know exactly what his situation is under the law. He will seek to find out, without necessarily resorting to a lawyer, the substantive law and the procedural regulations that apply to him; hence the importance for him (and for any representatives that he may retain) of having ready access to the legislation, regulations or caselaw from which these rules are derived. These questions will be dealt with under section II of this chapter, under the heading of *informing the public*.

Secondly, the citizen of the modern State seeks a guarantee that his interests will be protected through his *participation* in the administrative action. The fundamental demand of the citizens of the Service State is that they be associated with the decision-making process. This participation takes the form of a "convergent procedure", which enables the individual to contribute, by expressing his own view of the case, to the making of the decision which will affect his interests. The problems of access must, however, be solved before this dialogue between the decision-maker and the individual can be initiated: access to the administrative authority, access to the decision-maker in person when the nature of the decision makes this feasible, and ultimately access to the file on the decision. In areas where the cooperation of the individual remains necessary even after the decision has been made (as is the case with various types of social security benefits), the administrative procedure should establish the machinery for this on-going input. Finally, in cases where the decision is contested by the individual, fairness requires that the litigation procedure guarantee him a real possibility of making his views prevail before the review authorities. All these aspects of *public participation* will be covered in section IV.

The third safeguard required in the interests of the individual is the existence of an avenue of appeal against the decisions of ad-

ministrative authorities. A member of the public who feels aggrieved by a decision of course always has the option of having it reviewed by a superior court, but for a number of reasons (cost, speed, the technical nature of the litigation and so on), it is normally more advantageous for him to appeal before an administrative tribunal. Access to the review authority should thus be easy and require a minimum of formality. The structure and organization of the review authority should enhance its impartiality and technical competence, and its decisions should impress both the administrative authority and all members of the public with their quality. Section VI will deal with the application of these principles to the various areas of litigation within the PAB's jurisdiction.

B. Characteristics of the PAB's area of jurisdiction

Administrative action in the field of social security makes special demands of its own in addition to those implied in the general objectives shared by all administrative procedure.

With the possible exception of the fiscal domain, no sphere of administrative action is made up of such myriads of isolated decisions as that of social security. None includes such multitudes of repetitive elements disposed in such infinitely varied combinations. The very amplitude of the administrative operations raises, of course, serious problems with regard to the imperative of efficiency. But it raises even more difficult problems with regard to equity and fair dealing: how to ensure that justice will be served in each one of these millions of cases — that each of the millions of individuals touched by social security measures in one way or another will be accurately and adequately informed, will be given the opportunity of participating in the decisions affecting him, and will, if necessary, have the means to appeal against these decisions? The quest for ways and means of guaranteeing equal justice to large numbers of individuals takes on special significance in the sphere of social security benefits, since these benefits are by definition intended primarily for the most vulnerable and disadvantaged: children, the aged, women, the disabled, the unemployed, the sick and the poverty-stricken.

The fundamentally egalitarian character of social security has another significant repercussion upon the conduct of administrative

procedure. It calls for consistency in the decisions made — that is to say, for a concern on the part of the decision maker to treat identical cases in uniform fashion. Regarded from this point of view also, the sheer quantitative scale of the administrative operations poses problems: how can we ensure that identical questions will receive identical answers everywhere and at all times? The problem has direct consequences for administrative organization, the establishment by the administration itself of standards to govern its own practices, and the conservation of precedents.

Since the manifest purpose of social security is to eliminate or to reduce the economic insecurity of beneficiaries, the dire economic plight in which claimants may find themselves must be taken into account. Such situations demand a speedy decision. Indeed, one might say that society fails to live up to its self-imposed obligation to help its citizens in distress through its social security programmes, if the decisions to allocate benefits are preceded by excessive delays. The enormous financial resources required for the operation of a social security system likewise necessitate that the levy of contributions, as well as decisions regarding the obligation of individuals to make contributions, be efficiently and speedily handled.

In speaking of social security, therefore, the guarantee of individual justice, the need for consistency and the importance of speed in the rendering of decisions appear as essential considerations in any serious reflection upon the reform of administrative procedure.

In the narrower context of the social security measures coming within the purview of the PAB, two further observations need to be made.

Administrative action in the sphere of CPP benefits takes place generally in a non-adversary atmosphere from which considerations of humanitarianism are not altogether absent. This atmosphere corresponds by and large to the prevalent image that the CPP has in the public mind. The allocation of benefits to the elderly and disabled, to orphans, widows and widowers does not appear to elicit the sort of adverse reaction that the payment of unemployment insurance benefits does in some quarters. It has been said that the very existence of the CPP represents the tangible conciliation of two values — social solidarity and the work ethic — values held in unequal esteem by the diverse sectors of Canadian society.[619] It seems to us that this compromise is largely accepted today, a fact which may account for that atmosphere of serenity characteristic of

the various phases of the decision-making process — which may, indeed, explain that attitude of good will on the part of the administrative authorities that often disarms any aggressive reaction or feeling on the part of the claimants. It appears to us that this atmosphere should be maintained and in fact encouraged at any cost; indeed, it is to this end that our proposals are in part dedicated.

Obviously, this first observation holds true only in the sphere of benefit claims. In the area of contributions, the prevailing climate of the proceedings approximates much more closely that of tax litigation. Here, other elements, such as the law of contracts, commercial and corporate law, and the law of labour relations, enter the picture, complicating the issues and making the cases more closely akin to ordinary court proceedings.

Secondly it must be remembered that disability-pension cases represent the lion's share of the PAB's work-load. Indeed, within the Board's remaining fields of activity (excluding, in other words, its former jurisdiction in the area of QPP benefits), 71% of the cases appealed to the PAB between 1967 and 1976 involved claims for benefits under the CPP,[620] and 83% of these related specifically to disability pensions.[621] We may reasonably expect that in the years to come well over one-half of the PAB's work-load will continue to emanate from the sphere of disability claims. Our proposals take this into account by focusing attention primarily on this particular branch of litigation.

C. The integration of federal social security litigation

The three essential preoccupations we have mentioned — the need for individualized justice, consistency and rapidity — suffice to justify in our opinion the concentration before a single permanent and specialized administrative tribunal all litigation arising out of all federal social security programmes.

The ideal of equal justice accessible to all the millions of our citizens who at one time or another during their lives come in contact with social security, either as contributors or as claimants, is not, we believe, unrealizable. It will be realized as soon as all citizens are able, at any time the need should arise, to place their cases before an independent and technically competent appeal au-

thority accessible to them with a minimum of formality. Unfortunately, not all these conditions are present in our current system of administrative justice either for the CPP or for unemployment insurance, the two principal federal social security schemes.

The pursuit of consistency in the application of social security legislation appears to us likewise to argue in favour of the creation of a single appeal authority of last resort, capable, thanks to its specialized technical expertise, of constructing a caselaw, that is, a coordinated and authoritative system of precedents accessible to the administrative authorities and members of the public. Even though the conditions for the emergence of such a caselaw already exist formally at present with regard to the CPP and unemployment insurance, the actual realization of this objective seems to us still very remote. The pursuit of consistency in applying the law would be a valid objective not only within the limited context of a single social security plan but also with regard to the provisions of various plans. Hence the practical value of concentrating in the hands of a single appeal authority of last resort all litigation arising out of all federal social security plans.

Finally, the need for speedy decision-making, however important at the level of the initial decision, is no less great at the appellate level. The interest of contributors to secure their legal position and of beneficiaries to assure their material welfare requires that litigation be settled without excessive delay. For this reason, unless circumstances justify the maintenance of various levels of review, the multiplicity of appeal levels ought to be abolished. An effort should also be made to ensure that cases reach the final appeal authority promptly so as to enable it to rule on them within the minimum of delay. In this regard, the present situation with reference to CPP as well as unemployment insurance claims leaves a great deal to be desired, for partly identical reasons.

Our proposal calling for the establishment of a single administrative tribunal with final appeal jurisdiction over all social security programmes has already been sketched out in our previous study on unemployment insurance benefits.[622] In that monograph we suggested that the tribunal's authority include litigation connected with unemployment insurance contributions and benefits, CPP contributions and benefits, family allowances and Old Age Security benefits. We alluded to the possibility that the tribunal might also be empowered to rule on litigation in the sphere of veterans' pensions and allowances.

The new Federal Social Security Tribunal would succeed to the jurisdictions of the unemployment insurance Umpire, the PAB, and the Review Committees as provided by the *Family Allowances Act* and the *Old Age Security Act*.

Our proposal for the establishment of the Tribunal contained a description of its structure and mode of operation — the latter, in view of the specialized nature of our previous monograph, dealing exclusively with the Tribunal's unemployment insurance benefits jurisdiction.[623] Section VI of the present chapter will complete our proposals in this regard, by sketching out the Tribunal's possible manner of functioning in the social security sectors examined in this study, as well as in the spheres of family allowances and Old Age Security benefits.

SECTION II

Informing the public

The Canada Pension Plan, albeit a more recent creation than unemployment insurance, has become as much an accepted fact of life for the great majority of working Canadians as the earlier social security measure has done. Virtually all wage-earners and employers expect to have to pay contributions to the two plans. The obligation to do so has become, for all intents and purposes, part of the normal economic activity of most citizens. In the normal course of events, employers and trade unions assume the responsibility of informing wage-earners of their obligations and rights under the plans. Indeed, in certain cases, employers have the legal duty of doing so. We can therefore assume that a certain amount of general information concerning the obligation of wage-earners to contribute to the two schemes does reach the average working Canadian through more or less informal channels.

The situation is far otherwise with regard to benefits, since the average wage-earner in all likelihood will come in contact with the CPP only once in his life time, given the nature of the risks the plan covers. It is thus in terms of a single, specific event that he will probably seek to ascertain what his rights are. The decentralized offices of the Department of National Health and Welfare have a certain amount of documentation available to respond to enquiries; they also offer the services of officials capable of explaining some of the aspects of the CPP. The documentation, as is so often the case with the abundance of folders and booklets produced by administrative authorities, present the basic rules governing the plan in a highly simplified, or at least a much abbreviated, form. Thus, on the question of disability, for example, the documentary material offered to members of the public does little more than paraphrase the rather ambiguous terms of section 43(2). If the vagueness of the information serves as an invitation to enquirers to present a claim, it also makes it virtually impossible for them to predict what chance of

success their claim has. It is thus in the context of an application for benefits that the claimant must find out the specific legal provisions according to which his claim will be judged. This in turn raises the question: what access does the applicant have to this legal knowledge; and, in particular, what possibilities does he have of obtaining this information in the course of proceedings?

A. Access to the legal rules

The citizen presenting a claim for social security benefits is concerned, on the one hand, with the Act and the regulations, which define both his right to receive benefits and the way in which the administrative authority will evaluate this right, and, on the other hand, with caselaw, which can provide further specification of the rules especially with regard to his eligibility.

1. The Act and the regulations

We have already commented, in chapter 1 of this study, on the drafting of the CPP. It is evident that no effort was made to render the Act intelligible to the average citizen. Neither in its outline nor in its form does it come within the normal range of comprehension of the citizen likely to apply for social security benefits. There are those who will treat this objection as barely worthy of being laid at the doorstep of those who drafted the Act; statutes, after all, they will maintain, are intended to be understood only by those responsible for their application, that is to say, by officials and judges. This argument seems to us, however, to rest on a specious and unacceptable principle: in a democratic state, surely the rules of law must be sufficiently clear to be grasped by the citizen. Indeed, the Act is too obscure and complicated in its phrasing to be used even by officials in day-to-day situations; its legal language must be translated into everyday idiom by means of manuals, forms, directives and circulars in order to enable them to put it into application. As for members of the Bench, despite their being accustomed to deal with the complexities of legal writing, they are not insensitive to the problems created by the excessive obscurity of legislative phraseology. The acerbity of the comments made by certain judges on the *Unemployment Insurance Act* applies with equal justice also to the CPP.[624]

Ultimately, the question of legislative obscurity is one of legal policy whose implications far transcend the scope of the present

study. Nevertheless, it must be emphasized that the practically impenetrable formulation of the law, so utterly baffling to the uninitiated, does nothing to facilitate citizens' comprehension of procedure, their participation in it or their acceptance of the final decision. Nor does it facilitate the task of the Review Committee whose members are generally no less inexpert in the intricacies of legal phraseology than the claimants whose cases they are supposed to consider.

In the circumstances, there is reason to rejoice in the fact that since 1976 it has at least been possible to obtain an office consolidation of the CPP and its regulations. Since the regulations are subject to frequent change, it is to be hoped that the consolidation will be brought up to date annually. But even if this document were readily available to members of the public — which is by no means the case — it would be unrealistic to hope for increased comprehension of the Act and its regulations by contributors and their families: the consolidation contains merely legislation without explanation or comment, without index, without cross-reference between related provisions and without any mention of caselaw.

With particular reference to procedural provisions, it may be noted that while regulations governing the contentious phase of procedure have proliferated (there are, for example, three distinct bodies of rules of procedure before the PAB, to which may be added the Umpire's rules and those of the Review Committees), procedural provisions applicable to litigation are fragmentary and dispersed throughout the statutes and regulations where they are anything but conspicuous. It is hardly surprising that this should be so. These provisions are, indeed, intended for the most part to serve as guarantees to the citizen; and it is, unfortunately (or so it would seem), not for the enlightenment of the citizen that our social security legislation is drafted. A formulation mindful of the interests of the citizen would have seen to it that these procedural provisions were placed in sufficient relief, since they are the first thing of concern to him. Such an approach would have called for assembling the rules within a single text, preferably a statute rather than a regulation. Indeed, what is needed is precisely such a complete and consistent collection of rules for any social security claimant or contributor to turn to in order that he may find out all he needs to know to initiate proceedings and to take part in them. Specifically, the enactment should describe:

- the authority responsible for making the decision,
- the manner in which the decision must be applied for and the deciding authority's obligation to respond to the application,

- the time limit within which the decision must be made,
- the type of information to be submitted and the form in which it must be presented, as well as the supporting documents required,
- the applicant's obligation to cooperate with the authorities in establishing the facts,
- the conditions of third party participation in the procedure,
- the way in which the decision is made,
- the applicant's right to be heard (either orally or in writing),
- his right to be notified in writing concerning the decision, with the reasons for which it was taken and with a reminder regarding his right of appeal,
- the possibility that the decision may have retroactive effect,
- the applicant's right to have the decision reconsidered in the light of new facts,
- the authority responsible for hearing the appeal,
- the time limit within which the appeal must be lodged,
- the way in which the appeal may be initiated,
- the possibility that the execution of the initial decision may be suspended pending settlement of the appeal.

The preceding enumeration corresponds, it will be noted, to the successive phases of procedure as we have described them in chapter 3. It represents, in other words, the actual sequence of events in the experience of officials and of those whose claims they administer in applying the Act in individual cases. It would probably be unrealistic to hope that Parts I and II of the CPP and Part IV of the *Unemployment Insurance Act* might be revamped so that each part may include a body of procedural rules, logically organized and easy to read. At the very least, we believe that incorporating such a body of rules into the appropriate regulations would make a very significant contribution to administrative justice in the social security sector. One principle should guide the drafting of such provisions: the rules should be formulated in sufficiently clear and simple language to allow a person of average education to understand them. A copy of the appropriate provisions might then be appended to every application form for a decision.

2. The caselaw

In chapters 2 and 3, we described the manner in which authoritative decisions by two administrative tribunals covered in this

study are published and distributed. PAB caselaw is reported at relatively frequent intervals by a private publishing firm, though unfortunately not in a form that is readily accessible. The Umpire's caselaw in the area of contributions is not published at all.

This state of affairs calls for two observations. The first is that a caselaw that is not accessible to all those concerned with the application of the statutes upon which it bears is not really a caselaw at all, any more than an unpublished rule can be a rule of law. It is, in effect, somewhat unjust to expect Review Committees to abide by precedents which, as things go, often only the Department representative at a hearing can cite for their information. Our second observation on this score is the following: it is rather pointless to make use of the services of judges attached to important Courts of law (as is the case both with the PAB and the Umpire), if their decisions are not even allowed to take full effect as sources of law.

It seems to us that in the normal course of events the State must assume responsibility for the publication of the decisions of administrative tribunals, in a form designed to ensure that they will be accessible for consultation and use by all those concerned. The reader is referred in this regard to the observations made in our previous study concerning the Umpire's caselaw in matters of unemployment insurance benefits.[625]

B. Understanding procedure

There are three channels through which a member of the public can obtain information concerning a decision in the process of being taken on his claim: direct contact with officials, letters addressed to him by the administrative authority and, lastly, the examination of his case file, if he has access to it.

1. Contact with officials

In treating this particular channel of information, it is necessary to make a distinction between the area of contributions and that of benefits. As we have pointed out in chapter 3, the Department of National Revenue has somewhat decentralized the decision-making power, which is to some extent exercised by Rulings Officers assigned to the various regional offices. A member of the public consequently has access to an official who (even if not himself

personally responsible for the initial decision to be taken) is at least in charge of preparing the file. Unquestionably, such an official is the best possible informant that the individual could have. Even if the case is eventually transferred to the central administration of the Department, as a result of an application for a determination or an appeal, the procedure provides for direct contact between the parties and the official in charge of the file in the first place.

In the area of benefits, by contrast, all contacts between the applicant and the Department invariably take place through the mediation of an agent assigned to a district office. Although the agent contributes to the case file by adding to it (in the event of a disability claim) a memorandum of his interviews with, and observations concerning, the claimant, he takes no part whatsoever in making the decision. His role is limited to the sole function of transmitting information from the claimant to the Department and *vice versa*. At no time before the contentious phase of procedure is entered upon is there direct contact between the applicant and the official who decides on his case. It is, therefore, to an intermediary not in possession of all the documents relating to his claim that the applicant must turn to secure information concerning the conduct of the procedure. Once the contentious phase is begun, the claimant can obtain information from other sources as well, particularly from the secretary of the Review Committee and the PAB Registrar, who step in to guide him through the appeal process.

Admittedly, the choice between these two models of administrative organization is governed by a whole series of factors besides that of the individual's right to be informed. The concentration of decision-making power no doubt promotes, for example, the uniformity and consistency of decisions. But it is equally true that this concentration has also the effect of depriving the claimant of direct contact with those who direct the course of procedure. This fact alone tends to make the claimant more dependent on other available channels of information.

