

SPECIAL REPORT

to the Minister of
National Defence

November 2005

For the Sake of Fairness

*The Case of Squadron Leader
(Retired) Clifton Wenzel*



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Ombudsman

National Defence
and Canadian Forces



Défense nationale
et Forces canadiennes

Canada

For the Sake of Fairness

**The Case of Squadron Leader (Retired)
Clifton Wenzel**

November 8, 2005

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Executive Summary

1 ***Issue***

2 In May 2005, the Minister of National Defence, the Honourable William
3 Graham, referred the case of Squadron Leader (Retired) Clifton Wenzel to the
4 Ombudsman’s Office. In his letter, the Minister noted:

5 *I appreciate that this request is somewhat unusual and is
6 motivated in part by the extraordinary fact that this
7 decorated war veteran believes quite strongly that his
8 country has not treated him fairly, a view he has expressed
9 over an exceedingly lengthy period. In this respect, I
10 consider that your investigation of the matter would be in
11 the interests of the Department and of Canada.*

12 ***A Career Well Served***

13 This is the story of Clifton Wenzel and his 44-year-long battle for a pension he
14 believed he deserved. Mr. Wenzel is a former Royal Canadian Air Force
15 (RCAF) officer and decorated World War II veteran who retired with more
16 than 20 years of military service. He flew 47 combat missions in two
17 operational tours and, in 1945 and 1949, he was decorated with the
18 Distinguished Flying Cross and the Air Force Cross. After WWII, he
19 participated in the Berlin blockade and airlift, completing 400 sorties. Later he
20 flew in the Korean conflict. After his retirement from the Regular Force, he
21 served Canada for eight years with the RCAF Auxiliary (now known as the
22 Reserve).

23 In 1961, at the age of 39, Mr. Wenzel had a young family to provide for. He
24 thought his post-retirement job prospects would be far better if he began a
25 second career at that point in his life, rather than waiting until he was 45 years
26 old, the compulsory retirement age for a Flight Lieutenant, his rank at the time.
27 In his request for permission to retire, he stated his desire to provide financially
28 for his family and to take advantage of commercial ventures available at that
29 time. He also noted that retiring early would make way for the promotion of
30 younger officers and argued that his retirement would therefore be “in the
31 public interest”.

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7 At the time, the *Canadian Forces Superannuation Act (CFSA)* provided that an officer who retired before compulsory retirement age with 10 years of Regular Force service but fewer than 25, was normally entitled only to a return of his contributions to the superannuation plan. However, at the discretion of the Treasury Board, the officer could be awarded an annuity if the Minister of National Defence recommended that the retirement “*was in the public interest and that it is in the public interest that he be paid that annuity.*” For that reason, Mr. Wenzel attempted to make the case that his retirement was in the public interest.

8 Since the *CFSA* did not define “*in the public interest*”, DND developed a Policy Guide to provide guidance on how to deal with the Treasury Board’s discretionary authority to approve certain benefits under the *CFSA*. The Guide stated that before an annuity would be recommended, a member’s retirement had to be “*for the purpose of taking up civilian employment of public importance.*” The Policy Guide, however, was only distributed to a limited audience within National Defence Headquarters (NDHQ). Mr. Wenzel was not aware of it.

9 During 1960–1961, Mr. Wenzel’s request for an annuity proceeded up the chain of command, but at every level, the conclusion was always the same: no. In the end, he only received a return of his Superannuation Plan contributions (less than \$5000).

10 At various times over the next 44 years, Mr. Wenzel asked several Ministers of National Defence to reconsider his request for an annuity, but without success. In 2002, he filed an application in the Federal Court, which ruled that his application to review the initial 1961 decision was “out of time”.

11 As mentioned above, in May 2005, Minister Bill Graham asked the Ombudsman’s Office to review the case.

12 ***How the System Failed Mr. Wenzel***

13 The goal of our investigation was to determine whether the process DND/CF followed was fair to Mr. Wenzel, and whether the decision not to recommend him for an annuity had been arrived at fairly.