2. Form letters

Both Departments charged with taking initial decisions make considerable use of form letters, especially to transmit their decisions to the individuals concerned. The form letters, from which we have had occasion to quote some passages in Chapter 3, invariably afford an adequate indication as to the nature of the decision, the

texts upon which it was based, and the avenues of recourse that it may open to the recipient. They are far less satisfactory, however, in assigning reasons for the decision. Indeed, nothing obliges these administrative authorities to justify their decisions, and the Department of National Revenue does not, as a matter of policy, do so. Conversely, as we have noted in Chapter 3, the Department of National Health and Welfare does assign reasons for its decisions in the area of benefits.

The total absence of written explanation in support of an administrative decision seems to us hardly acceptable. Even the large number of the decisions to be rendered is not enough to justify such silence; surely a variety of form letters covering the most common reasons for an unfavourable decision could be prepared, to be completed by the addition of a short paragraph of supplemental explanations at need. In questions of contributions, we believe that when a case is sufficiently complex for the Coverage and Interpretations Section of the central administration to rule upon it, and above all when it is the subject of a determination or of a decision on appeal, by virtue of section 28 of the CPP or section 75 of the *Unemployment Insurance Act*, the decision ought to include, at the very least, a concise but sufficient explanation of the reasons for it.

What should such an explanation contain? It is not enough for it to refer to the legislative or regulatory provision that is being applied to the case, nor, we believe, to quote the terms of the provision *verbatim*. What the explanation should show is how the rule of law cited applies to the facts of the case as they were established in the course of the procedure. It is in this link between fact and law that the essence of the decision lies; an essence insufficiently elucidated by initial decisions in the area of benefits, as we have shown in Chapter 3. It is a matter of demonstrating not only that the decision had a rational basis in reality, but also that all the pertinent factual elements invoked by the claimant had indeed been taken into account.

Where the decision was based in part on rules of law derived from precedent, the explanation should indicate briefly in what way caselaw had modified the interpretation of the Act or the regulations and how this modification applies to the circumstances of the case in question.[626]

It is our belief that the insufficient justification of decisions not only leaves claimants ill-informed and dissatisfied, but ultimately has

an adverse effect on the functioning of the appeal process as well. On the one hand, by their very indefiniteness, such decisions serve as an incitement to claimants to engage the authorities in futile appeal proceedings, from motives of mischief, ignorance or revenge and with the sole object of inducing them to change their position. On the other, even where the appeal is "serious", the absence of clearly defined points at issue between the litigants tends to slow down the procedure by increasing the interval of time required to prepare the case for hearing.

3. Access to the file

The practices of the two Departments whose decisions are liable to being appealed to the PAB coincide in this respect: individuals have no access to all the information contained in their files before their cases are heard by the appeal authority of last resort. The Departments' practice of denying access to information is implicitly founded, in the case of contributors, on the privacy of business and, in the case of beneficiaries, principally on the privileged nature of medical information. With reference to the latter, it should be observed that the privilege, as a rule, cannot be asserted against the individual himself, since it only exists to safeguard his interest as against third parties. The physician alone is justified in withholding medical information from his patient, and even he only on the grounds that the knowledge of the patient's condition might pose a threat to the latter's well-being. In all other circumstances, the patient has an incontestable right to all the information that his physician possesses concerning the state of his health. Indeed, it would be paradoxical that a rule created to safeguard the patient's interests should be used to deny him access to information on which the refusal to grant him social security benefits is founded.

As we have observed in Chapter 3, even when a claim for disability benefits is being considered by the Review Committee, the claimant has no access to the medical documents or the Department's summary of medical findings in his file before the time of the hearing. It is only when the case is appealed to the PAB that the medical documentation becomes part of the case file.

Much the same conditions prevail in the sphere of contributions. It is not until a case comes before the Umpire that the individual, if he is sufficiently inquisitive and persistent, can compel the Department to afford him access to the pertinent documentation in his file.

This state of affairs falls far short, we believe, of fulfilling the requirement that the parties to an administrative procedure have free access to information. Every individual directly involved in an administrative decision on a social security matter should, in our opinion, be given access to all the documentation placed in his file by third parties. The administrative authority should not be free to withhold this information unless it has been specifically authorized to do so, in the interests of the individual or of justice, by the appeal tribunal.

SECTION III

Informing the decision-maker

As far as we could ascertain, it is chiefly in the area of disability pensions that the decision-maker is likely to encounter difficulties in gathering information. The information of the administrative authority is derived principally from two sources: the applicant himself and the documentary material furnished either by the applicant or by third parties.

A. Contact with the applicant

Whatever incidental advantages it may have, the concentration of decision-making power in the sphere of CPP disability benefits deprives the author of the decision of one valuable instrument of evaluation: first-hand observation of the physical and psychological state of the claimant's health and of his living conditions. For want of personal contact with the claimant, the Disability Assessment Division must confine its investigation of the case to an analysis of the file. The physicians of the Division must rely on observations made by other individuals: the attending physician, the medical specialist whom the Division may retain to examine the claimant, and the agent employed in the district office. The observations of the agent, by the way, are almost as important in our opinion as those of the examining physicians, since they can shed light not only on the apparent functional limitations of the applicant but also on his psychological state, his education and his social and economic circumstances. Unless the assessment of the disability is to be no more than a purely technical exercise, in all fairness these elements of the claimant's personal situation must be taken into account.

B. Documentation

Two types of documents are likely to play a crucial role in assessing a supposed disability: the medical reports filed by the treating physician and (if one is appointed by the Department) the examining specialist, and the claimant's professional *curriculum vitae*.

The principal source of difficulty in using medical reports is apparently their occasional lack of preciseness and their failure to apply to the claimant's condition the criteria of disability specified by the Act and by caselaw. To all appearances this is often the case with reports emanating from the attending physician and filed by the claimant in support of his application. One can only suppose that these reports would be far more useful to the claimant and to the physicians evaluating his case if the form on which they were to be submitted specified the legal meaning of disability and contained a series of specific questions designed to ascertain to what extent the claimant's condition fulfilled the legal criteria. The attending physician should then be invited to give his general comments on the patient's condition in the light of the entire medical file and his personal knowledge of the patient's case history.

The need for a professional *curriculum vitae* or synopsis of the claimant's occupational background as a means for assessing his residual working ability seems to us self-evident. Such a *curriculum vitae* is likely to afford invaluable insights into the applicant's situation — his education and training, life style, experience, geographical mobility and readiness to adapt to new circumstances — which ought certainly to be taken into account in formulating employment hypotheses for a claimant residually capable of pursuing gainful employment. The local agent of the Department is no doubt in the best position to gather this sort of information, thanks to his knowledge of local conditions; the applicant should accordingly be invited to make a full and detailed disclosure of his background to the agent at the earliest opportunity. Without this sort of information to draw on, the Department's assessment of residual working capacity runs the risk of becoming pure speculation, with little relevance to the actual physical, psychological and social situation of the claimant. Some of the employment hypotheses enunciated by Department representatives at PAB hearings impressed us as altogether unrealistic. Even if we admit that the notion of "severe disability" refers to the incapacity of the claimant to pursue a gainful occupation in the abstract, the Department in all fairness ought to propose employment hypotheses that are sufficiently plausible in the light of the applicant's actual situation.

SECTION IV

Claimant participation

In all the variety of decision-making processes examined in this study, claimant participation does not appear to encounter any serious difficulties. Whether the question at issue concerns contributions or benefits, members of the public have every opportunity to present their arguments at every stage of the procedure, and to a great extent they avail themselves of this opportunity. Their participation takes somewhat different forms, however, at different points in the process: in the pre-litigation phase, where the only parties involved are the administrative authority and the administered public, the nature of claimant participation differs from that in the contentious phase, where the two parties present their allegations before a review tribunal.

In the pre-litigation phase, the burden of proof is on the individual, since it is he that requests a decision. The effects of this rule are particularly apparent in the sphere of benefits, where it is up to the claimant to demonstrate his entitlement to a pension. Thus, the applicant for disability benefits must produce medical documentation proving that he is and has been disabled to the extent required by the Act since the date indicated on his application. Unless he can provide conclusive proof of his claim, the application for benefits is turned down — except in the event that probability favours his allegations, in which case the Department may proceed to an independent examination by a medical specialist. By contrast, when a *de facto* spouse applies for a surviving spouse's pension, proof that he meets the conditions laid down in section 63 is not enough to vindicate his claim since, according to caselaw, even in that case the Minister may allocate the pension at his own discretion. Invariably, the claimant must make his allegations in writing, whatever the nature of the benefits sought.

The situation is somewhat different where the issue concerns the payment of contributions, for here the employer and the

employee may not be in agreement as to the precise character of their contractual relation. Each one of the parties seeks in this case to produce conclusive proof of his allegations. Thanks to their direct contact with the interpretation agent, who may visit the place of employment, question the parties and examine documents, the parties' participation may not be confined to the production of documentary evidence and the submission of written arguments.

As we have remarked in Chapter 3, both in the areas of contributions and benefits, but especially in that of disability pensions, the claimant remains free, however, to offer proof at any time of the facts substantiating his allegations. The power to review or reconsider a decision, provided under section 86(2) of the CPP, can be invoked at any time in the course of the procedure, including before the PAB, and it frequently is. The claimant's participation at this stage remains of precisely the same character as before the initial decision; in matters relating to benefits, it is therefore limited to written submissions.

The same holds true of the final phases of the procedure prior to litigation, represented by the determination or appeal to the Minister (the hierarchical review processes in the sphere of contributions) and by the appeal to the Minister (the formal recourse for review in the sphere of benefits).

Once the litigation phase is entered, the nature of the claimants' participation changes. As it happens, the three appeal authorities — the Umpire, the Review Committee and the PAB — all hold hearings. What is more, hearings represent the normal form of procedure before them; there is no need for the appellant to request it.[627] This means, in effect, that the parties in the case are expected to present themselves at the hearing. Indeed, as we have already remarked, all three administrative tribunals go to considerable pains to arrange their sittings as close as possible to the place of residence of the parties. If for whatever reason the mobility of the PAB is insufficient to overcome the obstacle of distance, section 88(1) of the CPP provides for the compensation of any party invited to participate in a hearing, for expenses incurred to ensure his attendance.

The right of members of the administered public to be represented before the tribunals is more or less explicitly recognized by their respective rules of procedure. It is a right of which individuals often avail themselves, except before the Review Committees. As we have noted, moreover, in Chapter 4, the legal expenses of parties

involved in a decision appealed by the Minister are also assumed by the public purse.

The lack of formality prevailing, to various degrees, at the hearings of these tribunals certainly serves as an encouragement to members of the public to participate in the proceedings, by showing them that it is not necessary for them to be represented by counsel. But to enable the tribunals to take full psychological advantage of the sense of confidence their proceedings inspire it would be desirable for them to have a continued existence and to be, as it were, more in the public eye. Their greater conspicuousness would no doubt contribute to establishing more firmly their reputation for informality, as it has done in the case of the SAC. Unfortunately, more or less "occasional" tribunals hardly have the opportunity of dispelling the intimidating effect they have on the public, especially when they are known to be composed of judges.

Another factor also undoubtedly has a "demobilizing" effect on public participation in the proceedings: we are referring to the slowness with which litigation progresses. We shall content ourselves for the moment with merely noting this fact, reserving our further comments upon it for section V of this chapter.

If in facing the first-level appeal authorities (the Review Committee and the Umpire) the burden of proof is invariably upon the administered individual, the roles of the parties may be reversed before the PAB, since the Minister may appear before that tribunal in the capacity of the appellant.

The adversary character of the litigation procedure and the formal balance subsisting between the parties in the course of this phase ought not, however, to obscure the fact that in many cases, particularly those involving disability pension claims, the administrative authority enjoys a definite advantage over the administered party. Even if the latter has the benefit of legal counsel, the former is unquestionably better equipped at the level of technical expertise and material means. Even in questions of contributions, the Minister is at an advantage in having, as it were, at his fingertips a knowledge of caselaw barely accessible to his opponent. This imbalance is, to some extent, unavoidable. Yet it is to be hoped that its effects will be gradually reduced as more members of the Bar develop an interest in the field of social security litigation and as a truly accessible social security caselaw evolves.

All in all, we may conclude that public participation in the procedure is fairly sustained, especially in the litigation phase. Those with the persistency and tenacity to pursue the process to its conclusion seem certainly to participate to a satisfactory degree: the number of individuals who fail to attend a hearing of the PAB on their case is very small.[628] One nevertheless observes a fairly high rate of withdrawal from the procedure at every level of contentious review,[629] a phenomenon for which, among other things, the slowness of the appeal process may be held largely to blame.

SECTION V

Speed in decision-making

There is little to be said on this subject. It will suffice to quote a few statistics to show (conclusively, we believe) the urgent need for a thorough revamping of litigation under the federal social security plans.

According to statistical data either communicated to us or developed by ourselves by compilation or sampling, the following was the average length of time that procedure took in each of the PAB's fields of jurisdiction, with the exception of that dealing with QPP contributions for which our data are either not sufficiently exact or too old to be relevant.

In the sphere of *CPP contributions*, the rendering of the initial decision (whether a determination or a decision on an appeal against an assessment) takes 90 days.[630] A further 698 days elapse on the average between this and the final decision of the PAB,[631] making the total duration of the process approximately *2 years and 2 months*.

In the sphere of *CPP benefits*, the time required for the initial decision on a disability pension claim is usually 83 days.[632] An additional period of 156 days intervenes between this decision and that of the Minister on an appeal lodged by virtue of section 83. The settlement of the appeal by the Review Committee calls for a further 276 days. Lastly, no less than 478 days elapse on the average between the Review Committee decision and the end of the litigation before the PAB,[633] giving an overall total of *2 years and 9 months*.

In the area of *unemployment insurance contributions*, the initial decision normally takes the same length of time as in CPP contributions: 90 days. Between the time that this decision is appealed to the Minister and the date of the Umpire's decision, a period of 305 days elapses on the average.[634] The final phase, culminating in the decision of the PAB, requires a further 497 days,[635] making for a total of *2 years and 5 months*.

For purposes of comparison, it may be worthwhile to cite the experience of claimants for *unemployment insurance benefits*. A decision on an application is usually rendered within 5 days of its presentation. It takes a further 75 days approximately before the Board of referees will rule on the claimant's appeal. Supposing that the beneficiary delays lodging his appeal to the Umpire, the latter will in the normal course of events render his decision 312 days later, making the procedure from beginning to end *one year and one month* long, on the average.

Compared to those involved in other categories of litigation, the appellants of this last class — fortunately, for them, the most numerous — constitute something of a privileged group, relatively speaking of course. Indeed, it is quite unacceptable that a citizen applying for social security benefits should be forced to wait well over a year to ascertain whether he is entitled to receive any. Nor is it any the less intolerable from the point of view of the legal security of contributors that the final decision on their obligation to pay contributions should take more than 2 years to be rendered. If the notion of administrative justice is to mean anything in the domain of social security, surely we cannot acquiesce in this state of affairs.

The reasons for the excessive slowness of procedure in the contentious phase of administrative action are not hard to divide. Up to a point, a whole series of external factors — factors, in other words, extrinsic to the structure of the appeal system itself — may be pointed to to explain the phenomenon. Thus, one might blame it on the slowness of members of the public to avail themselves of their right of appeal (though nothing in our statistics suggests widespread negligence on this score); on the need to secure the cooperation of third parties not bound to observe the strictures of any procedural calendar (such as physicians, in disability pension claims); in the slowness of the administration, or on any one of the thousand practical obstacles that can interfere with, or hinder the holding of hearings. But the real causes of the inefficiency with which the process functions must be sought in the administrative structure itself: the multiplicity of appeal authorities in each area of jurisdiction, and their impermanent character.

What the situation calls for is, therefore, the reorganization of the appeal system in the whole social security sector — a reorganization that is even more urgent than that in the field of unemployment insurance benefits.

SECTION VI

Review and redress

The purpose of the social security appeal system must surely be to afford members of the public the opportunity to obtain a quick ruling upon their rights and obligations by an authority independent of that responsible for the initial decision. For a number of reasons, it is nevertheless desirable that before appealing to this independent authority the individual might ask the author of the initial decision to re-examine the case and to reconsider its judgment. As far as possible, this re-examination should not be a task entrusted to the original decision-makers.

A system conceived along these lines seems to us capable of fulfilling all the requirements of independence, moral authoritativeness, economy of procedures and means, rapidity and, of course, fairness. Its fundamental structure would be simple. Individuals could first bring the initial decision, by means of a non-contentious review process, before a body ranking higher in the administrative hierarchy than the original decision-making authority. A second, contentious level of appeal would be provided by an administrative tribunal of final resort which would rule on cases at the conclusion of a judicial type of procedure. Both these recourses would be, of course, subject to judicial review by the regular courts.

In our opinion, in a sector such as social security, typified by a vast number of administrative decisions needing to be more or less urgently made in the interest of the economic welfare of claimants, there is no justification for giving the appeal system a more elaborate structure. At least the simple ground-plan should not be discarded unless it can be shown that administrative justice derives considerable advantage from doing so.

The application of this organizational concept to the various appeal systems presently culminating in the PAB calls for the suc-

cessive reorganization of the pre-contentious phase of procedure, the abolition of the lower appeal authorities and the reorganization of the higher appeal authority.

A. Reorganization of pre-contentious review

Our analysis of the decision-making process in the areas of CPP and unemployment insurance contributions confirms that the organization of pre-contentious review in these fields corresponds to our proposed groundplan. Indeed, the request for a determination and the appeal constitute, for all practical purposes, forms of internal hierarchical review of interpretations by the Department of National Revenue. The Determinations and Appeals Section of the Department, in fact, exercises control over decisions rendered both at the district level and by the Participation and Interpretation Section. This arrangement appears to us to be satisfactory and efficient, and consequently in no need of change.

In the sphere of CPP benefits, however, we have noted that through the delegation of powers within the Department of National Health and Welfare the review of decisions provided for under section 83 of the CPP and known as "appeal to the Minister" is in fact exercised by the same administrative unit as is responsible for making the initial decision. This so-called "appeal" is in general practice based on new facts or on the submission of new evidence. The recourse, consequently, adds nothing to the already acknowledged right of the claimant to apply for a reconsideration of the initial decision on the grounds of new facts, by virtue of section 86(2).

In order to allow section 83 to serve the purpose for which, we believe it was originally intended, the recourse covered by the section should be one of hierarchical review whereby the initial decision might be reconsidered by an authority higher than the first decision-making unit. Since the initial decision is in fact rendered at the level of the Director General, it should be brought for review before the assistant deputy minister. It would be, of course, impractical to envisage entrusting the task of reviewing large numbers of individual decisions to this senior official, already burdened with heavy administrative responsibilities of his own. We therefore propose the creation within the Department of an "appeal committee" or a "reconsideration committee" (the latter being a more accurate

description of the actual nature of the recourse). The composition of this committee should be laid down in the CPP.

The members of the committee would be appointed by the Minister — in fact, they would be chosen by the assistant deputy minister. The committee would consist of the assistant deputy minister, two officials of the Department (one of whom should be a lawyer), and two physicians not belonging to the civil service. The two Department officials would normally be the head of the legal service and a senior official of extensive experience in the field. The physician members would necessarily be practitioners from the Ottawa region selected on the basis of their medical specialization and experience. The assistant deputy minister would participate in the work of the committee insofar as his other duties might allow him to do so. Two committee members would constitute a quorum, one of whom should be a physician in cases of disability pension claims. In the event of a draw, the assistant deputy minister should be called upon to decide the issue or to cast the deciding vote if he was part of the quorum.

The task of gathering facts for the review of cases should remain the responsibility of the Disability Evaluation Division and the Appeals Service, which might submit recommendations to the committee.

The exercise of the recourse for reconsideration should be limited to a period of six months following the initial decision. Since there already exists the possibility of reviewing a decision on the submission of new evidence, little purpose is served by maintaining the one-year time limit presently provided under section 83 — a provision which, we believe, does little more than delay pointlessly the initiation of appeal litigation.

The procedure of the reconsideration committee would involve simply a study of the file. In exceptional circumstances, the committee might call the head of the unit that submitted a recommendation or the initiator of the recourse, to explain his position.

Discounting any delays due to additional fact gathering, under the proposed system cases might be reviewed relatively rapidly by a body hierarchically superior to the initial decision-making authority and having a somewhat independent point of view thanks to the participation of outside individuals.

B. Abolition of lower appeal authorities

Two of the appeal systems culminating in the review of cases by the PAB include a first level of contentious review. We are referring to the Umpire, who has primary appeal jurisdiction over the sphere of unemployment insurance contributions, and the Review Committee, which has an analogous role in the area of CPP benefits. In accordance with the principle previously declared, we must now consider whether the existence of this first level of contentious review does more in the final analysis to advance than to hinder the cause of administrative justice.

1. Appeal to the Umpire

The existence of this first level of contentious review is by and large the outcome of historical circumstances. Prior to 1971, the decisions of the former Unemployment Insurance Commission in the areas of contributions and benefits were subject to appeals to the Umpire. When the CPP was established, in 1965, the desire to ensure the coordination of final appeal jurisdictions over questions of the obligation to pay contributions to the CPP and to unemployment insurance led the legislator to superimpose the authority of the PAB over that of the Umpire. Once the principle is admitted that all appeal litigation arising out of federal social security schemes should be adjudicated by a single tribunal, however, these two successive levels of appeal become superfluous. Under the system here proposed, a single process of contentious review against the administrative decisions of the Department of National Revenue would be all that is needed, both for unemployment insurance and for the CPP.

2. Appeal to the Review Committee

Do the advantages of the appeal to the Review Committee outweigh its disadvantages, from the point of view of administrative justice?

The most arresting feature of the Review Committee is its equally representative constitution, a feature likely to reassure the claimant that, through the designation of one of its members, he can in fact participate in the formulation of the decision affecting him. The Review Committee is inexpensive to operate, and its informal

procedure and geographical accessibility make it a forum before which the claimant can feel quite at ease in presenting his case.

Conversely, the composition of the Review Committee tends somewhat to undermine its credibility as a quasi-judicial body. One of its members is, after all, firmly committed to the appellant's cause, whatever its merits, while the other two, being for the most part local dignitaries, are usually sympathetically inclined towards their compatriot's plight. Hence the general tendency of Review Committees to show themselves overwhelmingly and consistently in favour of claimants — especially since the Committees realize that any patently inacceptable decision of theirs can always be appealed to a higher level by the Minister.

Since Review Committee members are generally inexperienced in legal matters, their decisions, as may be expected, often fall short of the highest standards of judicial thinking. Not only is their reasoning sometimes highly questionable, but, what is more, their decisions not infrequently fly in the face of legal principle and provision.

Contrary to what one might expect of a tribunal of as modest proportions as the Review Committee is, the settlement of cases before it often drags out over many months and runs into untold practical difficulties, not to mention the delays caused by the negligence or indifference of those whose participation in the proceedings is essential.

One may, furthermore, question the practical usefulness of an appeal tribunal which, as a matter of record, does not get around to hearing more than one half of the cases brought before it owing to their being withdrawn either because the appellants lose interest in them or because an out-of-court settlement is made by the parties.[636]

Finally, as regards disability pension claims, it might certainly be argued on the theoretical level that the multiplication of appeal possibilities and, consequently, of the chances that a decision handed down at one level may be reversed at another merely encourages claimants not disabled in the meaning of the CPP and capable of pursuing an occupation to persist in their efforts to secure a pension. This is certainly not the type of mentality that the social security system ought to try to promote in structuring its appeal organization.[637]

We therefore propose that the possibility of recourse to the Review Committee be abolished and that the decision of the recon-

sideration committee, whose creation we recommended in A., be directly appealable to the appeal authority to be described in C.

It will perhaps be objected that we have not proposed an analogous measure for implementation with reference to the unemployment insurance Board of referees.[638] It is our opinion that, unlike the Review Committees, the Boards have demonstrated in over three decades of operation their capacity for quick and efficient functioning. Their performance, on the whole, may be considered satisfactory: their members are generally far more experienced than those of the Review Committees so that, despite their occasional shortcomings, the Boards' contribution to administrative justice in the area of unemployment insurance benefits justifies, all in all, their being maintained in existence.

If for whatever reason, however, it should be judged unadvisable to abolish the use of an appeal authority of the equal representation type in the sphere of CPP benefits, it appears to us indispensable, at the very least, to effect certain adjustments in it in order to improve its performance. Accordingly, we would recommend that Review Committee Chairmen be chosen from a list of lawyers, drawn up for each one of the districts of the CPP administration by the Governor in Council, on the recommendation of the federal Minister of Justice. Secondly, the Committees and particularly their Chairmen should be placed under the supervision of the higher appeal authority in a manner analogous to that which we have proposed with reference to the unemployment insurance Board of referees.[639]

C. Reorganization of the higher appeal authority

We therefore recommend that both the Umpire and the PAB be replaced by a new Federal Social Security Tribunal. This administrative tribunal should be created by a constitutive Act enumerating its powers. On the premise that an excessive fragmentation of jurisdictions is a source of superfluous complications conducive to slowing down the conduct of procedure and hindering the development of a consistent caselaw in the sphere of social security, we believe that the Tribunal should have exclusive jurisdiction of last resort over appeals against the following decisions:

- the decisions of Boards of referees in the area of unemployment insurance benefits;

- the decisions of the Department of National Revenue in the area of unemployment insurance contributions;
- the decisions of the reconsideration committee, the creation of which within the Department of National Health and Welfare we have proposed, in the area of CPP benefits;
- the decisions of the Minister of National Revenue in the area of CPP contributions to be paid both by salaried employees and self-employed persons;
- the decisions of the Minister of Revenue of Quebec in the area of QPP contributions;
- the decisions of the Minister of National Health and Welfare in the area of family allowances;
- the decisions of the Minister of National Health and Welfare in the area of Old Age Security pensions.

Certain items in this list call for some explanation. We are proposing that the Tax Review Board's authority over the decisions of the Minister of National Revenue concerning self-employed contributions — a jurisdiction conferred on the TRB under section 37 of the CPP — be withdrawn. The transfer of this power to the Federal Social Security Tribunal could be effected, as the section now stands, by a simple regulation. In the event of a disagreement between the Tax Review Board's determination of a self-employed individual's income, under the *Income Tax Act*, and the Tribunal's determination, under the CPP, the possibility of appeal to the Supreme Court might be provided *exclusively in such cases of disagreement*, or alternatively the Tax Review Board's decision might be allowed to preponderate.

We are proposing, moreover, that the Tribunal be given jurisdiction in litigation arising out of family allowances. The settlement of disputes in these cases is presently the responsibility, under section 15 of the *1973 Family Allowances Act*,[640] of Review Committees of the "equal representational" type, very similar to those provided for by the CPP.[641] Appeals to these Committees must be preceded by applications for reconsideration addressed to the regional director of family allowances.[642] It is our recommendation that this precontentious procedure be maintained. No justification, however, exists for continuing to depend for the settlement of appeals on an institution subject to the same constraints and limitations as the Review Committees when a permanent and specialized Tribunal, readily accessible to claimants and capable of deciding appeals efficiently and rapidly, is available. The litigation in this sector is,

incidentally, very infrequent: since the *1973 Family Allowances Act* has come into effect, only two appeals have been lodged under section 15.

Essentially the same arguments will apply to litigation connected with Old Age Security pension benefits. The jurisdiction over this area of social security is presently shared by two government bodies. The decisions of the Minister of National Health and Welfare concerning claimants' eligibility for the Old Age Security pension, the Guaranteed Income Supplement and the spouse's allowance may be appealed to Review Committees[643] whose constitution and manner of operation are similar to those of their CPP counterparts.[644] Since 1970, not more than twelve cases have been appealed to the Review Committees. When the litigation concerns the reduction of the Income Supplement or spouse's allowance because of other income received by the beneficiary or his spouse, the case is, however, referred to the Tax Review Board for settlement.[645] Since 1970, the Board has heard only two appeals in this area. In each case to be presented for review, the appeal must be preceded by a request for explanations or reconsideration addressed to the regional director of Old Age Security pensions.[646] While this last requirement ought to be maintained, all appeal litigation in the field of Old Age Security pensions should fall within the jurisdiction of the Federal Social Security Tribunal, in the same way and for the same reasons as we have outlined with reference to family allowances.

In our study on unemployment insurance benefits, we have already made detailed recommendations concerning the eventual composition of the Tribunal. We persist in the opinion that a Tribunal composed of five to seven members should prove sufficient to the task, provided that appeals might be heard by individual members sitting by themselves. If this solution is adopted, the Chairman should have the right to reserve certain cases that he considers to be of especial importance for hearings to be conducted by himself and two other members.

The experience and example of the Quebec Social Affairs Commission convince us of the wisdom of requiring that the members of the Tribunal be qualified jurists by training, with the possible exception of the Chairman himself and one or two members. If all the members appointed were to be jurists, it would be necessary to envisage the addition to the staff of the Tribunal of a number of assessors possessing the varied technical expertise required for the treatment of certain appeals. This alternative solution would of

course complicate the structure and operation of the Tribunal; it would logically require that certain categories of cases be heard by a corresponding college of members, a somewhat onerous *desideratum* of a Tribunal expected to hold hearings throughout the territory of Canada.

Needless to say, there should be no charge for appellants' recourse to the Tribunal, any more than there is any charge made presently for their access to the tribunals that it would replace. The question of whether an appellant would have to obtain leave to appeal in the sphere of CPP benefits, as he must under the present system, would have to be resolved. In our previous study on unemployment insurance benefits, we suggested that the appeal be subject to prior authorization by the Chairman, who would rule on applications in the light of the importance of the principles raised or the special circumstances of the cases at issue. It must be remembered, however, that in the sphere of unemployment insurance benefits the Tribunal would constitute the second level of appeal, whereas, according to the proposals put forward in B., this would not be the case in the area of CPP benefits. As for the time limit within which appeals might be lodged, it seems to us that a period of three months would suffice for all categories of actions, except for those in the sphere of unemployment insurance benefits. Here, the existence of a first "process" before the Board of referees might allow and in fact justify an acceleration of procedure by shortening the appeal period to 45 days following the decision.

Finally, it may not be out of place here to recall our proposals concerning the organization of the support services at the Tribunal's disposal. In our previous study, we suggested the division of these responsibilities between the clerk, in charge of the physical organization of Tribunal sittings and the handling of case files, and a secretariat, in charge of affording supervision and guidance to the Boards of referees and of preparing the digest of the Tribunal's caselaw. In the event that the Review Committees provided for under the CPP were maintained but placed under the chairmanship of jurists, they, too, would need to be given supervision and instructions appropriate to their task by the secretariat of the Tribunal.[647]

SECTION VII

Enforcing the decisions

Two questions need to be confronted with reference to the enforcement of decisions. The first, concerned essentially with the unemployment insurance plan, deals with the recovery of benefits paid to claimants not entitled to receive them, the payments being the result of a mistake regarding the claimants' coming within the scope of the plan. The second question, by contrast, has extremely broad implications — implications which in fact transcend the frame of reference of this study: the sanctions provided by administrative legislation.

A. Recovery of overpayments

As we have observed in Chapter 3, under certain circumstances benefits may be paid under the CPP to individuals not entitled to receive them, or the benefits paid may exceed the amount to which they are entitled. This situation may arise as a result of the beneficiaries' fraudulent conduct or negligence. As a matter of practical experience, we have noted that such cases are relatively infrequent and that the Department of National Health and Welfare has never, at any rate, deployed the civil and criminal sanctions that are available to it to deal with such situations. Rather, it has sought to negotiate for the reimbursement of overpayments by beneficiaries, and has often waived its right to recovery when the pressing of its claim might have caused undue hardship.

In the sphere of unemployment insurance benefits, the problem, however, is far more acute.[648] One of the possible causes of an overpayment of benefits is the mistake committed by the Employment and Immigration Commission or the Department of National Revenue in classifying the occupational activity of the beneficiary at the time that he contributed to the plan. His employment may have

been considered insurable when in fact it was not, the erroneous classification being in no way his fault, let alone the result of any fraud on his part. Once the mistake has come to light, an effort is made to effect recovery of the benefits paid to him. In such circumstances, we can only reiterate the recommendation made in our previous study: the Employment and Immigration Commission should refrain, as a matter of policy, from attempting forcibly to collect overpayments made in consequence of a mistake committed by itself or by the Department of National Revenue.[649] At most, it should envisage concluding with the beneficiary an agreement for the repayment of the debt by instalments, and it should be prepared to write off the debt altogether if it appears that its recovery is likely to cause undue hardship to the beneficiary.

B. Sanctions

Our analysis in Chapter 3 of the sanctions provided under the CPP and the *Unemployment Insurance Act* leads to some disquieting observations.

In the sphere of benefits, the CPP provides for penal sanctions exclusively in the case of fraudulent acts committed for the purpose of illegally securing benefits. These acts are considered to constitute an offence only if they are wilfully done.[650] There is nothing particularly surprising in all this.

In the sphere of contributions, however, a careful reading of the two Acts reveals that the administrative authority has a highly developed arsenal of repressive measures at its disposal to compel the public to lend its support to the system and at the same time to eliminate fraud.

The most striking provision under this head is undoubtedly section 123 of the *Unemployment Insurance Act* which makes any violation, wilful or otherwise, of the Act and its regulations an offence. This provision has no counterpart in the CPP.

Each of the two Acts, moreover, includes a series of criminal sanctions designed to outlaw certain types of conduct relative to the collection and remittance of contributions, and the disclosure to the Minister of information required for applying the Act. In the overwhelming majority of cases, an offence may exist even in the absence of any wilful intent on the part of the individual committing

the act. What is more, the prohibited actions render the offender liable to administrative, as well as to criminal, sanctions. The administrative authority has complete freedom, in other words, in the choice of the sanctions to be applied to offenders, whether their offence was wilful or not.

This state of affairs raises significant questions concerning the ends to be served by criminal and by administrative sanctions, respectively, as provided under administrative statute. It is in the domains of tax law and social security law that the questions present themselves with the greatest urgency. But the real scope of the problem is not really known, and nothing short of a complete analysis of federal legislation would be required to formulate a general theory of what we have called administrative criminal law. Such a theory should, in our opinion, embody a systematic study of the following questions: the relation between criminal and administrative sanctions, the imposition of administrative sanctions, the methods of recovery used to exact penalties, the waiver of sanctions by the administrative authorities, and the recourses open to the administered public against their imposition.

SECTION VIII

Summary of proposals

The administrative universe that gravitates around the PAB as its centre is, all things considered, a fairly peaceful sector of the public administration, where affairs are conducted perhaps in a slow, but nevertheless orderly fashion. It is all but exempt from the great controversies that periodically shake other, sometimes neighbouring sectors of the administration — such as that of unemployment insurance benefits, for example — to their very foundations. There are, all in all, few areas in it of flagrant abuse or glaring injustice, even if we have pointed to a number of administrative practices that might certainly be improved upon in the interest of justice.

The most frequent and justified source of dissatisfaction with the present system, however, is the extraordinary slowness of its appeal procedure. This defect, by the way, is one that it shares with the entire social security sector. Without having troubled to achieve a comprehensive overview of this domain of administrative action, the federal legislator has created two administrative tribunals — the Umpire and the PAB — both of which have proved unsatisfactory because of the slowness with which they dispense justice.

The cornerstone of our proposals is the recommendation that a statute be enacted creating a new Federal Social Security Tribunal and determining its constitution, organization, jurisdictional authority and fundamental procedure. The new Tribunal would succeed to the jurisdictions exercised by the PAB, the Umpire and the Review Committees in matters of family allowances and Old Age Security pensions, and would in addition have certain powers presently exercised by the Tax Review Board.

Except in the sphere of unemployment insurance benefits, the Tribunal could be appealed to directly within 3 months of the rendering of an initial decision, without need on the part of the appellant to obtain leave to appeal.

Except, again, in the sphere of unemployment insurance benefits, the Tribunal would serve as the one and only appeal authority for the contentious review of decisions. The first level of contentious review in decisions concerning CPP benefits — the Review Committee — would be consequently abolished.

Within the present areas of the PAB's jurisdiction, the contentious review of cases would be invariably preceded by a process of internal, hierarchical review by the administrative authority that rendered the initial decision. The recourse provided by section 83 of the CPP in the sphere of benefits would be changed so as to make it subject to a six-month time limit within which a reconsideration committee, created by the Act and composed of senior officials and outside physicians, could be applied to for a ruling on the initial decision.

Our principal proposal with reference to the initial decision-making process calls for the justification of all decisions. In certain sectors of social security, where no specific legal provision exists to the contrary, the notification to claimants of administrative decisions is not accompanied by any explanation of the grounds on which they were made. Elsewhere, what justification is tendered does not sufficiently specify the connection between the facts in the case and the rules of law that have been applied to them. Consequently, we recommend that all decisions henceforth be justified in writing and that greater care be taken in describing the grounds on which they were taken.