14 We found a number of serious weaknesses in that process.

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- 15 For example, Mr. Wenzel's files contained inaccurate and incomplete information. There was an error in the calculation of his pensionable service, which gave the impression that he had served for less than 20 years. The correct calculation would have put him in the 20-year plus service category and, our research revealed, could have greatly enhanced his chance of getting an annuity. There was also no information about Mr. Wenzel's transfer to the RCAF (Auxiliary) on his retirement from the regular Air Force, and no information about the nature of his intended civilian employment. It is entirely conceivable that if, in 1961, the decision-makers had had all of the information they needed, and if Mr. Wenzel had had all of the support and assistance he needed to make the best case possible, he might have been awarded an annuity.
- 16 People who took part in the process failed Mr. Wenzel in several ways: they failed to provide accurate and complete information about his service; they failed to help him in his quest for an annuity; and they failed to ensure that all the information that should have been in his file was in fact there. The system also failed Mr. Wenzel by defining "public interest" too narrowly in the Policy Guide, and by hiding that definition, however defective, from Mr. Wenzel and, indeed, from anyone who needed the information.
- 17 In addition, our investigation showed that the Policy Guide itself was not consistently applied. Lastly, although the Guide allowed for consideration of exceptional circumstances and Mr. Wenzel's case could have been considered exceptional, it was not.

18 ***Putting Things Right***

- 19 Forty-four years have passed. This is the Year of the Veteran. Now is the time to make things right for Mr. Wenzel. In framing his recommendations, the Ombudsman has been mindful that Canada has historically attempted to treat its veterans with honour and dignity. The facts and circumstances of Mr. Wenzel's case, as outlined in this report, and his long struggle to achieve a fair outcome, make his case unusual. As is amply demonstrated by the decorations he was awarded, Mr. Wenzel's service to Canada was distinguished and commendable. He has given our country much but, for almost half a century, the system failed him and he has received too little in return.
- 20 The recommendations can be found at the end of this report. Essentially, they consist of the following: that the damages Mr. Wenzel has suffered be repaired with dignity and honour, that the injustice to him be acknowledged and that he be compensated accordingly.

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Issue/Complaint

21 On May 5, 2005, the Minister of National Defence (MND), the Honourable William Graham, referred the case of retired Squadron Leader Clifton Wenzel to the Ombudsman's Office for investigation, pursuant to paragraph 4(a) of the *Ministerial Directives* for the Ombudsman's Office. Paragraph 4(a) of the *Ministerial Directives* provides that the Ombudsman shall investigate any matter referred to the Ombudsman by written direction of the Minister.

22 In 1961, at the age of 39, Mr. Wenzel retired from the Royal Canadian Air Force (RCAF) Regular Force with 20 years and 135 days of pensionable service. At the time of his retirement, the *Canadian Forces Superannuation Act (CFSA)* had just come into effect. Under the *CFSA*, a member retiring from the Regular Force before compulsory retirement age was entitled to an annuity, but only if retirement was "in the public interest." When that was thought to be the case, the Minister of National Defence had the authority to recommend to the Treasury Board that an annuity be awarded. Otherwise, the member was entitled only to a return of his contributions to the superannuation plan.

23 Mr. Wenzel's retirement was not considered to be "in the public interest" and he was not recommended for an annuity. Although no formal appeal existed, he repeatedly wrote to his chain of command explaining why he believed he should have received an annuity. He ultimately hired a lawyer to make his case. No change resulted.

24 Since his retirement, more than 40 years ago, Mr. Wenzel has not given up the fight for his reduced annuity. Over the years, he wrote to successive Ministers of National Defence, and also took the matter to the Federal Court of Canada. He subsequently asked Minister Graham to review his case.