With more particular reference to disability pensions, it seems to us desirable that medical report forms should be accompanied by an outline of the requirements of the Act as clarified and interpreted in PAB caselaw, and by a list of the criteria used in establishing disabilities. We also believe that in evaluating disability pension claims more weight should be given to non-medical factors, especially the professional antecedents of the claimant. Finally, we believe that the employment hypotheses put forward to illustrate the claimant's residual work capacity should take more account of his personal situation, particularly the degree of his real geographical mobility in search of an employment.

To bring procedure more fully within the intellectual grasp of those administered, we propose that the regulations pertaining to each Act falling within the PAB's jurisdiction contain a section devoted to procedure. The provisions of this section should, on the

one hand, govern the conduct of the decision-making and appeal processes and, on the other, define the rights and obligations of individuals participating in the procedure. They should be drafted in simple terms and a copy of them should be attached to application forms used by claimants to solicit a decision.

Lastly, we suggest that a systematic study be undertaken of provisions in federal law creating a power of sanction, with the particular object of specifying the purpose of administrative sanctions and the rules governing their imposition and execution.

In conclusion, we believe that an effort should be made to base the future development of federal social security law on a surer and more consistent foundation. The somewhat random course that its evolution has followed thus far has produced a number of undesirable results, especially in the appeal system. The rationalization of this system, through the establishment of a single supreme appeal authority, could do much to reduce, if not to eliminate altogether, the disadvantages inherent in a complex sharing of administrative powers. In the short term, moreover, we are convinced that the institution of such a tribunal — open, accessible, independent and creative — can only advance the cause of administrative justice.

Notes

1. Concerning the concepts of centralization and decentralization, autonomous agencies and administrative tribunals, see DUSSAULT, *Traité de droit administratif*, vol. I, pp. 78-143; also GÉLINAS, *Organismes autonomes et centraux de l'administration québécoise*, pp. 1-70.
2. See, for example, DUSSAULT, *Traité de droit administratif* (1974); ABEL, "The Dramatis Personae of Administrative Law" (1972); WILLIS, "Canadian Administrative Law in Retrospect" (1974); ANGUS, "Judicial Review in Canada: Do We Need It?" (1974); PEPIN, "Quelques observations générales sur la question du caractère efficace ou illusoire du contrôle judiciaire de l'activité de l'administration" (1976); MULLAN, "Judicial Restraints on Administrative Action: Effective or Illusory?" (1976).
3. This is the definition put forward by ISAAC, *La procédure administrative non contentieuse*, pp. 150-158; and WIENER, "Vers une codification de la procédure administrative", pp. 15-26; see likewise LANGROD, "Procédure administrative et Droit administratif", pp. 6-26.
4. In Great Britain, the Council on Tribunals, however, has the specific mandate of bringing about a certain uniformity in the procedure of administrative tribunals; see the *Tribunal and Inquiries Act*, 1971, c. 62. For the situation in France, see ISAAC, *op. cit.*, pp. 250-286. With regard to Canada, see BEETZ, "Uniformité de la procédure administrative" and PEPIN, "Les tribunaux administratifs", pp. 601-616.
5. Norway, Sweden, Spain, Federal Republic of Germany, Switzerland, Austria, Poland, Czechoslovakia, Hungary, Yugoslavia, Bulgaria. A collection of, and commentary on, American and European texts may be found in WIENER, *op. cit.*, note 3.
6. See the *Statutory Powers Procedure Act*, SO 1971, c. 47 and the *Administrative Procedures Act*, RSA 1970, c. 2. The Ontario statute has been the subject of considerable commentary; see, chiefly, MULLAN, "Reform of Judicial Review of Administrative Action — The Ontario Way".
7. See in particular sections 22 and 25 of the *Universal Declaration of the Rights of Man*.
8. See McINNES, *Welfare Legislation and Benefits Plans in Canada*; HÉTU and MARX, *Droit et pauvreté au Québec*; ISSALYS and WATKINS, *Unemployment Insurance Benefits*. To our knowledge, there is at present no legal periodical being published in Canada in this particular field, and there has not been one since the *Bulletin of Welfare Law* (1974-1977) has ceased publication. The *Bulletin*, incidentally, dealt only with certain aspects of social security. For a general description of the entire social security system, see the publication of the federal Department of National Health and Welfare entitled *Social Security in Canada*.

9. This is the definition put forward by MÉLENNEC and BERZIA, *Le régime général de la sécurité sociale,* Introduction. For a more detailed analysis, see DUPEYROUX, *Droit de la sécurité sociale*, pp. 7-20; JAMBU-MERLIN, *La sécurité sociale*, pp. 7-10; CALVERT, *Social Security Law*, pp. 1-10.
10. *Cf.*, the statement on "community values", presented as the basis of the Canadian social security system in *Working Paper on Social Security in Canada* (1973), pp. 4-6.
11. For a classification of the risks and burdens covered by social security, see DUPEYROUX, *op. cit.*, note 9, p. 10.
12. *Report of the Royal Commission of Enquiry on Health and Welfare* (Castonguay-Nepveu Report), vol, V, Income Security, t. I, pp. 19-21; the *Working Paper* previously cited, note 10, p. 15, distinguishes only two types of plans: social insurance plans and income support plans.
13. ISSALYS and WATKINS, *op, cit.*, note 8, pp. 9-12.
14. *Ibid.*, chapter 2.
15. Federal law includes two special plans for the compensation of victims of work accident and occupational diseases; see the *Government Employees Compensation Act*, RSC 1970, c. G-8 and the *Merchant Seamen Compensation Act*, RSC 1970, c. M-11.
16. *Old Age Security Act*, RSC 1970, c. O-6, am. by: RSC 1970 (2nd supp.), c. 21; SC 1970-71-72, c. 43, 62 and 63; SC 1972, c. 10; SC 1973-74, c. 8 and 35; 1974-75-76, c. 58; and SC 1976-1977, c. 9.
17. *Family Allowances Act*, SC 1973-74, c. 44, am. by SC 1976-77, c. 3.
18. *Quebec Family Allowances Plan*, SQ 1973, c. 36; am. by SQ 1974, c. 39 and 58, SQ 1976, c. 15 and SQ 1977, c. 46.
19. *Family Allowances Act*, RSPEI, 1974, c. F-2.
20. *Hospital Insurance and Diagnostic Services Act*, RSC 1970, c. H-8, am. by SC 1976-77, c. 10, and *Medical Care Act*, RSC 1970, c. M-8., am. by SC 1974-75-76, c. 107 and SC 1976-77, c. 10. For a background account of these plans, see *Social Security in Canada*, previously cited, note 8, pp. 18-25.
21. *Canada Assistance Plan*, RSC 1970, c. C-1, amended by SC 1974-75-76, c. 58.
22. *Working Paper on Social Security in Canada*, previously cited, note 10, p. 51.
23. *Old Age Security Act*, previously cited, note 16.
24. A description of all these components of the system will be found in *Social Security in Canada*, previously cited, note 8.
25. *Working Paper on Social Security*, previously cited, note 10, p. 15.
26. ISSALYS and WATKINS, *Unemployment Insurance Benefits*.
27. *Ibid.*, pp. 12-16.
28. *Statistical Bulletin of the Canada Pension Plan* (quarterly), Table 1.
29. Quebec Pension Plan, *1975 Annual Report*, p. 55.
30. 90% of contributors were employees, 6% were self-employed, and 4% had a mixed occupational status. *Canada Pension Plan Contributors – Income and Contributions* (annual), Table 28.
31. Quebec Pension Plan, *1975 Annual Report*, p. 48.
32. See, on this subject, the Report of the Study Committee on the Financing of the Quebec Pension Plan, *La sécurité financière des personnes âgées au Québec*.
33. PAB caselaw evidently constitutes a fourth legal factor tending to regulate its own activity. It will be discussed in Chapter 2.

34. *British North America Act* (1867), 30-31 Vict. c. 8 (U.K.), sec. 92(7). We shall henceforth cite the Constitution as the BNA Act.
35. Unlike the present plan, the plan was selective in application. See BRYDEN, *Old Age Pensions and Policy-Making in Canada*, Chapters 4 and 5, especially pp. 75-77.
36. *Employment and Social Insurance Act*, SC 1935, c. 38.
37. *Re Employment and Social Insurance Act*, [1936] RSC 427.
38. *Att. gen. of Canada v. Att. gen. of Ontario*, [1937] AC 355.
39. *Att. gen. of Canada v. Att. gen. of Ontario*, [1937] AC 326. These two judgments have been commented on by TREMBLAY, *Les compétences législatives au Canada*, pp. 219-221 and 231-236.
40. There was, in fact, a third way — much more questionable legally — consisting of the federal Executive's invoking its "spending power" in order to avoid the division of powers determined by the Constitution. This method was particularly resorted to in establishing the federal family allowances scheme in 1944.
41. BNA Act (1940), 3-4 Geo. VI, c. 36 (U.K.).
42. SC 1940, c. 44.
43. BNA Act (1951), 14-15 Geo. VI, c. 32 (U.K.). For the genesis of this text, see BRYDEN, previously cited, note 35, Chapter 6 (especially pp. 123-124) and pp. 200-203. For its interpretation, see MORIN, *Le pouvoir québécois ... en négociation*, pp. 151-152.
44. For an account of the federal and Québec conceptions of contributory pension plans, their confrontation and the eventual working out of a compromise, see BRYDEN, previously cited, note 35, c.7 and 8, especially pp. 160-175; MORIN, previously cited, note 43, pp. 19-31; and LAMARSH, *Memoirs of a Bird in a Gilded Cage*, pp. 77-128.
45. BNA Act (1964), 12-13 Eliz. II, c. 73 (U.K.).
46. *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 SCR 392.
47. *Lingley v. Hickman*, [1972] FC 171; *Président de la CAP v. Matte*, [1974] CA 252.
48. RSC 1970, c. C-5; amended by SC 1970-71-72, c. 43, SC 1973-74, c. 41, SC 1974-75-76, c. 4 and SC 1976-77, c. 36. All references to the *Canada Pension Plan* will henceforth be abbreviated CPP.
49. *Delegation of powers (Canada Pension Plan, Part I) Regulations*, SOR/69-391, amended by SOR/71-636; *Delegation of powers (Canada Pension Plan, Parts II and III) Regulations*, SOR/68-44, amended by SOR/72-500, 75-383, 75-567 and 77-1057.
50. SOR/65-515; amended by SOR/65-550, SOR/66-29, 68, 69, 164, 175, 242, 450, 510, 534 and 570, SOR/67-82, 125, 355, 356, 508 and 571, SOR/68-2, 43, 54, 180 and 332, SOR/69-4, 87, 135, 232 and 558, SOR/70-60, 221, 234, 249, 296, 320, 474 and 493, SOR/71-356 and 668, SOR/72-237 and 335, SOR/73-25 and 41, SOR/74-19 and 219, SOR/75-52, 97, 110 and 306, SOR/76-70, 108, 109, 289, 655 and 811 and SOR/77-252, 1076, 1082 and 1083. The Department of Supplies and Services published in 1976 an office consolidation of the CPP and its regulations. The publication is available to the public at a cost of $4. We shall henceforth cite the regulation under the title *CPP Regulations*.
51. *Pension Appeals Board Rules of Procedure (Contributions and Coverage)*, SOR/66-533, amended by SOR/67-45 and SOR/73-109. We shall henceforth cite these rules under the title *PAB rules (CPP contributions)*.

52. *Review Committee Rules of Procedure*, SOR/69-136, amended by SOR/71-237, SOR/75-308 and SOR/77-1079.
53. *Pension Appeals Board Rules of Procedure (Benefits)*, SOR/73-110, amended by SOR/75-309. We shall henceforth cite these rules under the title *PAB rules (CPP benefits)*.
54. SQ 1965 (1st Sess.), c. 24; amended by SQ 1968, c. 9 and 23; by SQ 1970, c. 19; by SQ 1971, c. 17 and 32; by SQ 1972, c. 26 and 53; by SQ 1973, c. 16 and 36; by SQ 1974, c. 16 and 39; by SQ 1975, c. 17; and by SQ 1977, c. 24. We shall henceforth cite the *Quebec Pension Plan* by the letters QPP.
55. See BRYDEN, previously cited, note 35, pp. 164-173.
56. OC 2243, Nov. 24, 1966 (QOG Dec. 17, 1966); amended by OC 2970, Oct. 1, 1969 (QOG Oct. 25, 1969), OC 3375, Sept. 10, 1970 (QOG Sept. 26, 1970), OC 1029, March 28, 1973 (QOG Apr. 11, 1973 and May 30, 1973), OC 2544, July 11, 1973 (QOG July 25, 1973) and OC 2459, June 11, 1975 (QOG June 18, 1975).
57. OC 2254, June 20, 1973, amended particularly by OC 953, 1976 (unpublished).
58. *Rules of Procedure of the Review Commission*, OC 2244, Nov. 24 1966 (QOG Dec. 17, 1966), henceforth to be cited under the title *PAB rules (QPP contributions)*; *Rules of Procedure of the Review Commission (benefits)*, OC 1465, Apr, 30, 1972 (QOG June 10, 1972), henceforth to be cited under the title *PAB rules (QPP benefits)*.
59. OC 911, May 18, 1966 (unpublished).
60. OC 3213, June 19, 1974 (unpublished).
61. SC 1970-71-72, c. 48; amended by SC 1973-74, c. 2, SC 1974-75-76, c. 66 and 80 and SC 1976-77, c. 54.
62. *Unemployment Insurance (Collection of Premiums) Regulations*, SOR/74-86, amended by SOR/75-94, SOR/76-139, SOR/77-197 and 1068.
63. Consolidation of SOR 1955, p. 2858; amended by SOR/55-392, 436 and 437, SOR/56-10 and 369, SOR/57-116, 456 and 484, SOR/58-467 and 474, SOR/59-3, 31, 169 and 365, SOR/60-190 and 543, SOR/61-35, 191 and 317, SOR/62-101, SOR/63-43, SOR/64-54, 108, 212 and 463, SOR/65-334, SOR/66-25, 111 174, 351, 483 and 509, SOR/67-87, 137, 439 and 597, SOR/68-56, 253 and 469, SOR/69-121 and 324, SOR/70-264, SOR/71-57, 324, 386, 513, 634 and 657, SOR/72-4, 113, 114 and 221, SOR/73-15, 16, 279, 352 and 692, SOR/74-54, 500 and 656, SOR/75-67, 314 and 520, SOR/76-85, 248, 377 and 706, SOR/77-587, 755, 983, 1064, 1065 and 1122.
64. *Umpire Rules of Procedure*, SOR/74-602, amended by SOR/75-229.
65. This is the case in French law; see BORDELOUP, "L'inégalité dans le droit de la sécurité sociale".
66. Concerning the legal nature of the unemployment insurance, see ISSALYS and WATKINS, previously cited, note 26, pp. 9-10.
67. See McINNES, previously cited, note 8, pp. 1-3, for the state of the law in the common law provinces. In Quebec, section 2468 of the *Civil Code* governs this matter.
68. *Commission des accidents du travail du Québec v. Lachance*, [1973] SCR 428, p. 434.
69. *Miller v. Grand Trunk Railway*, [1906] AC 187.
70. *Parry v. Cleaver*, [1970] AC 1.
71. *Canadian Pacific v. Gill*, [1973] SCR 654.

72. One may add the judgment in *Hewson v. Downs*, [1969] 3 All E.R. 193, in which the principles of the *Parry v. Cleaver* decision are applied to a retirement pension paid by virtue of British legislation on social security.
73. McINNES, previously cited, note 8, pp. 27-28.
74. It may be remarked that in another social security sector, that of compensating work-accident victims, the legislator has expressly excluded the common law right of action against the employer for liability for tort. It should, however, be remembered that Canadian workmen's compensation schemes are entirely financed by employers, and not by equal contributions levied from employers and employees, as the CPP and QPP are.
75. CPP, sec. 5.
76. Debates of the House of Commons, November 16, 1964, p. 10330 (Mr. Benson, Minister of National Revenue).
77. CPP, secs. 95 and 97.
78. CPP, sec 43(1).
79. Debates of the House of Commons, November 16, 1964, p. 10311 (Miss LaMarsh, Minister of National Health and Welfare).
80. CPP, secs. 96, 100 and 101; *Unemployment Insurance Act*, sec. 126.
81. CPP, secs. 110-112.
82. QPP, sec. 1*q*).
83. *Quebec Family Allowances Plan*, SQ 1973, c. 36, sec 1*e*).
84. Statement of the Minister of Social Affairs, on March 17, 1977.
85. CPP, sec. 103 and QPP, sec. 213.
86. *Charter of the Quebec Deposit and Investment Fund*, SQ 1965, c. 23; amended by SQ 1968, c. 9; SQ 1969, c. 27 and 50; SQ 1970, c. 18; SQ 1972, c. 60; SQ 1973, c. 11 and 12; and SQ 1977, c. 62.
87. *Unemployment Insurance Act*, sec. 67.
88. *Ibid.*, secs. 131-138.
89. Evidently, there is no question here of dismembering the public administration for the benefit of the private sector, since these autonomous agencies remain public authorities, but rather of dismembering the central administration, which is under the direct supervision of the political authorities, for the benefit of relatively independent bodies, outside the sphere of political control.
90. See GÉLINAS, *op. cit.*, note 1, pp. 21-62.
91. *Employment and Immigration Act*, SC 1976-77, c. 54.
92. *Pension Act*, RSC 1970, c. P-7; amended by RSC 1970 (2nd Supp.), c. 22; SC 1972, cc. 12 and 20; SC 1973-74, c. 19; SC 1974-75-76, c. 66; and SC 1976-77, c. 28.
93. The history of the phenomenon of decentralization, through the dismemberment of the central administration, remains to be written. HODGETT's work, *The Canadian Public Service*, Chapter 7, outlines some of the elements of the process. The Law Reform Commission will attempt to summarize the principal phases of this development in a working paper currently in preparation.
94. SC 1974-75-76, c. 4, sec. 42.
95. *Unemployment Insurance Act*, SC 1970-71-72, c. 48, sec. 86. It has been proposed that the judges of the Trial Division of the Federal Court be relieved of these duties and that they be assigned to a new administrative tribunal; see ISSALYS and WATKINS, previously cited, note 26, pp. 307-309. We shall deal with this proposal in greater

detail with special reference to the PAB. The Law Reform Commission has taken up this idea in its working paper on *The Federal Court — Judicial Review*, p. 18.