25 Recognizing the importance and truly unique aspects of this case, the Minister noted in his letter to the Ombudsman's Office (see enclosed Appendix A) that

26 *after repeated reviews and the passage of more than 40 years, I am advised that there are few options available to the Government... I appreciate that this request is somewhat unusual and is motivated in part by the extraordinary fact that this decorated war veteran believes quite strongly that his country has not treated him fairly, a view he has expressed over an exceedingly lengthy period. In this respect, I consider that your investigation of the matter would be in the interests of the Department and of Canada.*

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Investigative Process

27 Upon receiving the Minister's letter of referral, I assigned two investigators who retrieved various documents (decisions, minutes, proceedings, briefing notes, reports and records) that allowed them to conduct a thorough review of the Wenzel case.

28 ***Documents provided by Mr. Wenzel***

29 Mr. Wenzel provided my investigators with a variety of documents pertinent to his retirement from the RCAF Regular Force as well as documents filed in 2003 with the Federal Court of Canada – Trial Division supporting his application for judicial review of the Minister's 1961 decision not to recommend that he receive a reduced annuity. He also made available correspondence between himself and the Department of National Defence including several Ministers of National Defence.

30 Investigators felt it was important that Mr. Wenzel himself be interviewed. Arrangements were made to meet him personally and hear his version of events. The investigators also reviewed Mr. Wenzel's military personnel files held by Library and Archives Canada.

31 ***Documents requested from the Department of National Defence and Canadian Forces***

32 An initial request was made on May 12, 2005, to obtain various documents from several sources within DND/CF, including the Director of Pensions and Social Programs and the Ministerial Correspondence Unit. All of the requested documents, except for the Ministerial briefing notes from 2003 and 2005, were received by May 25, 2005. A request for additional documents was made to the Service Pension Board Secretary on June 14, 2005. Those documents were received on July 11, 2005, and included the briefing notes requested on May 12, 2005.

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33 Documents requested from Department of National Defence and Canadian
Forces (DND/CF) included the following:

- 34 • minutes, proceedings or other similar records of the work of the Service
Pension Board, from 1959–1962;
- 35 • records or reports of individual cases considered by the Service Pension
Board in that time period; and
- 36 • any other documents that would be helpful in providing a sense of the
facts and issues the Board may have taken into consideration in looking
at a case or that would give a sense of the Board's processes.

37 In addition, the investigators sought the following:

- 38 • records of recommendations made to the Minister concerning particular
cases and/or recommendations from the Minister to Treasury Board;
- 39 • correspondence from Mr. Wenzel's legal counsel to DND/CF in 1961;
- 40 • correspondence to and from the Minister's Office concerning
Mr. Wenzel; and
- 41 • briefing notes to the Minister concerning Mr. Wenzel's case.

42 The records received from the Service Pension Board files, however, do not
appear to be the Board's complete records.

43 The *CFSA* and the policies concerning the award of annuities in force at the
time of Mr. Wenzel's retirement were also reviewed.

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Summary of Facts

44 Mr. Clifton Wenzel is a retired RCAF officer and a decorated World War II veteran with a distinguished flying career and a total of more than 29 years of military service to his credit.

45 Mr. Wenzel joined the Canadian Army Militia as a reservist in 1939 and, in World War II, served as a bomber and coastal patrol pilot with the RCAF. He flew 47 combat missions in two operational tours. After the war, Mr. Wenzel served for over four years with the Royal Air Force (RAF) and completed nearly 400 sorties during the Berlin blockade and airlift in 1947. He took up the gauntlet again for Canada, joining the RCAF Regular Force in 1951 following his transfer from the RAF and flew in the Korean conflict. He served in the peacetime RCAF for just over 10 years and, after his retirement from the RCAF Regular Force, he served eight years with the RCAF Auxiliary (now known as the Reserves). During his career, he was decorated with the Distinguished Flying Cross in 1945 and the Air Force Cross in 1949.

46 ***Seeking Permission to Retire***

47 In 1960, Mr. Wenzel was 38 years old, had a young family to provide for and, it seemed to him, no real prospects for promotion. He indicated to my investigators that he thought his post-retirement job prospects would be far better if he began a second career sooner, rather than if he waited until he was 45 years old, which was the compulsory retirement age for his rank at the time (Flight Lieutenant). Mr. Wenzel needed permission to retire since he had not yet reached compulsory retirement age. On July 5, 1960, he requested permission to retire effective July 31, 1961. These were the reasons for retirement as stated in his request:

48 *...An increasing pressure on my financial capabilities has precipitated this request. I shall shortly be faced with the problem of properly educating my two children and as I cannot see my way clear to do this on my present emolument, I am forced to subjugate my own personal desires in the interests of their welfare. As my children are younger than normal for my age bracket, the expenses involved will be reaching a maximum at an age when reasonable civilian employment will be less available. Commercial ventures in which I am interested should be lucrative next year and by retiring five years early, I will be able to take advantage of the opportunity offered.*

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49 ...With the competition for permanent commissions so keen
amongst the younger enthusiastic officers my retirement will
create a vacancy for an additional youthful candidate. It is,
therefore, suggested that my retirement be deemed as being
in the public interest.

50 In summarizing the sequence of events and decisions in the 15 months
following Mr. Wenzel's letter, as excerpted above, it is important to place them
in the context of the following:

- 51 • the "public interest" criterion set out in the CFSA
- 52 • the Policy Guide that provided guidance on how to deal with the
discretionary authority to approve certain benefits under the CFSA.

53 ***Reaction of the Chain of Command***

54 The CFSA provided that an officer retiring before his compulsory retirement
age, who had served 10 years of Regular Force service but less than 25 years,
was entitled only to a return of contributions to the superannuation plan.
However, at the discretion of the Treasury Board, the officer could be awarded
an annuity, reduced by five per cent for each year by which the age of the
officer at the time was less than the retirement age for his rank. The CFSA
provided that the Treasury Board would consider the matter only if a
recommendation was made by the Minister of National Defence that the
retirement "was in the public interest and that it is in the public interest that he
be paid that annuity."

55 The "public interest" criterion is pivotal and central to our investigation and is
referenced throughout this report. (The CFSA came into force on March 1,
1960, just prior to Mr. Wenzel's request for voluntary retirement. The relevant
section of the CFSA in effect at the time of Mr. Wenzel's retirement is
enclosed as Appendix B.)

56 As indicated above, Mr. Wenzel requested that his retirement be effective
July 31, 1961. As of that date, he would have served the required 10 years in
the Regular Force to potentially qualify for a reduced annuity under the new
CFSA. For that reason, when Mr. Wenzel submitted his request for early
retirement, he provided his reasons to demonstrate why his retirement could be
considered "in the public interest" and which in turn could enable the Minister
to recommend a reduced annuity.

57 Mr. Wenzel's request for retirement proceeded up his chain of command. Each
level commented on their interpretation of the CFSA and whether or not
Mr. Wenzel should receive a reduced annuity or merely a return of his
contributions.