96. RSC 1970, c. O-2, secs. 5, 9 and 11.
97. RSC 1970, c. J-1, sec. 38, amended by SC 1974-75-76, c. 48, sec. 22.
98. Information obtained from the Registrar of the PAB.
99. *Debates of the Special Joint Committee on Old Age Pensions*, Jan. 21, 1965, p. 1547.
100. *Unemployment Insurance Act*, SC 1970-71-72, c. 48, sec. 86 and 2(1)*t*).
101. OC 911, May 18, 1966, issued in accordance with sec. 229 of the QPP.
102. *PAB rules (QPP contributions)*, sec. 3*d*); *cf.*, *PAB rules (QPP benefits)*, sec. 3*e*).
103. CPP, sec. 91(1)*c*). It will be noted that this delegation of regulation-making power concerns appeal procedure not only under the CPP but also under any general pension plan instituted by a province which confers appeal authority on the PAB: CPP, sec. 87. This section explains the presence, in sec. 27 of *PAB rules (CPP contributions)* and sec. 24 of *PAB rules (CPP benefits)*, of a provision concerning appeals under the QPP and referring to Quebec regulations.
104. CPP, sec. 85 (4.1).
105. CPP, sec. 85(1); QPP, sec. 196 (in its formulation prior to SQ 1974, c. 39, sec. 47).
106. The Chairman may order that a hearing be held on an application for leave to appeal: *PAB rules (CPP benefits)*, sec. 7(1). He can require the production of additional documents in support of the application: sec. 8(1).
107. CPP, sec. 29(1) and 85(1).
108. QPP, sec. 190 and 196.
109. *Unemployment Insurance Act*, sec. 86(1).
110. *PAB rules (CPP benefits)*, sec. 9; *cf.*, *PAB rules (QPP benefits)*, sec. 7.
111. *PAB rules (CPP contributions)*, sec. 14; *PAB rules (CPP benefits)*, sec. 15; *cf.*, *PAB rules (QPP benefits)*, sec. 12. In the sphere of QPP contributions, this power is vested collectively in the Board: *PAB rules (QPP contributions)*, sec. 14.
112. *PAB rules (CPP contributions)*, sec. 20; *PAB rules (CPP benefits)*, sec. 17; *cf.*, *PAB rules (QPP benefits)*, sec. 14. In the sphere of QPP contributions, this power is vested collectively in the Board: *PAB rules (QPP contributions)*, sec. 20.
113. *PAB rules (CPP contributions)* and *PAB rules (QPP contributions)*, sec. 25(6). This power is not exclusively the Chairman's: it may also be exercised by the Board collectively or by any one of its members. It would seem that an attempt was made here to maximize procedural flexibility, to such an extent that one wonders what purpose the provision serves at all.
114. *PAB rules: (CPP contributions)*, sec. 22; *(CPP benefits)*, sec. 31; *(QPP contributions)*, sec. 22; *cf. (QPP benefits)*, sec. 18.
115. *PAB rules: (CPP benefits)*, sec. 7(2) and 10(2) *cf. (QPP benefits)*, sec. 4(4) and 5(5).
The Registrar has the same responsibility in other areas of the PAB's jurisdiction, even if the rules of procedure do not so provide expressly.
116. *PAB rules: (CPP contributions)*, sec. 5 and 6; *(CPP benefits)*, sec.

10(2) and (3) and 11; *(QPP contributions)*, sec. 5 and 6; *cf. (QPP benefits)*, sec. 8(2), (3) and (5).

117. *PAB rules: (CPP contributions)*, sec. 15(2) and 25(5); *(CPP benefits)*, sec. 12(3); *(QPP contributions)*, sec. 15(2); *cf. (QPP benefits)*, sec. 9(3).
118. *PAB rules: (CPP contributions)*, sec. 10, 23(1) and 25(2); *(CPP benefits)*, sec. 19(2) and 20(1); *(QPP contributions)*, sec. 10, 23 and 25(2); *cf. (QPP benefits)*, sec. 16(2) and 17(1).
119. *PAB rules: (CPP contributions)*, sec. 14; *(CPP benefits)*, sec. 15; *cf. (QPP benefits)*, sec. 12.
120. *PAB rules: (CPP contributions)*, sec. 18; *(CPP benefits)*, sec. 16(2); *(QPP contributions)*, sec. 18(2); *cf. (QPP benefits)*, sec. 13(2).
121. *PAB rules: (CPP contributions)*, sec. 23; *(CPP benefits)*, sec. 20; *(QPP contributions)*, sec. 23; *cf. (QPP benefits)*, sec. 17.
122. *PAB rules (CPP benefits)*, sec. 23.
123. *PAB rules: (CPP contributions)*, sec. 22*a*); *(CPP benefits)*, sec. 21(1)*a*).
124. *PAB rules: (QPP contributions)*, sec. 22*a*); *cf. (QPP benefits)*, sec. 18(1)*a*).
125. CPP, sec. 85(4).
126. CPP, sec. 88(1).
127. *PAB rules: (CPP benefits)*, sec. 18; *cf. (QPP benefits)*, sec. 15.
128. CPP, sec. 85(5).
129. See ISSALYS and WATKINS, previously cited, note 26, pp. 164-165.
130. This Department in fact assumes the operating costs of unemployment insurance Umpires, who constitute the tribunal of last resort in the sphere of benefits and the first level of appeal in the sphere of contributions.
131. OC 2313-74, June 19, 1974.
132. *Debates of the Special Joint Committee on Old Age Pensions*, Dec. 8, 1964, pp. 337 to 339 and Jan. 22, 1965, pp. 1625-1626.
133. The statement of the Minister of National Health and Welfare on this point does not seem sufficiently qualified: *Debates of the House of Commons*, 1965, p. 12036.
134. It may be pointed out here that in 1965 the effectiveness of the Umpire as an appeal authority in the area of unemployment insurance benefits had not yet been compromised, as it has subsequently been, by the number of appeals and the excessive work load of the Umpires as judges of the Federal Court. The legislator would probably hesitate today to press into service members of the regular courts in constituting a new administrative tribunal.
135. A provision adopted in 1977, though not yet put into effect, allows for the appointment of provincial court judges as unemployment insurance Umpires: *Employment and Immigration Act*, previously cited, note 91.
136. Judging from the effect that this consideration has had in the case of the PAB, one could hardly conclude that it still weighs very much with the federal legislator in analogous situations. It will suffice to observe in this regard the composition of other bodies whose functions are by and large of the same nature, such as the Immigration Appeal Board, the National Parole Board and the Antidumping Tribunal.
137. DUSSAULT, *op. cit.*, note 1, pp. 990-991, cites the PAB as an example of the administrative appeal tribunal. Thus also the Working group on administrative tribunals, in *Les tribunaux administratifs au Québec*, pp. 113-114.

138. *M.H.W. v. Jaeger* (1971), CCH 6066. The numbers following the letters CCH refer to the pages of the PAB caselaw digest contained in "Employment Benefits and Pension Guide", published by CCH Canadian Ltd.. See Section IV of the present Chapter.
139. These arrangements, it seems to us, are dictated by two principal considerations. On the one hand, there are situations in which the public authority, serving the purposes of the public interest, must by that very fact take precedence over the procedural safeguard of individual interests. On the other hand, given the often disproportionate means at the disposal of the public authority and the individual, all procedural allowances must be made to the latter if he is to defend his interests adequately.
140. *Code of civil procedure*, sec. 33.
141. *Federal Court Act*, RSC 1970, (2nd Supp.), c. 10, sec. 18.
142. *Ibid.*, sec. 28(6).
143. For the concept of appeal in administrative law, see: Working group on administrative tribunals, *op. cit.*, note 137, pp. 205-209; DUSSAULT, *op. cit.*, note 1, pp. 1055-1061; and BORGEAT, "La place de l'appel dans le droit du contrôle de l'administration", pp. 131-134.
144. See sec. 31 of the *Federal Court Act* and sec. 30(2) of the CPP.
145. CPP, sec. 28(3).
146. *Ibid.*, sec. 86(1), amended by SC 1976-77, c. 36, sec. 18.
147. *Ibid.*, sec. 85(6).
148. *Ibid.*, sec. 83(2). The French version of this subsection is faulty; the use of the words "qu'aucune prestation n'est payable ni à l'un (i.e., the applicant) ni à l'autre (i.e., the beneficiary) ..." would seem to imply that the decision-maker must choose between the two individuals or refuse benefits to both. Clearly, such is not the case, however. Each decision bears upon the entitlement of a single individual to benefits, whether the individual is an applicant (in the case of an initial application for benefits) or a beneficiary (in the case of the withdrawal of the right to benefits). The mistake, unfortunately, is only one of many in the French translation of the CPP.
149. *M.H.W. v. Jaeger*, previously cited, note 138.
150. *Ibid.*, p. 6067.
151. See DUSSAULT, *op. cit.*, note 1, pp. 1059-1061.
152. For an enumeration of the discretionary powers conferred by the CPP, see ANISMAN, *A Catalogue of Discretionary Powers*, pp. 99-103.
153. *An Act to amend the CPP*, SC 1974-1975, c. 4, sec. 25 and 31; see *M.H.W. v. Pustina* (1977), CCH 6348.
154. Notably *Pure Spring Co. v. Minister of National Revenue*, [1946] RCE 471, and *Minister of National Revenue v. Wright's Canadian Ropes*, [1947] AC 109.
155. *M.H.W. v. Storry* (1973), CCH 6127; *Drinkwalter v. M.H.W.* (1973), CCH 6133; *M.H.W. v. Vant* (1976), CCH 6325; *M.H.W. v. Heiberg* (1977), CCH 6369.
156. *M.H.W. v. Weaver* (1975), CCH 6251.
157. *M.H.W. v. Stuart* (1975), CCH 6250; *M.H.W. v. Clary* (1975), CCH 6280. The Minister may, by virtue of sec. 86(2), revise his own decision so as to take into account new facts, even before he is requested to do so by the PAB: see *M.H.W. v. Seigo* (1972), CCH 6088.
158. The conditions precedent were that "the surviving spouse (should have), for a number of years immediately before the death of the

contributor, been living apart from the contributor under circumstances that would have disentitled him to an order for separate maintenance under the laws of the province in which the contributor was ordinarily resident" (former section 63(2)). See *M.H.W. v. Michaud* (1975). CCH 6318; *M.H.W. v. Vant*, previously cited, note 155; *M.H.W. v. Pustina*, previously cited, note 193 *M.H.W. v. Taylor* (1977), CCH 6351; *M.H.W. v. Bellefountaine* (1977), CCH 6376.

159. *M.H.W. v. Herschel* (1977), CCH 6366.
160. See DUSSAULT, *op. cit.*, note 1, pp. 1398-1403.
161. *Ibid.*, pp. 990-993.
162. QPP, sec. 193.
163. *Social Affairs Commission Act*, SQ 1974, c. 39, sec. 20*k*), 42 and 47; amended by SQ 1975, c. 64, sec. 17.
164. QPP, sec. 197 (now repealed).
165. (1973), CCH 6136.
166. Previously cited, note 155.
167. QPP, sec. 194 and 195.
168. *PAB rules: (CPP contributions)*, sec. 23(2); *(CPP benefits)*, sec. 20(2); *(QPP contributions)*, sec. 23; *cf. (QPP benefits)*, sec. 17(2).
169. RSC 1970, c. O-2, sec. 5.
170. This roll was created following a recommendation contained in a management study carried out in 1974-1975 by the Management Consultants Bureau of the Department of Supplies and Services; see, *infra*, note 172.
171. We have extracted the following data from this sampling: file number, name and address of the individual concerned, place of the hearing, language used at the hearing, identity of the appellant, interventions, participation and representation of the parties at the hearing, nature and tenor of the contested decision, subject of litigation, dates of successive phases of the procedure, the decision of the PAB, caselaw cited, observations made by the PAB.
172. Department of Supplies and Services, Management Consultants Bureau, *Study of the Administrative Systems in the Office of the Registrar of the Pension Appeals Board* (March 1975). We shall henceforth refer to this document as the "DSS Report".
173. If, as the record shows, the drafters of the legislation expected the volume of contribution-related litigation to decrease after an initial breaking-in period, their expectations in this regard were not borne out by experience. See *Debates of the Special Joint Committee on Old Age Pensions*, Dec. 2, 1964, p. 165.
174. Similar observations could be made with reference to unemployment insurance benefits: see ISSALYS and WATKINS, *op. cit.*, note 8, pp. 142 and 170.
175. DSS Report, previously cited, note 172, p. 54.
176. *Ibid.*, p. 80.
177. It may be noted that this Table does not take into account the 114 cases brought before the PAB between January 1, 1975 and August 1, 1975. Neither the Chairman nor the Board had to rule on these cases, since they were forwarded to the Social Affairs Commission, which treated them as appeals duly lodged before the Commission: see the *Social Affairs Commission Act*, SQ 1974, c. 39, sec. 42. The Table does not, moreover, take into account the fact that 21 cases already under advisement (and therefore pending) at the end of 1974 were

ruled upon by the PAB during the first seven months of 1975, in accordance with the *Act to amend the SAC Act,* SQ 1975, c. 64, sec. 17.

178. *Cf.*, the far higher rates applicable to CPP benefits: withdrawals, 16%; out-of-court settlements, 16%.
179. DSS Report, previously cited, note 172, p. 68,
180. The two Quebec cases included in our sample are cases in which the surviving spouse of a deceased contributor to the CPP was domiciled in Quebec. Even though these cases are included on Table XIII, they were not taken into account in computing the percentages.
181. The northern region of Ontario is bounded to the south by the southern-most boundaries of Nipissing and Sudbury counties. The eastern region extends to the western boundaries of Renfrew and Lennox-Addington counties. The western region is bounded in the east by the eastern boundaries of Bruce, Huron, Perth, Oxford and Norfolk counties. The central region includes the remainder of the province.
182. Greater Vancouver, the Interior and the Islands.
183. These "split" decisions are usually in the sphere of disability benefit claims. A "compromise" may be considered to result whenever the PAB fixes the beginning of the disability at a date prior to that proposed by the Minister but subsequent to that urged by the beneficiary. See *M.H.W. v. Long* (1973), CCH 6148; *M.H.W. v. Coakley* (1974), CCH 6271; *Clarke v. M.H.W.* (1977), CCH 6373.
184. See Chapter 1, Section I, B.
185. CPP, sec. 5.
186. See *Delegation of powers (CPP, Part I) Regulations*, previously cited, note 49.
187. The powers of these inspectors are regulated by sec. 26 of the CPP. They include right of access to the accounts of business firms and individuals, the right to examine accounts and documents and to require the cooperation of those having custody of the documents, the right to secure copies and, in the event of an apparent breach of the Act, to seize documents.
188. See sec. 26(2) of the CPP and sec. 202 of the *CPP Regulations* (the latter applying in particular to employers). Section 205 of the same Regulations, adopted under sec. 41(1)*d*) of the CPP, authorizes the imposition of a penalty not exceeding $250 on any employer failing to provide the required information.
189. These instructions are contained in a manual of procedure (reference MOI 23), to which the Department denied us access.
190. CPP, sec. 28(1).
191. *Ibid.*, secs. 31 to 33.
192. *Ibid.*, sec. 37.
193. *Ibid.*, sec. 28(4).
194. *Ibid.*, sec. 28(1)*b*) and (6).
195. *Ibid.*, sec. 28(3)*a*) to *c*). The French version of paragraph *c*) is obviously defective. Section 28(7), however, authorizes the Minister to inform third parties concerned, not of his intention to render a determination, but of the determination itself, once it has been rendered.
196. *Delegation of powers (CPP, Part I) Regulations*, previously cited, note 49, sec. 5.
197. CPP, sec. 26, 41(1)*b*) to *d*) and 42(3); *CPP Regulations*, sec. 202 and 205.

198. CPP, sec. 28(5).
199. *Ibid.*, sec. 30(1).
200. *Ibid.*, sec. 22 and 23.
201. *CPP Annual Report*, 1975/76, p. 17.
202. Precisely because of its general character (since it covers all fraudulent acts on the part of contributors), sec. 42(4) does not give rise to the subsidiary application of sec. 115 of the *Criminal Code*.
203. CPP, sec. 42(6).
204. The text lists trustees-in-bankruptcy, assignees, liquidators, curators, receivers, trustees and "every agent or other person administering, managing, winding-up, controlling or otherwise dealing with the property, business, estate or income" of a self-employed worker.
205. CPP, sec. 23.
206. *Ibid.*, sec. 33.
207. *Ibid.*, sec. 24(1) and (2) and 37.
208. *Ibid.*, sec. 94(1).
209. *Delegation of powers (CPP, Parts II and III) Regulations*, previously cited, note 49.
210. CPP, sec. 117.
211. *M.H.W. v. Moore* (1977), CCH 6367.
212. The exercise of discretionary power is called for in the allocation of a surviving spouse's pension to the *de facto* spouse of a deceased contributor rather than to his legal spouse. See *supra*, Chapter 2, Section III, B.
213. See *Old Age Security Act*, previously cited, note 16, sec. 14 and 18; *Old Age Security Regulations*, SOR/68-66, amended by SOR/69-557, SOR/72-16 and 456, SOR/73-484 and 724, SOR/75-474 and 576, SOR/77-476, sec. 3, 5, 7, 13 and 22 to 40; *Family Allowances Act*, previously cited, note 17; *Family Allowances Regulations*, SOR/74-30, sec. 16-24.
214. *Review Committee Rules of Procedure*, previously cited, note 52, sec. 3(1)*b*).
215. *Ibid.*, sec. 4(1).
216. *Ibid.*, sec. 4(3) and 5.
217. See, for example: *M.H.W. v. Durdle*, PAB, July 26, 1976, where the Chairman of the Committee as well as the appellant's appointed Committee member were both members of the provincial legislature; *M.H.W. v. Coughlan* (1976), CCH 6338.
218. In the case of *Brooks v. M.H.W.*, PAB, August 23, 1976, the appellant unsuccessfully alleged that the Chairman had been appointed without the consent of the member designated by himself, and that he acted in a partial manner during the hearing.
219. *Cf. supra*, Chapter 2, Section III, B.
220. The question of an applicant's age may arise on the occasion of an appeal. The question may also be submitted by the Minister, by virtue of section 510 of the *CPP Regulations*, to a "tribunal" identical in composition to that of the Review Committee; the decision of this tribunal may, however, be disregarded by the Minister subsequently, in the light of new facts (sec. 512).
221. *M.H.W. v. Jaeger*, previously cited, note 149.
222. *M.H.W. v. Clary*, previously cited, note 157; *M.H.W. v. Herschel*, previously cited, note 159; *M.H.W. v. Cann* (1978), CCH 6378.
223. See among others: *M.H.W. v. Caines* (1973), CCH 6167; *M.H.W. v.*

Kubik (1974), CCH 6185; *M.H.W. v. Montpellier* (1974), CCH 6215; *M.H.W. v. Russell* (1974), CCH 6279.