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- 58 On September 22, 1960, Mr. Wenzel's Station Personnel Services Officer wrote to Air Force Headquarters supporting Mr. Wenzel's retirement request and asking Headquarters to confirm his interpretation of the regulations that Mr. Wenzel did not qualify for an annuity.
- 59 Having received this letter, the Command Staff Officer Administration wrote to the Chief of the Air Staff on September 26, 1960, supporting Mr. Wenzel's retirement request, and stating that he shared the view that Mr. Wenzel would not be entitled to an annuity unless his retirement was "in the public interest". He asked the Chief of the Air Staff to confirm Mr. Wenzel's entitlements. On October 6, 1960, the Director of Personnel Careers replied on behalf of the Chief of the Air Staff, noting that, if Mr. Wenzel's release went through for the reasons stated, the maximum he could expect was a return of his contributions. On receipt of this response, the Command Staff Officer Administration wrote to Air Transport Command Headquarters on October 18, 1960, confirming that the maximum entitlement Mr. Wenzel could expect was a return of contributions. The Command Staff Officer Administration interviewed Mr. Wenzel on October 24, 1960, and conveyed this information to him.
- 60 Permission to retire before compulsory retirement age also required the approval of a Board of Officers. The Board of Officers considered Mr. Wenzel's case on November 7, 1960, and recommended that his request to retire be granted effective July 31, 1961, in light of the "*existing favourable manning situation and [Mr. Wenzel's] strong desire to enter a commercial venture.*" A minute sheet that had been prepared by Mr. Wenzel's home unit was attached to the Board of Officers report. It noted that Mr. Wenzel's retirement could not be deemed to be "in the public interest" because he had based his request primarily on the education of his children and obtaining civilian employment.
- 61 Throughout the review of Mr. Wenzel's request for retirement, the chain of command took the position that the reasons Mr. Wenzel gave for his retirement did not justify the conclusion that his retirement would be "in the public interest"; therefore, he would not be recommended for a reduced annuity.
- 62 On January 26, 1961, Mr. Wenzel, through his chain of command, requested an interview with the then Minister of National Defence (MND) in order to present "*such facts that may be relevant to the case.*" In response to this request, the Command Staff Officer Administration interviewed Mr. Wenzel on February 21, 1961. After the interview, he noted in writing that he had explained the mechanics of the pension policies to Mr. Wenzel and believed that Mr. Wenzel had understood. He also noted that he told Mr. Wenzel an interview with the Minister "*could not and would not be arranged.*"

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63 Mr. Wenzel pursued the matter further by writing to the Administrative Unit Commander on April 5, 1961, making further submissions to justify why he thought he should be entitled to more than a return of his contributions. His letter was forwarded to the Chief of the Air Staff. On April 26, 1961, Mr. Wenzel received a response on behalf of the Chief of the Air Staff, noting that his request had been carefully reviewed, and that it was agreed that the CFSA provided for a reduced annuity, but only “*if a recommendation has been made by the Minister (to the Treasury Board) that the retirement of the officer in question is in the public interest and that it is in the public interest that he be paid the annuity.*” This letter stated that the Chief of the Air Staff did not consider that Mr. Wenzel’s case met this requirement.

64 Mr. Wenzel hired a lawyer who wrote to the MND on May 24, 1961. (A copy of this letter cannot be found by either DND or Mr. Wenzel’s lawyer.) The Deputy Judge Advocate General (DJAG) responded on June 12, 1961, stating:

65 *... the payment of an annuity rather than a return of contributions is dependant [sic] upon a recommendation by the Minister approved by the Treasury Board, that the officer’s retirement from the forces was “in the public interest and that it is in the public interest that he be paid that annuity.”*

66 *The general policy in the Armed Forces has always been to place stringent restrictions on voluntary retirement in order to retain trained personnel...*

67 *The new provisions providing a discretion in the Treasury Board to authorize a reduced annuity was introduced to provide an annuity to a member of the Regular Force whose services were urgently required by other Government Departments or Crown Agencies, or for employment in some other civilian employment of public importance. It was not intended that the deterrent to voluntary retirement implicit in a return of contributions only, should be removed except in special circumstances such as the foregoing.*

68 *Under section 20 of the Canadian Forces Superannuation Act, a Board known as the Service Pension Board is charged with the responsibility of determining and certifying the reason for the retirement of a contributor from the forces. F/L Wenzel’s case has not as yet been referred to the Service Pension Board, but taking into account the circumstances of his retirement, I doubt that the approval of a reduced annuity would be forthcoming in his case.*

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69 *It may be that F/L Wenzel is assuming a civilian position that could reasonably be deemed to be of public importance. If so, I would suggest that you convey this information to the Air Member Personnel, RCAF Headquarters, Department of National Defence, Ottawa, for consideration when his case is under review.*

70 Mr. Wenzel's lawyer responded to this letter on October 17, 1961, requesting that he and Mr. Wenzel appear before the Service Pension Board; however, by this date, the Service Pension Board had already decided on the case. I will come back to this later on in the report (see *Minister Reviews Request*).