224. CPP, sec. 59(2); see *M.H.W. v. McDermott* (1976), CCH 6323, where an application made by telephone was held to be unacceptable.
225. *CPP Regulations*, sec. 506(1).
226. *Ibid.*, sec. 514*n*).
227. CPP, sec. 59(2); *CPP Regulations*, sec. 500*b*).
228. CPP, sec. 59(1) and 91(1)*d*); *CPP Regulations*, sec. 507.
229. CPP, sec. 43(2)*b*).
230. *Ibid.*, sec. 59(1.1), (1.3) and (1.4).
231. *M.H.W. v. McDermott*, previously cited, note 224.
232. CPP, sec. 59(1.2).
233. *CPP Regulations*, sec. 531(1).
234. CPP, sec. 107 and 108; *CPP Regulations*, sec. 518, 801 and 802.
235. *CPP Regulations*, sec. 508; see *M.H.W. v. Frost* (1977), CCH 6369.
236. *Ibid.*, sec. 534(1) and (2).
237. *Ibid.*, sec. 535.
238. This is the report referred to under sec. 531(1)*a*) of the *CPP Regulations*. Originally, in strict compliance with the letter of the regulation, its submission was required at the time of the application for benefits. For some years now, however, the practice has been to dispense the applicant from the obligation of asking his physician for a report at the time of his application, and to rely on the applicant's own statements in the questionnaire concerning the essential facts in his case, subject to the additional confirmation provided by the subsequent medical report.
239. *CPP Regulations*, sec. 536.
240. *Ibid.*, sec. 531(2).
241. *Ibid.*, sec. 531(3) and (4).
242. *Ibid.*, sec. 534(4).
243. Definition of "severe disability" in the meaning of sec. 43(2)*a*)(ii) of the CPP.
244. *CPP Regulations*, sec. 535 and 536.
245. CPP, sec. 59(3). The French version of this text (once again, an obvious mistranslation) suggests that the obligation to give notice of the decision only exists when the decision is negative.
246. *Ibid.*; see also sec. 97, 54 and 58.
247. *Ibid.*, sec. 60.
248. *CPP Regulations*, sec. 515, laid down by virtue of sec. 91(1)*d*) of the CPP. Conditions governing payments to the minor children of a disabled contributor are defined in sec. 78 of the CPP.
249. See *Regulation on the Delegation of Powers (CPP, Parts II and III)*, previously cited, note 49.
250. Section 91(1)*e*) of the CPP provides for "periodic ... assessments" of the disability.
251. *CPP Regulations*, sec. 532(1).
252. *Ibid.*, sec. 533, laid down by virtue of sec. 91(1)*f*) of the CPP.
253. *Supra*, Chapter 1, Section I, c., Table V.
254. Governed by sec. 44(1)*a*), 46 to 53, 66 and 67 of the CPP.
255. Governed by sec. 44(1)*d*) and (3), 56, 62, 63, 73 and 74 of the CPP.
256. Governed by sec. 44(1)*g*) and (3), 58, 77, 78 and 79 of the CPP.
257. Governed by sec. 44(1)*c*) and (3), 55 and 72 of the CPP.
258. CPP, sec. 46 and 48.

259. CPP, sec. 97.
260. CPP, sec. 99(1).
261. *Supra*, Chapter 2, Section III, B.
262. Since the *Storry* decision, previously cited, note 155, PAB caselaw has called for the application of this presumption prior to the substitution of the common-law spouse for the legal spouse.
263. The former text required proof (1) of a cohabitation for seven years, (2) of support of the common-law spouse by the deceased contributor and (3) of the public acknowledgement of the common-law spouse as the deceased contributor's spouse.
264. CPP, sec. 62(3).
265. *M.H.W. v. Nilberg* (1972), CCH 6084; *M.H.W. v. Frustaci* (1975), CCH 6309.
266. *M.H.W. v. Pertus* (1976), CCH 6333.
267. *CPP Regulations*, sec. 509(2), 514 *n*), 519(2) and 525.
268. *M.H.W. v. Pertus*, previously cited, note 266.
269. *M.H.W. v. Cann*, previously cited, note 222; the former version of sec. 66 of the CPP was applied in this case, subsequently changed by S.C. 1976-77, c. 36, sec. 12.
270. *CPP Regulations*, sec. 509 to 511 and 513.
271. CPP, sec. 78 and 91(1)*d*); *CPP Regulations*, sec. 515.
272. The *Delegation of Powers (CPP, Parts II and III) Regulations*, previously cited, note 49, provides for it in express terms in the case of appeal, and lets us presume it in the case of reconsideration: see, *supra*, B., 1., *d*).
273. To recognize that a decision rendered on reconsideration, which merely confirms the initial decision, may be the subject of an appeal would be simply to make the time limit for appeal, laid down in sec. 83, meaningless.
274. CPP, sec. 91(1)*d*) and *CPP Regulations*, sec. 537.
275. The items of information are enumerated in sec. 3(1) of *The Review Committee Rules of Procedure*, previously cited, note 52.
276. See *M.H.W. v. Jaeger*, previously cited, note 138, commented on *supra*, Chapter 2, Section III, B..
277. CPP, sec. 84(6).
278. *Ibid.*, sec. 86(2) and *M.H.W. v. Jaeger*, previously cited, note 138.
279. *Review Committee Rules of Procedure*, previously cited, note 52, sec. 3(1).
280. CPP, sec. 84(1).
281. Previously cited, note 159.
282. *Review Committee Rules of Procedure*, previously cited, note 52, sec. 2*b*).
283. *Ibid.*, sec. 3(2).
284. *Ibid.*, sec. 3(1).
285. See *supra*, A., 2., *a*).
286. *Ibid.*.
287. On this point, practice appears to be at variance with sec. 4(3)*c*) of the *Review Committee Rules of Procedure*, which charges the secretary of the Committee with conveying this answer to the appellant.
288. *Review Committee Rules of Procedure*, sec. 5.
289. *Ibid.*, sec. 6.
290. CPP, sec. 84(4).
291. *Review Committee Rules of Procedure*, sec. 8(2).

292. *Ibid.*, sec. 8(1).
293. *Ibid.*, sec. 8(3).
294. See, for example, the case of *M.H.W. v. Zullo*, PAB, December 30, 1975, where the appellant had designated an official of his union as member of the Review Committee and had asked another to plead his cause before the Committee. Practices of this kind illustrate what credence may be given to the postulate of impartiality in the case of all Committee members.
295. *Review Committee Rules of Procedure*, sec. 7(1).
296. *Ibid.*, sec. 7(2).
297. *Supra*, Chapter 2, Section IV.
298. *M.H.W. v. Weaver*, previously cited, note 156.
299. CPP, sec. 84(6); the French version of the text speaks, misleadingly, of the Minister's power to institute an action ("intenter une action") by virtue of sec. 83.
300. *Ibid.*, sec. 86(1) and (2).
301. *M.H.W. v. Vant*, previously cited, note 155; *M.H.W. v. Taylor*, previously cited, note 158.
302. CPP, sec. 84(6).
303. *M.H.W. v. Pustina*, previously cited, note 153.
304. CPP, sec. 84(5).
305. Only one of these cases has been the subject of a published decision: *M.H.W. v. Coughlan*, previously cited, note 217, where the Review Committee Chairman was in disagreement with the other two members.
306. CPP, sec. 84(6).
307. *Rules of Procedure of the Review Committee*, sec. 9.
308. See *infra*, Chapter 4, Section I.
309. See *supra*, Chapter 2, Section V, B..
310. Until 1975, the retirement pension could also give rise to situations of this type, since its amount was to be reduced in proportion to the income derived from occupational activities by a beneficiary under 70 years of age (former sec. 68 and 69 of the CPP); in the event of the non-disclosure of income, the Director General could suspend payment of the pension until an investigation had been conducted (former sec. 522 and 523 of *CPP Regulations*).
311. See, for example, sec. 121(1)*e*) of the *Unemployment Insurance Act*, previously cited, note 61, where the element of intent is an essential component of an analogous offence.
312. CPP, sec. 106(1).
313. Previously cited, note 61; see *supra*, Chapter 1, Section II, B., 3.
314. *Unemployment Insurance Act* (UIA), sec. 90 *a*), *b*), *c*), *q*) and *r*).
315. Previously cited, note 62.
316. Previously cited, note 64.
317. UIA, sec. 78(1).
318. *Employment and Immigration Act*, previously cited, note 91, sec. 5.
319. *Ibid.*, sec. 68 ff.
320. *Ibid.*, sec. 7 and 9.
321. See ISSALYS and WATKINS, previously cited, note 8, pp. 23-29 and Chapters 2 and 3.
322. *Ibid.*, p. 45.
323. With regard to the constitutional problems raised, before and after the 1971 reform, by the exercise of this power, see: *The Queen v. Scheer*,

[1974] SCR 1046; *Re Martin Service Station*, (1974) 44 DLR (3d) 99 (F.A.C.), upheld by *Martin Service Station v. M.N.R.*, S.C.C., May 5, 1976.

324. *Ibid.*, pp. 169 to 172.
325. Concerning the power of these inspectors, see UIA, sec. 73.
326. *Regulations on Unemployment Insurance (Contributions)*, sec. 20 and 23, laid down by virtue of sec. 90(1)*a*) and *c*) of the UIA.
327. UIA, sec. 75(1), (4), (5), (6) and (8).
328. *Ibid.*, sec. 90(1)*q*).
329. *Ibid.*, sec. 117. Oddly enough, a court is not required to await that all recourse against the Minister's decision be exhausted, since no mention is made of the eventuality of appealing to the PAB the Umpire's decision.
330. UIA, sec. 68 and 70.
331. *Mendelsohn v. M.N.R.* NR 37 (1975); *Saint-Gelais v. M.N.R.* NR 73 (1975). The text involved here is sec. 175(1)*e*) of the Regulations; for a more detailed discussion of the writing off of overpayments, see ISSALYS and WATKINS, previously cited, note 8, pp. 99-101, 114-116.
332. UIA, sec. 84(2) and 85.
333. The title would lead one to believe that these rules apply to all cases before the Umpire. In fact, however, they concern only appeals in the sphere of contributions. There is no systematic body of rules of procedure in the sphere of benefits; these appeals are governed essentially by the few provisions of the UIA and by the *Unemployment Insurance Regulations*, previously cited, note 63.
334. The duties of the registrar of the Umpire are not laid down in any legal text. Section 2 of the *Rules of Procedure* simply defines the registrar as an official appointed by the Employment and Immigration Commission to administer the Umpire's office.
335. A procedure for the withdrawal of appeals is provided under sec. 15 of *Rules of Procedure*.
336. *Umpire Rules of Procedure*, sec. 5(3).
337. *Ibid.*, sec. 6.
338. *Ibid.*, sec. 7*a*).
339. *Ibid.*, sec. 2 and 8(1) and (2).
340. *Ibid.*, sec. 7*c*); it seems that *d*) should more correctly be (iv) of *c*).
341. *Ibid.*, sec. 9.
342. *Ibid.*, sec. 8 and 10. The Umpire can order the consolidation of interventions raising the same questions of law or fact and originating with parties residing in the same region. This measure enables the parties to join their efforts in defence of their interests, and avoids the pointless repetition of identical testimony and pleas at the hearing.
343. *Ibid.*, sec. 13.
344. *Umpire Rules of Procedure*, sec. 17.
345. See ISSALYS and WATKINS, previously cited, note 8, pp. 183-185.
346. *Umpire Rules of Procedure*, sec. 18.
347. *Ibid.*, sec. 12 and 20.
348. *Ibid.*, sec. 21.
349. *Ibid.*, sec. 22(2) and (3).
350. *Ibid.*, sec. 22(4).
351. UIA, sec. 84(2); *Umpire Rules of Procedure*, sec. 24(1).
352. UIA, sec. 86(2); see *supra*, Chapter 2, Section III, C..

353. See *Valley View Mobile Homes v. M.N.R.* (1976), CCH 6343 and *Rumble v. M.N.R.* (1977), CCH 6358.
354. See *supra*, Chapter 2, Section IV.
355. See ISSALYS and WATKINS, previously cited, note 8, pp. 172-176.
356. R.S.C. 1970 (2nd Supp.), c. 10.
357. *M.N.R. v. MacDonald*, [1977] 2 FC 189; *M.N.R. v. Caughnawaga Indian Brotherhood*, [1977] 2 FC 269. The Appeal Division of the Federal Court had already, a year earlier, set aside a decision by the Umpire in a matter involving contributions, in a very brief judgment which did not raise the question of the Umpire's jurisdiction: *M.N.R. v. Margison Associates*, F.A.C. January 28, 1976 (no. A-241-75), setting aside *Margison Associates v. M.N.R.*, NR 43 (1975).
358. Previously cited, note 323.
359. ISSALYS and WATKINS, Previously cited, note 8, p. 192.
360. The Employment and Immigration Commission has discretionary power, however, to allow benefits to an eligible person who has lost his right of applying for them through the failure of another to conform to the law: UIA, sec. 116.
361. *Unemployment Insurance (Collection of Premiums) Regulations*, previously cited, note 62, sec. 4(3).
362. UIA, sec. 71(1).
363. *Ibid.*, sec. 79.
364. *Ibid.*, sec. 80.
365. *Ibid.*, sec. 70(3).
366. *Ibid.*, sec. 124.
367. *Ibid.*, sec. 88(3); the penalty is that provided under section 90(1)*c*).
368. *Ibid.*, sec. 88(2).
369. *Ibid.*, sec. 88(4)*a*).
370. *Ibid.*, sec. 88(4)*c*).
371. *Ibid.*, sec. 88(4)*b*) and *d*).
372. *Ibid.*, sec. 88(1).
373. See *supra*, Chapter 2, Section V, A.
374. QPP, sec. 1*q*); see *supra*, Chapter 1, Section III, A., 2.
375. Sec. 72, third paragraph, authorizes the Minister to make a contribution even if no amount has been deducted or paid for a preceding year, subject to a maximum period of retroactivity of four years (sec. 63, third paragraph).
376. QPP, sec. 1*s*); in view of this definition, the French version of sec. 63, first paragraph, is redundant.
377. *Ibid.*, sec. 56.
378. *Regulations concerning contributions to the QPP*, OC 2494, (1966) QOG 752; am. by OC 3590, (1968) QOG 455 and OC 4647-73, (1973) QOG 6653, sec. 2.01.
379. See SQ 1965, c. 24, sec. 60; am. by SQ 1971, c. 52 and SQ 1972, cc. 26 and 53.
380. QPP, sec. 232.
381. See *supra*, Chapter 2, Section V, A.
382. See *supra*, Chapter 1, Section III, A., 2.
383. *Supplemental Pension Plans Act*, SQ 1965, c. 25; am. by SQ 1969, c. 50; SQ 1972, c. 68; and SQ 1975, cc. 18 and 19.
384. Previously cited, note 18.
385. See OC 3476-76, (1976) QOG 6247, issued by virtue of the *Subsidies Act No. 2, 1976/77*, SQ 1976, c. 2; OC 2351-77, (1977) QOG 3833,

issued by virtue of the *Department of Social Affairs Act*, SQ 1970, c. 42.

386. QPP, sec. 12.
387. We are using for this description of the Board the categories drawn up by DUSSAULT, previously cited, note 1, *ibid.*.
388. QPP, sec. 23 and 226 *s*).
389. *Ibid.*, sec. 4 and 5.
390. *Ibid.*, sec. 6 and 226*c*) and *d*).
391. *Ibid.*, sec. 226*g*).
392. *Ibid.*, sec. 226*j*) and *k*).
393. *Ibid.*, sec. 226*a*) and *t*).
394. *Ibid.*, sec. 26*d*).
395. *Ibid.*, sec. 213, 218 to 221 and 228.
396. *Ibid.*, sec. 26*a*) to 26*c*).
397. *Ibid.*, sec. 26*g*), 27 and 28.
398. *Ibid.*, sec. 26*f*).
399. *Ibid.*, sec. 30.
400. *Ibid.*, sec. 234*a*).
401. The term "for cause" does not in fact limit the power of review, since even in the absence of such a prescription the caselaw requires the existence of valid grounds to justify its exercise: see GAGNON, "Le recours en révision en droit administratif", pp. 188-196.
402. *Ibid.*, sec. 14, introduced by S.Q. 1972, c. 53, sec. 6.
403. *Ibid.*, and sec. 21.
404. *Ibid.*, sec. 15 and 16.
405. *Ibid.*, sec. 22.
406. *Ibid.*, sec. 24.
407. *Réglement de régie interne du Conseil d'administration de la Régie des rentes*, previously cited, note 57, sec. 5.01 to 5.05.
408. Prior to 1972, the Reconsideration Committee consisted of three individuals.
409. *Règlement de régie interne*, previously cited, note 57, sec. 5.02.
410. QPP, sec. 13.
411. *Yvon S. v. Régie des rentes du Québec* (1973), CCH 6157; *Régime de rentes — 36*, [1977] SAC 327.
412. See *infra*, D.
413. *Regulations respecting benefits*, previously cited, note 56, sec. 3.06 and 3.11.
414. *Ibid.*, sec. 3.01 and 3.02.
415. *Ibid.*, sec. 3.02.
416. *Ibid.*, sec. 3.05.
417. *Ibid.*, sec. 3.10.
418. *Ibid.*, sec. 3.03 and 3.04.
419. QPP, sec. 119*b*) and *f*), 120 and 173.
420. *Ibid.*, Sec. 109; *Regulations concerning benefits*, sec. 7.01.
421. *Boyer v. Régie des rentes du Québec* (1975), CCH 6263.
422. *Choquette v. Régie des rentes du Québec* (1972), CCH 6125; *Régime de rentes — 9*, [1977] SAC 257.
423. QPP, sec. 100, 101 and 103.
424. *Regulations respecting benefits*, sec. 3.07 and QPP, sec. 214, 2nd paragraph.
425. This requirement appears rather singular in view of the work background ("historique du travail") requirement of sec. 7.02 of *Regulations respecting benefits*.

426. *Hogan v. Régie des rentes du Québec* (1972), CCH 6155.
427. See *Regulations respecting benefits*, sec. 7.02.
428. Social Affairs Commission, *Annual Report, 1976-1977*, pp. 78-79. With reference to the SAC's power of making recommendations concerning administrative practices, see Chapter 5.
429. *Ibid.*, sec. 7.04 and QPP, sec. 110.
430. *Ibid.*, sec. 3.02; see *Benoît v. Régie des rentes du Québec* (1971), CCH 6031.
431. *Ibid.*, sec. 7.03.
432. The authority used is the *Dictionary of Occupational Titles*, published by the U.S. Department of Labour. Although the work has been adapted for Canadian use by the federal Department of Manpower and Immigration, under the title of *Descriptive Classification of Occupations*, its appropriateness in the Canadian and Quebec context has been called in question. See Quebec Pension Board, *Annual Report, 1967*, p. 7.
433. *Régime de rentes — 13*, [1976] SAC 372; *Régime de rentes — 19*, [1976] SAC 396.
434. See Quebec Pension Board, *Annual Report, 1976*, p. 14.
435. *Regulations respecting benefits*, sec. 7.03 and 7.05.
436. *Ibid.*, sec. 3.18.
437. Quebec Pension Board, *Annual Report, 1977*, p. 22.
438. *Act to Amend the QPP*, SQ 1977, c. 24.
439. QPP, sec. 119*a*), 165*a*) and 171*a*).
440. *Ibid.*, sec. 131-133.
441. *Supra*, Chapter 2, Section III, B.
442. *Supra*, Chapter 3, Section II, B., 2.
443. *Resnick v. Quebec Pension Board*, previously cited, note 165.
444. *Régime de rentes — 16*, [1976] SAC 380, pp. 382-383; *Régime de rentes — 17*, [1976] SAC 390; *Régime de rentes — 30*, [1976] SAC 424; these decisions will be examined in Chapter 5.
445. *Régime de rentes — 16*, [1976] SAC 380, pp. 383-389; *Régime de rentes — 37*, [1976] SAC 441; *Régime de rentes — 41*, [1976] SAC 622; *Régime de rentes — 25*, [1977] SAC 297; *Régime de rentes — 27*, [1977] SAC 302.
446. *Régime de rentes — 28*, [1977] SAC 305, p. 307.
447. Social Affairs Commission, previously cited, note 427, pp. 75-76.
448. *Ibid.*, pp. 72-75.
449. QPP, sec. 101, 104, 119*c*) and *g*), 121, 139 to 142, 155, 175, 176, 181 to 185.
450. *Regulations respecting benefits*, sec. 3.07.
451. *Ibid.*, sec. 3.10 A.
452. *Ibid.*, sec. 3.10.
453. QPP, sec. 105*b*) and 226*c*); *Regulations respecting benefits*, sec. 6.01: "substantially" means in a proportion higher than 50%. Consequently, it was required that the deceased contributor should have maintained himself entirely and should have contributed to the extent of 50% to the maintenance of his spouse, that is, should have contributed in the proportion of 75% to the maintenance of the household: *Régime de rentes — 50*, [1976] SAC 644.
454. QPP, sec. 199 and 202.
455. QPP, sec. 119*c*) and 175; *Regulations respecting benefits*, sec. 5.01; see *Régime de rentes — 52*, [1976] SAC 648.

456. QPP, sec. 160*a*).
457. *Ibid.*, sec. 165, 165*a*), 177 and 181.
458. *Regulations respecting benefits*, sec. 4.01.
459. By virtue of sec. 23 of the QPP.
460. *Supra*, Chapter 3, Section II, B., 2.
461. QPP, sec. 120 and 121.
462. By the application of sec. 167 to 171 of the QPP, rendered inoperative in 1977 by the new sec. 171*a*).
463. By the application of sec. 183 of the QPP.
464. See the annual reports of the Board.
465. See *supra*, A., 1.
466. QPP, sec. 201.
467. *Ibid.*, sec. 202.
468. *Ibid.*, sec. 203.
469. *Regulations respecting benefits*, sec. 2.03.
470. *Régime de rentes — 33*, [1976] SAC 432; the SAC based this conclusion also on sec. 20*k*) of the *SAC Act*, previously cited, note 163. The former version of section 196 would also have precluded appeal to the PAB against such a decision.
471. See *supra*, A., 1.
472. QPP, sec. 26 and 195.
473. *Ibid.*, sec. 163*a*); *Regulations respecting benefits*, sec. 3.18 and 3.19.
474. *Ibid.*; see *Régime de rentes — 6*, [1976] SAC 121.
475. *Ibid.*, sec. 163; *Regulations respecting benefits*, sec. 3.16.
476. *PAB Rules of Procedure (Contributions and Coverage)*, previously cited, note 51; *PAB Rules of Procedure (Benefits)*, previously cited, note 53; *Rules of Procedure of the Review Commission (Contributions)* and *Rules of Procedure of the Review Commission (Benefits)*, previously cited, note 58.
477. See *supra*, Chapter 3, Section II D., 4.
478. *Review Committee Rules of Procedure*, previously cited, note 52, sec. 4(2), 7(3) and 9.
479. *PAB Rules of Procedure (CPP Benefits)*, sec. 23.
480. CPP, sec. 85(1).
481. *PAB Rules of Procedure (CPP benefits)*, sec. 4.
482. *Ibid.*, sec. 22. This provision figures in other procedural texts applicable to the PAB also.
483. *Ibid.*, sec. 8(2).
484. *Ibid.*, sec. 6(1) and (2).
485. *Ibid.*, sec. 21(1)*a*); this time limit may, however, be extended, as we shall see.
486. *Ibid.*, sec. 7(1) and 8(1); *M.H.W. v. Jaeger*, previously cited, note 138. The Chairman may notwithstanding summon the parties before him if he deems it useful; he has occasionally exercised this power.
487. *M.H.W. v. Jaeger*, previously cited, note 138; see *Debates of the Special Joint Committee on Old Age Pensions*, Dec. 9, 1964, p. 350.
488. QPP, former sec. 196.
489. *PAB Rules of Procedure (QPP benefits)*, sec. 4 to 6.
490. See the *DSS Report*, previously cited, note 172, pp. 29-30.
491. *PAB Rules of Procedure (QPP benefits)*, sec. 4(2); an identical provision appears in the *PAB Rules of Procedure (CPP benefits)*, sec. 6(3).
492. CPP, sec. 85(5).

493. *PAB Rules of Procedure (CPP contributions)*, sec. 24; *(CPP benefits)*, sec. 5; *(QPP contributions)*, sec. 24; *cf. (QPP benefits)*, sec. 5.
494. The files of Review Committees are kept for this purpose by the PAB well beyond the time limit provided under sec. 23 of *PAB Rules of Procedure (CPP benefits)*.
495. *PAB Rules of Procedure (CPP benefits)*, sec. 10(1); *cf. (QPP benefits)*, sec. 8(1).
496. *PAB Rules of Procedure (CPP contributions)*, sec. 4; *(QPP contributions)*, sec. 4.
497. See *supra*, note 482.
498. *PAB Rules of Procedure (CPP contributions)*, sec. 5; *(QPP contributions)*, sec. 5.
499. *PAB Rules of Procedure (CPP benefits)*, sec. 11(1); CPP, sec. 85(5.1).
500. *PAB Rules of Procedure (CPP benefits)*, sec. 19; *cf. (QPP benefits)*, sec. 16.
501. See *supra*, Chapter 3, Section III, C., 1.
502. In making our calculations, we have excluded withdrawn appeals, liquidated by a mere act of the Registrar. We have included, however, cases settled by agreement between the parties prior to the hearing since, as we shall see, these cases do in fact call for ratification at a PAB hearing.
503. *PAB Rules of Procedure (CPP contributions)*, sec. 7 to 9; *(QPP contributions)*, sec. 7 to 9; *(CPP benefits)*, sec. 9 and 11(2); *cf. (QPP benefits)*, sec. 7 and 8(4).
504. *Ibid.*, *(CPP contributions)*, sec. 10 and 11; *(QPP contributions)*, sec. 10 to 12; *(CPP benefits)*, sec. 10(3), 12(1) and 13; *cf. (QPP benefits)*, sec. 8(5), 9(1) and 10.
505. See *supra*, Chapter 2, Section V, Table XII.
506. *PAB Rules of Procedure (CPP contributions)*, sec. 14; *(QPP contributions)*, sec. 14; *(CPP benefits)*, sec. 15; *cf. (QPP benefits)*, sec. 12.
In the area of QPP contributions, leave must be given by the PAB, that is, by a quorum of three members, a provision which makes for considerable practical difficulties.
507. *PAB Rules of Procedure (CPP contributions)*, sec. 13; *(QPP contributions)*, sec. 13; *(CPP benefits)*, sec. 14; *cf. (QPP benefits)*, sec. 11.
508. *Kitchener-Waterloo Symphony Association v. M.N.R.*, PAB, November 28, 1975 (unpublished).
509. *M.H.W. v. Storry*, previously cited, note 155, and *Resnick v. Quebec Pension Board*, previously cited, note 165: decisions in these cases were suspended and rendered simultaneously.
510. *Valley View Mobile Homes v. M.N.R.*, previously cited, note 353.
511. *PAB Rules of Procedure (CPP contributions)*, sec. 4; *(QPP contributions)*, sec. 4. With regard to the notion of "hearing", see *Attorney General of Manitoba v. National Energy Board*, [1974] 2 FC 502.
512. *PAB Rules of Procedure (CPP contributions)*, sec. 15; *(QPP contributions)*, sec. 15; *(CPP benefits)*, sec. 12(2) to (4); *cf. (QPP benefits)*, sec. 9(2) to (4).
513. See *supra*, Chapter 2, Section III, B.
514. *PAB Rules of Procedure (CPP contributions)*, sec. 18; *cf. (QPP contributions)*, sec. 15.
515. See *M.H.W. v. Wrice* (1972). CCH 6101.
516. *M.H.W. v. Pilote* (1974), CCH 6221; *M.H.W. v. Frustaci*, previously cited, note 265; *M.H.W. v. Coughlan*, previously cited, note 217.

517. See *supra*, Chapter 3, Section II, A., 2.
518. *PAB Rules of Procedure (CPP contributions)*, sec. 15(3); *(QPP contributions)*, sec. 15(3); *(CPP benefits)*, sec. 12(4); *cf. (QPP benefits)*, sec. 9(4).
519. *M.H.W. v. Holic* (1974), CCH 6210. As an example of its procedural flexibility, the PAB declared in this judgment its willingness to receive hearsay evidence. Our personal attendance at a number of hearings leads us to believe, however, that if such evidence *is* admissible, it would be so only in exceptional cases.
520. *PAB Rules of Procedure (CPP contributions)*, sec. 19; *(QPP contributions)*, sec. 19; *(CPP benefits)*, sec. 16(3); *cf. (QPP benefits)*, sec. 13(3).
521. *PAB Rules of Procedure (CPP contributions)*, sec. 17 and 18; *(QPP contributions)*, sec. 17 and 18; *(CPP benefits)*, sec. 16(1) and (2); *cf. (QPP benefits)*, sec. 13(1) and (2).
522. *M.H.W. v. Caines*, previously cited, note 223; *M.H.W. v. Frustaci*, previously cited, note 265.
523. *M.H.W. v. MacDonald* (1974), CCH 6177; *Whitaker v. M.H.W.* (1974), CCH 6188; *M.H.W. v. Holic*, previously cited, note 519.
524. The Quebec Pension Board does, and has always done, likewise.
525. *M.H.W. v. Buccione* (1975), CCH 6282.
526. CPP, sec. 29(2) and 85(6); QPP, sec. 191 and 197.
527. CPP, sec, 85(5).
528. *PAB Rules of Procedure (CPP contributions)*, sec 23(1); *(QPP contributions)*, sec. 23; *(CPP benefits)*, sec. 20(1); *cf. (QPP benefits)*, sec. 17(1).
529. CPP, sec. 29(2) and 85(6); QPP, sec. 191 and 197; UIA, sec. 87.
530. *M.H.W. v. Seigo* and *M.H.W. v. Clary*, previously cited, note 157.
531. It may be noted that, even though such is not the case at present, judges of the Federal Court could also be appointed to the PAB.
532. *Lavell v. Attorney General of Canada*, [1977] FC 347 (FAC); *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 SCR 228; see LEMIEUX and VALLIÈRES, "La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire", pp. 385-390; see also *supra*, Chapter 2, Section II, B.
533. See *supra*, Chapter 3, Section III, C., 5.
534. Section 30(2) of the CPP creates a right of appeal to the Supreme Court against decisions of the PAB on any question of fact or law involving the application or interpretation of sec. 4.
535. See *M.N.R. v. MacDonald*, previously cited, note 357, p. 191.
536. [1976] 2 FC 539 (DPI).
537. See LEMIEUX and VALLIÈRES, previously cited, note 532, p. 425.
538. Provided, of course, that the subject under consideration is a "decision or order" within the meaning of section 28. It would seem that any decision by the PAB on a case appealed to it could be qualified as such, in any event, in the light of the caselaw relevant to this section: see LEMIEUX and VALLIÈRES, previously cited, note 532, pp. 393-399.
539. See *Matsqui Institution Disciplinary Board v. Martineau*, FAC, March 17, 1978, no. A-500-77, and the precedents cited by LEMIEUX and VALLIÈRES, previously cited, note 532, pp. 423-424.
540. *Social Affairs Commission Act*, SQ 1974, c. 39; am. by SQ 1975, c. 64, SQ 1977, cc. 22, 23, 42, 48, 49, 68; and by Bill No. 9, 3rd Session of the 31st legislature.

541. See HETU and MARX, "La nouvelle Commission des affaires sociales", p. 727.
542. Bill No. 40, 2nd Session of the 30th legislature.
543. *Journal des débats de l'Assemblée nationale*, December 12, 1974, p. 3427.
544. This calculation takes into account the new powers conferred upon the SAC by the *Handicapped Persons' Rights Act*, Bill No. 9, 3rd Session of the 31st legislature.
545. See *supra*, Chapter 1, Section II, B.
546. SQ 1969, c. 63, sec. 42; am. by SQ 1970, c. 44 and SQ 1974, c. 39.
547. Previously cited, note 83, sec. 17.
548. Sec. 196.
549. RSQ 1964, c. 159; am. by SQ 1966-67, c. 52; SQ 1971, c. 45; SQ 1972, c. 60; SQ 1975, c. 54 and SQ 1977, c. 42; sec. 59*b*).
550. SQ 1975, c. 55, sec. 12; am. by SQ 1977, c. 42.
551. RSQ 1964, c. 14; am. by SQ 1965, c. 15; SQ 1966, c. 6; SQ 1968, cc. 9, 11, 12, 13, 17, 18 and 60; SQ 1969, cc. 15, 17, 28, 48 and 62; SQ 1970, cc. 8, 17 and 43; SQ 1971, cc. 17, 19, 20 and 77; SQ 1972, cc. 14, 49, 53, 55 and 58; SQ 1973, cc. 11, 12, 21, 43 and 67; SQ 1974, c. 10; and SQ 1977, c. 22. The last Act mentioned adds sec. 89, creating the possibility of appeal to the SAC.
552. SQ 1965, c. 64; am. by SQ 1966-67, c. 64; SQ 1970, c. 56; SQ 1972, c. 60; SQ 1973, c. 12; SQ 1974, c. 63; and SQ 1977, c. 23. The last Act mentioned adds section 32*c*), creating the possibility of appeal to the SAC.
553. SQ 1977, c. 68, sec. 56.
554. *Health Services and Social Services Act*, SQ 1971, c. 48, sec. 119; am. by SQ 1973, c. 38; SQ 1974, c. 42; SQ 1975, c. 62; and SQ 1977, c. 48.
555. *Handicapped Persons' Rights Act*, previously cited, note 544, sec. 30, 48 and 59.
556. *Health Services and Social Services Act*, previously cited, note 554, sec. 92*b*).
557. *Ibid.*, sec. 106.
558. *Public Health Protection Act*, SQ 1972, c. 42.
559. *Handicapped Persons' Rights Act*, previously cited, note 544, sec. 44.
560. *Health Services and Social Services Act*, previously cited, note 554, sec. 7; *Handicapped Persons' Rights Act*, previously cited note 544, sec. 20.
561. *Act for the Protection of the Mentally Ill*, SQ 1972, c. 44, sec. 46; am. by SQ 1974, cc. 39 and 71.
562. *SAC Act*, previously cited, note 540, sec. 5.
563. *Health Services and Social Services Act*, previously cited, note 554, sec. 16*a*).
564. *Health Services Act*, SQ 1970, c. 37; am. by SQ 1970, c. 38; SQ 1971, cc. 32 and 47; SQ 1972, c. 26; SQ 1973, cc. 17 and 30; SQ 1974, cc. 40 and 41; SQ 1975, cc. 59 and 60; SQ 1976, cc. 26 and 27; and SQ 1977, c. 44.
565. *Health Services and Social Services Act*, previously cited, note 554, sec. 21, 38*g*), 38*r*) and 54*c*).
566. Bill No. 40, previously cited, note 542, sec. 3 and 25.
567. SQ 1974, c. 39, sec. 3.
568. See *Journal des débats de l'Assemblée nationale*, June 6, 1975, pp. 1157-1158.