71 ***Policy Guide and "the Public Interest"***

72 In anticipation of the new *CFSA*, which would come into effect on March 1, 1960, a Policy Guide was adopted on January 21, 1960, by the Associate Minister of National Defence. The Associate Minister had been charged with the responsibility for dealing with pension matters on behalf of the Minister. The Guide was to provide guidance on how to deal with the discretionary authority given to the Treasury Board to approve certain benefits under the *CFSA*. The Guide also noted that under the *CFSA*, the Service Pension Board had the duty to determine the contributor's reason for retirement, and that this was to provide for uniformity of circumstances under which benefits were paid within all three Services. Under the Guide, the Associate Minister designated certain authorities to initiate and make recommendations to him for his consideration, and these authorities were to use the guidelines set out in the Guide.

73 As the *CFSA* provided no definition of the term "*public interest*" and provided no guidance on how public interest should be measured, the following criteria were established and included in the Policy Guide. They were as follows:

74 *4(e) Retirement "voluntarily", not have reached retirement age, with ten or more years regular force service but less than twenty-five years such service for an officer and less than twenty years for a man (CFSA 10(6)(a)(ii) and (10)(c))*
Statutory Minimum: A return of contributions

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75 Permissible Maximum: *In the discretion of Treasury Board, on the recommendation of the Minister of National Defence that the retirement and the payment of an annuity is in the public interest, an annuity reduced by five per cent for each full year the contributor is under the compulsory retirement age for his rank.*

....

76 *The applicable provisions of the CFSA....were incorporated at the suggestion of Treasury Board that provision should be made for the payment of pension or annuity where it was in the public interest that an officer or man be permitted to retire voluntarily and receive an annuity or pension.*

....

77 Policy Guide: *Before any voluntary case will be eligible for consideration of a recommendation for approval of an annuity reduced by five per cent for each full year under retirement age, one of the following categories must apply:*

78 *(i) The voluntary retirement is for the purpose of taking up civilian employment of public importance;*

79 *(ii) The voluntary retirement is for the purpose of facilitating a contributor's rehabilitation, is within three years of his prescribed retirement age and the contributor has given good and faithful service; or*

80 *(iii) The contributor has to his credit 25 or more years of good and faithful pensionable service. [Underlining appeared in original document.]*

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81 It should be noted that the Guide aimed for consistency in applying the criteria developed, but it also left room for exceptions that might arise, noting that:

82 *A general policy guide must be sufficiently specific and definitive in nature to obviate detailed consideration of every individual case. Such a guide must not, however, preclude consideration of individual cases and the making of recommendations which may not be fully in accord with the guide.*

83 ***Role of the Service Pension Board***

84 The Service Pension Board was established under the *CFSA* and had the duty to determine the reasons for retirement of contributors to the *CFSA*. Appointed by the Minister, the Board consisted of a chairman, one member from each of the Services, and a member representing the Minister. Mr. Wenzel retired on July 31, 1961, and shortly thereafter, in September 1961, the Board considered his case.

85 The Senior Personnel Officer of each service was responsible for making recommendations concerning annuities tied to voluntary retirements to the Service Pension Board. The RCAF's recommendation was included in a statement from the Senior Personnel Officer, stating that the "*contributor requested his release to seek civil employment as he considered his service salary inadequate*". In the summation of the reason for retirement, it stated "*Voluntary with more than 10 years service. Does not fall under the provisions of paragraph 4(e) of the Policy Guide on Discretionary Awards*", and recommended only the return of contributions. The RCAF did not provide any further information on Mr. Wenzel's service. The Service Pension Board determined in the minutes of their meeting that Mr. Wenzel's retirement was voluntary and did not warrant a recommendation for a reduced annuity. According to the calculations provided by the Director for Accounting to the Board, Mr. Wenzel was entitled to a return of contributions in the amount of \$4,731.43.