569. *SAC Act*, previously cited, note 540, sec. 3 and 5, am. by SQ 1975, c. 64.
570. *Ibid.*, sec. 6*a*).
571. *Ibid.*, am. by SQ 1977, c. 49.
572. *Ibid.*, am. by SQ 1977, c. 68.
573. *SAC Act*, previously cited, note 540, sec. 6.
574. *Ibid.*, sec. 24 to 28*b*).
575. *Ibid.*, sec. 9.
576. See HETU and MARX, previously cited, note 541, pp. 732-733.
577. By virtue of sec. 41 of its constitutive Act; see *infra*, Section IV.
578. For the determination of cases concerning the access of an individual to his medical or social file, and the contesting of elections or appointments to the administrative or supervisory bodies of health and social services establishments.
579. For the determination of cases concerning the grant, suspension or withdrawal of a permit, applications for recognition as a handicapped person and complaints against health and social services establishments.
580. For the determination of cases concerning the right of physicians to practice in a hospital and the payment of professional services by the Quebec Health Insurance Plan.
581. See, for example, *Protection du malade mental — 9*, [1976] SAC 341, where the division was constituted of four members and four assessors.
582. *SAC Act*, previously cited, note 540, sec. 32.
583. *Rules of evidence, procedure and practice of the SAC*, OC 5113-75, (1975) QOG 5855.
584. *Pension Plan — 11*, [1976] SAC 367.
585. *Rules of procedure of the SAC*, sec. 34.
586. *SAC Act*, sec. 15.
587. *Ibid.*, sec. 35.
588. *Rules of procedure of the SAC*, sec. 2.
589. *SAC Act*, sec. 36 and 37.
590. *Rules of procedure of the SAC*, sec. 16.
591. *SAC Act*, sec. 29.
592. *Ibid.*, sec. 31 and *Rules of procedure of the SAC*, sec. 2.
593. *SAC Act*, sec. 29.
594. *Rules of procedure of the SAC*, sec. 7-12.
595. *SAC Act*, sec. 21.
596. *Ibid.*, sec. 33 and *Rules of procedure of the SAC*, sec. 27, 28 and 35.
597. *Rules of procedure of the SAC*, sec. 25.
598. *SAC Act*, sec. 22 and *Rules of procedure of the SAC*, sec. 23.
599. *SAC Act*, sec. 22*a*) and *Rules of procedure of the SAC*, sec. 24.
600. *SAC Act*, sec. 28; see *Pension Plan — 2*, [1977] SAC 243.
601. *SAC Annual Report*, 1975-1976, p. 35.
602. *SAC Annual Report*, 1976-1977, p. 23.
603. *SAC Act*, sec. 42.
604. To these may be added the 170 decisions made by the PAB Chairman, granting or refusing leave to appeal. See Tables X and XII.
605. *SAC Act*, sec. 41.
606. *Supra*, Chapter 3, Section V, B., 2.
607. *Supra*, Chapter 3, Section V, B., 1.

608. *SAC Act*, sec. 40.
609. *Supra*, Chapter 3, Section V, B., 2.
610. See *supra*, Chapter 2, Section II, B.
611. *Resnick v. Quebec Pension Board*, previously cited, note 165.
612. *Régime de rentes — 16*, [1976] SAC 380, p. 382.
613. *Ibid.*, p. 383.
614. *Régime de rentes — 17*, [1976] SAC 390; *Régime de rentes — 30*, [1976] SAC 424; *Régime de rentes — 37*, [1976] SAC 441; *Régime de rentes — 25*, [1977] SAC 297 and *Régime de rentes — 32*, [1977] SAC.
615. *Régime de rentes — 17*, [1976] SAC 390, p. 392.
616. See *supra*, the decisions cited in note 223.
617. *Régime de rentes — 4*, [1975] SAC 100.
618. *Régime de rentes — 9*, [1977] SAC 257.
619. This is the thesis of BRYDEN, previously cited, note 35.
620. See Table XII.
621. See Table XXV.
622. ISSALYS and WATKINS, previously cited, note 8, pp. 307-309.
623. *Ibid.*, pp. 301-307.
624. *Ibid.*, pp. 203-204 and 245-246.
625. *Ibid.*, pp. 251-252.
626. This indication might take the following form: "The precedents established by the decisions of ....., an appeal tribunal whose decisions are binding on us, have determined that the words '.....' mean '.....'. With regard to your case, etc, ..."
627. By contrast, before the Umpire ruling on questions of unemployment insurance benefits or before the SAC, a hearing must be requested — a request that is invariably granted — unless the tribunal does not summon the parties *proprio motu*.
628. See Chapter 4, Section III, A., and Table XXIII.
629. The rate is 10% in the case of the Review Committee (Table XVII) and the Umpire (Table XX) and 20% in the case of the PAB (Table XII, appeals relative to QPP benefits being discounted).
630. See Chapter 3, Section I, B., 2., *c*) and 3.
631. See Table XXVI.
632. See Chapter 3, Section II, B., 1., *c*).
633. See Table XXVI.
634. See Chapter 3, Section III, C., 6.
635. Figure computed on the basis of the three appeals in this sphere included in our sample. It is unfortunately, anything but improbable.
636. See Table XVII.
637. See DIXON, "The Welfare State and Mass Justice: A Warning from the Social Security Disability Program", pp. 732-733.
638. ISSALYS and WATKINS, previously cited, note 8, p. 299.
639. *Ibid.*, pp. 303-304.
640. Previously cited, note 17.
641. *Family Allowances Regulations*, SOR/74-30, sec. 17 to 24, laid down by virtue of sec. 19*h*) of the Act.
642. *Ibid.*, sec. 16.
643. *Old Age Security Act*, previously cited, note 16, sec. 18(1) and (1.1).
644. *Old Age Security Regulations*, SOR/68-66, am. by SOR/73-484 and SOR/576, sec. 23 to 30.
645. *Old Age Security Act*, sec. 18(2); *Old Age Security Regulations*, sec. 31 to 40.

646. *Old Age Security Regulations*, sec. 22.
647. See our proposals concerning the training of members of Boards of referees, in ISSALYS and WATKINS, previously cited, note 8, pp. 310-313.
648. *Ibid.*, pp. 94-117.
649. *Ibid.*, pp. 287-289 and 316-318.
650. The sole exception to this rule (the cashing, whether wilful or otherwise, of a cheque representing benefits not due to be paid) appears to be the result of legislative oversight. The corresponding text in the QPP (sec. 230 *b*)), requires that the element of intent be present.

Cases cited

(Figures identify note numbers)

(A) *Courts of law*

Att. gen. of Canada v. Att. gen. of Ontario, [1937] AC 326 39

Att. gen. of Canada v. Att. gen. of Ontario, [1937] AC 355 38

Canadian Pacific v. Gill, [1973] SCR 654 71

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Lavell v. Att. gen. of Canada, [1971] FC 347 (AD) 532

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Matsqui Institution Disciplinary Board v. Martineau, unpublished, FCA, March 17, 1978, no. A-500-77 539

Miller v. Grand Trunk Railway, [1906] AC 187 69

M.N.R. v. Caughnawaga Indian Brotherhood, [1977] 2 FC 269 (FCA) . 357

M.N.R. v. MacDonald, [1977] 2 FC 189 (FCA) 357, 535

M.N.R. v. Margison Associates, unpublished, FCA, January 28, 1976 (no. A-241-75) 357

M.N.R. v. Wright's Canadian Ropes, [1947] AC 109 154

Parry v. Cleaver, [1970] AC 1 70

Chairman of the PAB v. Matte, [1974] CA 252 47

P.E.I. Potato Marketing Board v. Willis, [1952] 2 SCR 392 46

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(B) *Pension Appeals Board*

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Benoît v. Quebec Pension Board, (1971) CCH 6031 430

Boyer v. Quebec Pension Board, (1975) CCH 6263 421

Brooks v. M.H.W., unpublished, August 23, 1976 218

M.H.W. v. Buccione, (1975) CCH 6282 525

M.H.W. v. Caines, (1973) CCH 6167 ..... 223, 522

M.H.W. v. Cann, (1978) CCH 6378 ..... 222, 269

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Clarke v. M.H.W., (1977) CCH 6373 183

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M.H.W. v. Coakley, (1974) CCH 6271 183

M.H.W. v. Coughlan, (1976) CCH 6338 ..... 217, 305, 516

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M.H.W. v. Durdle, unpublished, July 26, 1976 217

M.H.W. v. Frost, (1977) CCH 6369 235

M.H.W. v. Frustaci, (1975) CCH 6309 ..... 265, 516, 522

M.H.W. v. Heiberg, (1977) CCH 6369 155

M.H.W. v. Herschel, (1977) CCH 6366 ..... 159, 222, 281

Hogan v. Quebec Pension Board, (1972) CCH 6155 426

M.H.W. v. Holic, (1974) CCH 6210 ..... 519, 523

M.H.W. v. Jaeger,
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Kitchener-Waterloo Symphony Association v. M.N.R., unpublished,
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M.H.W. v. Kubik, (1974) CCH 6185 223

M.H.W. v. Long, (1973) CCH 6148 183

M.H.W. v. MacDonald, (1974) CCH 6177 523

M.H.W. v. McDermott, (1976) CCH 6323 ..... 224, 231

M.H.W. v. Michaud, (1975) CCH 6318 158

M.H.W. v. Montpellier, (1974) CCH 6215 223

M.H.W. v. Moore, (1977) CCH 6367 211

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M.H.W. v. Pertus, (1976) CCH 6333 ..... 266, 268

M.H.W. v. Pilote, (1974) CCH 6221 516

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Resnick v. Quebec Pension Board, (1973) CCH 6136 ... 165, 443, 509, 611

Rumble v. M.N.R., (1977) CCH 6358 353

M.H.W. v. Russell, (1974) CCH 6279 223

M.H.W. v. Seigo, (1972) CCH 6088 ..... 157, 530

M.H.W. v. Storry, (1973) CCH 6127 ..... 155, 166, 262, 509

M.H.W. v. Stuart, (1975) CCH 6250 157

M.H.W. v. Taylor, (1977) CCH 6351 ..... 158, 301, 530

Valley View Mobile Homes, v. M.N.R., (1976) CCH 6343 ..... 353, 510

M.H.W. v. Vant, (1976) CCH 6325 ..... 155, 158, 301

M.H.W. v. Weaver, (1975) CCH 6251 ..... 156, 298

Whitaker v. M.H.W., (1974) CCH 6188 523

M.H.W. v. Wrice, (1972) CCH 6101 515

Yvon S. v. Quebec Pension Board, (1973) CCH 6157 411

M.H.W. v. Zullo, unpublished, December 30, 1975 294

(C) *Unemployment Insurance Umpire*

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Margison Associates v. M.N.R., unpublished, NR 43 and 43A (1975 and 1976) 357

Mendelsohn v. M.N.R., unpublished, NR 37 (1975) 331

(D) *Social Affairs Commission*

Protection du malade mental — 9, [1976] CAS 341 581

Régime de rentes — 6, [1976] CAS 121 474

Régime de rentes — 11, [1976] CAS 367 584

Régime de rentes — 13, [1976] CAS 372 433

Régime de rentes — 16, [1976] CAS 380 ..... 444, 445, 612, 613

Régime de rentes — 17, [1976] CAS 390 ..... 444, 614

Régime de rentes — 19, [1976] CAS 396 433

Régime de rentes — 30, [1976] CAS 424 ..... 444, 614

Régime de rentes — 33, [1976] CAS 432 470

Régime de rentes — 37, [1976] CAS 441 ..... 445, 614

Régime de rentes — 41, [1976] CAS 622 445

Régime de rentes — 50, [1976] CAS 644 453

Régime de rentes — 52, [1976] CAS 648 455

Régime de rentes — 2, [1977] CAS 243 600

Régime de rentes — 4, [1975] CAS 100 617

Régime de rentes — 9, [1977] CAS 257 ..... 422, 617

Régime de rentes — 25, [1977] CAS 297 ..... 445, 614

Régime de rentes — 27, [1977] CAS 302 445

Régime de rentes — 28, [1977] CAS 305 446

Régime de rentes — 32, [1977] CAS 317 614

Régime de rentes — 36, [1977] CAS 327 411

Bibliography

ABEL, Albert, "The Dramatis Personae of Administrative Law", (1972) 10 *Osg. Hall L.J.* 61.

ANGUS, William, "Judicial Review in Canada: Do We Need It?", (1974) 20 *McGill L.J.* 177.

ANISMAN, Philip, *A Catalogue of Discretionary Powers*, Ottawa, Law Reform Commission, 1975.

BEETZ, Jean, "Uniformité de la procédure administrative", (1965) 25 *R. du B.* 244.

BORDELOUP, Jean, "L'inégalité dans le droit de la sécurité sociale", (1968) *Droit social* 394.

BORGEAT, Louis, "La place de l'appel dans le droit du contrôle de l'administration", (1975) 16 *C. de D.* 125.

BRYDEN, Kenneth, *Old Age Pensions and Policy Making in Canada*, Montreal, McGill-Queen's University Press, 1974.

CALVERT, Harry, *Social Security Law*, 2nd ed., London, Sweet and Maxwell, 1978.

CANADA, *Statistical Bulletin: Canada Pension Plan*, Ottawa, Department of National Health and Welfare (quarterly since 1969).

CANADA, *Canada Pension Plan Contributors*, Ottawa, Department of National Health and Welfare (annual).

CANADA, *Working Paper on Social Security in Canada*, Ottawa, Department of National Health and Welfare, 1973.

CANADA, *Annual Report of the Canada Pension Plan*, Ottawa, Department of National Health and Welfare (annual since 1965).

CANADA, *Social Security in Canada*, Ottawa, Department of National Health and Welfare, 1974.

Canadian Employment Benefit and Pension Guide, Don Mills, CCH Canadian Limited, 1974.

COWARD, Lawrence, *Mercer Handbook of Canadian Pension and Welfare Plans*, 5th ed., Don Mills, CCH Canadian Limited, 1974.

DIXON, Robert, "The Welfare State and Mass Justice: A Warning from the Social Security Disability Program", (1972) *Duke L.J.* 681.

DUPEYROUX, Jean-Jacques, *Droit de la sécurité sociale*, 6th ed., Paris, Dalloz, 1975.

DUSSAULT, René, *Traité de droit administratif*, Quebec, Presses de l'Université Laval, 1974.

FARMER, J.A., *Tribunals and Government*, London, Weidenfeld and Nicolson, 1974.

GAGNON, Jean-Denis, "Le recours en révision en droit administratif", (1971) 31 *R. du B.* 182.

GÉLINAS, André, *Organismes autonomes et centraux de l'administration québécoise*, Montreal, Presses de l'Université du Québec, 1975.

GHESTIN, J., "La réparation du dommage résultant du reversement de prestations de sécurité sociale payées par erreur", (1973) *Semaine juridique*, I. 2528.

HÉTU, Jean and Herbert MARX, *Droit et pauvreté au Québec*, Montreal, Éditions Thémis, 1975.

HÉTU, Jean and Herbert MARX, "La nouvelle Commission des affaires sociales", (1976) 36 *R. du B.* 726.

HODGETTS, J.R., *The Canadian Public Service — A Physiology of Government*, Toronto, University of Toronto Press, 1973.

ISAAC, Guy, *La procédure administrative non contentieuse*, Paris, Lib gén. de droit et de jurisprudence, 1968.

ISSALYS, Pierre and Gaylord WATKINS, *Unemployment Insurance Benefits*, Ottawa, Law Reform Commission of Canada, 1977.

JAMBU-MERLIN, Roger, *La sécurité sociale*, Paris, Armand Colin, 1970.

LaMARSH, Judy, *Memoirs of a Bird in a Gilded Cage*, Toronto, Pocket Books, 1970.

LANGROD, Georges, "Procédure administrative et Droit administratif", (1956) 22 *Rev. int. des sc. adm.* 5.

LEMIEUX, Denis and Nicole VALLIÈRES, "La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire", (1976) 17 *C. de D.* 379.

LEVASSEUR, Georges, "Le secret médical et la sécurité sociale", (1976) 12 *Rev. trim. de droit sanitaire et social* 359.

MARION, François, "Le contentieux technique médical", (1976) 12 *Rev. trim. de droit sanitaire et social* 401.

MAUREL, Edmond, "La notion de l'humain dans le fonctionnement du contentieux de la sécurité sociale", (1974) 10 *Rev. trim. de droit sanitaire et social* 537.

McCORMICK, Harvey, *Social Security Claims and Procedure*, St. Paul, West Publishing Co., 1973.

McINNES, Ronald, *Welfare Legislation and Benefit Plans in Canada*, Toronto, Law Society of Upper Canada, 1974.

MÉLENNEC, Louis and Jean BERZIA, *Le régime général de la sécurité sociale*, Paris, Delmas, 1975.

MORIN, Claude, *Le pouvoir québécois ... en négociation*, Quebec, Editions du Boréal Express, 1972.

MULLAN, David, "Reform of Judicial Review of Administrative Action — The Ontario Way" (1974) 12 *Osg. Hall L.J.* 125.

MULLAN, David, "Judicial Restraints on Administrative Action: Effective or Illusory?", (1976) 17 *C. de D.* 913.

OUELLETTE, Yves and Gilles PEPIN, *Précis de contentieux administratif*, Montreal, Editions Thémis, 1972.

PEPIN, Gilles, "Les tribunaux administratifs", pp. 550-620 in Raoul-P. BARBE (ed.), *Droit administratif canadien et québécois*, Ottawa, Éditions de l'Université d'Ottawa, 1969.

PEPIN, Gilles, "Quelques observations générales sur la question du caractère efficace ou illusoire du contrôle judiciaire de l'activité de l'administration", (1976) 36 *R. du B.* 453.

QUEBEC, *Bulletin statistique du Régime de rentes*, Quebec, Régie des rentes du Québec (quarterly since 1967).

QUEBEC, *Rapport annuel de la commission des affaires sociales*, Quebec, Commission des affaires sociales (annual since 1976).

QUEBEC, *Rapport annuel de la Régie des rentes du Québec*, Quebec, Régie des rentes du Québec (annual since 1966).

QUEBEC, *Report of the Commission of Inquiry on Health and Social Welfare*, (Castonguay-Nepveu), Quebec, Éditeur officiel du Québec, 1971.

QUEBEC, *La sécurité financière des personnes âgées au Québec*, Report of the Study Committee on the Financing of the Quebec Pension Plan (Cofirentes Report), Quebec, Éditeur officiel du Québec, 1977.

QUEBEC, *Statistiques des Affaires sociales — Sécurité du revenu*, Quebec, Éditeur officiel du Québec (quarterly since 1973).

QUEBEC, *Les tribunaux administratifs au Québec*, Report of the Work Group on administrative tribunals, Quebec, Éditeur officiel du Québec, 1971.

ROCHE, Louis and Louis POUJOL, "L'expertise médicale en matière de sécurité sociale", (1976) 12 *Rev. trim. de droit sanitaire et social* 381.

SAINT-JOURS, Yves, *Le droit pénal de la sécurité sociale*, Paris, Presses universitaires de France, 1973.

SAINT-JOURS, Yves, "Le pouvoir de décision et le contentieux en matière de sécurité sociale", (1974) 10 *Rev. trim. de droit sanitaire et social* 595.

SCHWARTZ, Bernard and H.W.R. WADE, *Legal Control of Government*, London, Oxford University Press, 1972.

STREET, Harry, *Justice in the Welfare State*, 2nd ed., London, Stevens and Sons, 1975.

TREMBLAY, André, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Ottawa, Éditions de l'Université d'Ottawa, 1967.

WADE, H.W.R., *Administrative Law*, 4th ed., Oxford, Clarendon Press, 1977.

WIENER, Céline, *Vers une codification de la procédure administrative*, Paris, Presses Universitaires de France, 1975.

WILLIS, John, "Canadian Administrative Law in Retrospect", (1974) 24 *U. of T. L.J.* 225.