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86 ***Minister Reviews Request***

87 It appears that Mr. Wenzel was not aware of the date that the Service Pension Board would be reviewing his case. As indicated above, on October 17, 1961, his counsel wrote seeking an appearance before the Board to plead Mr. Wenzel's case. The DJAG responded to the letter on November 1, 1961, stating that the Minister had reviewed the circumstances of the case and was

88 *unable to arrive at the conclusion that Mr. Wenzel's retirement was in the public interest and that it was in the public interest that he be paid an annuity.*

89 The DJAG further stated that the Treasury Board

90 *limited its approval to the payment of an annuity to cases of voluntary retirement where the contributor has taken up employment of "public importance", and in a few cases where the contributor was within two or three years of compulsory retirement age to facilitate the contributor's rehabilitation. None of these factors are however relevant in the case of the voluntary retirement of Flight Lieutenant Wenzel.*

91 ***Through the Years***

92 New career opportunities awaited Mr. Wenzel as he prepared to retire in 1961. Upon learning of his pending retirement, the Commanding Officer of Air Transport Command persuaded Mr. Wenzel to transfer to the RCAF Auxiliary upon his retirement, where his skills and experience could be put to good use in training other pilots. He suggested 411 Squadron in Toronto, which at that time was changing focus from fighter planes to transport planes, where Mr. Wenzel's expertise lay. To enable him to serve in the Auxiliary, Mr. Wenzel and his family were moved from Trenton to Toronto at public expense. As well as serving in the Auxiliary, Mr. Wenzel pursued employment as a civilian airplane pilot, working for a charter airline. Shortly thereafter, he became the airline's operations officer, while continuing as a pilot. Mr. Wenzel served on a part-time basis in the Auxiliary until he reached the mandatory retirement age for his rank (then Squadron Leader) in January 1969.

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- 93 Despite having been consistently informed by his chain of command that he would not be recommended for a reduced annuity, Mr. Wenzel told my investigators that throughout the process, he truly believed he was entitled to an annuity and always had confidence that things would work out. However, on October 6, 1961, he received his return of contributions, not the annuity he expected. Mr. Wenzel advised my investigators that he never got over his feeling that he had not been treated fairly. In July and August 1987, Mr. Wenzel again pursued the matter by writing letters to the Department of National Defence. Mr. Wenzel received a response to those letters dated November 18, 1987, reconfirming the earlier decision not to award him an annuity.
- 94 Later, in 1993, Mr. Wenzel wrote to Senator Jack Marshall, then Chairman of the Senate Sub-Committee on Veterans Affairs, raising the matter of his Auxiliary service and wondering whether it might be grounds for the Treasury Board to revisit the question of his annuity. Senator Marshall pursued the matter with the Minister of National Defence and the President of the Treasury Board. The President of the Treasury Board responded on June 24, 1993, saying that since the Minister could not conclude that Mr. Wenzel's retirement was "in the public interest", the Treasury Board could not exercise its discretion under the *CFSA*. He also pointed out that revisions to the *CFSA* had removed any authority to reconsider Mr. Wenzel's case or alter the benefit he was originally given. The then Minister of National Defence, the Honourable Tom Siddon, also responded to Senator Marshall on September 16, 1993, stating that he had been advised that at the time of Mr. Wenzel's early voluntary retirement, the Minister had concluded his retirement was not "in the public interest" and, therefore, had not recommended to the Treasury Board that he be paid an annuity. Minister Siddon said he agreed with his predecessor's decision that Mr. Wenzel's reasons for retiring did not meet the established criteria.
- 95 Mr. Wenzel contacted the Ombudsman's Office on March 7, 2000. Pursuant to paragraph 8(e) [now 14(e)] of the *Ministerial Directives* for the Ombudsman's Office, the Ombudsman may not investigate any matter that occurred prior to June 15, 1998. unless "*the Minister considers that it is in the public interest including the interest of employees or members of the DND or the CF as a whole, for the Ombudsman to deal with the matter.*" Given the nature of Mr. Wenzel's case, in particular the fact that it involved an individual issue that was not deemed to have systemic implications for current DND/CF members, the Ombudsman did not request the Minister's permission to investigate the matter.

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96 In 2002, Mr. Wenzel engaged the services of legal counsel. On April 29, 2002, his counsel made a request to then Minister of National Defence, the Honourable Art Eggleton, to reassess Mr. Wenzel's case. He continued to pursue the matter with Minister Eggleton's successor, the Honourable John McCallum. A reply to these letters was sent on December 5, 2002, from the Deputy DND/CF Legal Advisor, advising that his review of Mr. Wenzel's case did not lead to the conclusion that the Board of Officers or the Service Pension Board had acted inappropriately.

97 *Out of Time*

98 In January 2003, Mr. Wenzel filed an application in the Federal Court of Canada – Trial Division, for judicial review of the decision not to grant him an annuity. The Court dismissed the application on February 28, 2003, on the grounds that, given that the decision was made in 1961, the application was "clearly out of time". It ruled that it was not appropriate to override provisions of the *Federal Court Act*, which require applications for judicial review to be made within 30 days of the decision being communicated to the person who wished to have the decision reviewed. In any event, the Court noted that no such application to extend the time had been sought in this case. Given that Mr. Wenzel showed no intent to challenge the decision in any way in 1961, the Court declined to apply a more generous standard with respect to a possible extension of the applicable time limit. Since Mr. Wenzel was clearly out of time, the Court commented that the application for judicial review of the Minister's decision had no "*likelihood of success.*"

99 Again, Mr. Wenzel's legal counsel wrote to the Minister of National Defence on August 27, 2003. The DND/CF Legal Advisor replied on October 9, 2003, that the Federal Court had addressed the issue of legal review and dismissed Mr. Wenzel's application for a judicial review, and that the Department was "not in a position to be of any further assistance" to Mr. Wenzel on this matter.

100 I note that Mr. Wenzel stated in his application to the Federal Court of Canada that

101 *despite the passage of time, to this day [my] feelings and thoughts are not only unchanged but are still acutely present in my body and soul. These range from bewilderment to resentment at having been treated in this manner by my Government. Modestly, I feel I deserve a modicum of respect and a minimum of reciprocity for the sacrifices and commitment made in my youth when the safety of our nation was at risk...in the autumn of my life, I feel deserted by my government.*

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102 ***An Appeal to Minister Graham***

103 Mr. Wenzel's case assumed a higher profile when his legal counsel prepared a 16-page brochure on Mr. Wenzel's behalf entitled "*The Shameful Treatment of a RCAF Legend.*" The brochure was distributed to politicians and members of the public, including some media representatives. Several recent Ministers of National Defence have received letters from the public, as well as from a number of Members of Parliament, endorsing Mr. Wenzel's attempts to secure an annuity.

104 On February 14, 2005, Minister Graham received a letter from Member of Parliament Pat O'Brien, then Chairman of the Standing Committee on National Defence and Veterans Affairs. This letter followed an update the Committee had received on the Wenzel case from the Parliamentary Secretary to the Minister of National Defence, the Honourable Dr. Keith Martin. In his letter, Mr. O'Brien questioned why Mr. Wenzel's transfer to the Auxiliary was any less "in the public interest" than the cases of other members of the RCAF who were allowed to take an early retirement to become teachers or public servants. He asked Minister Graham to compare Mr. Wenzel's case with the circumstances of others who requested retirement at the same time.

105 As previously indicated, on May 5, 2005, Minister Graham then referred the case to the Ombudsman pursuant to paragraph 4(a) of the *Ministerial Directives*.

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Findings and Analysis

- 106 In order to carry out our review of this matter, we examined the process followed by DND/CF to determine whether it had been fair to Mr. Wenzel, and whether the decision not to recommend to the Treasury Board that Mr. Wenzel receive a reduced annuity under the *CFSA* was arrived at fairly.
- 107 This review revealed a number of weaknesses, summarized below and critically examined in the rest of this section.
- 108 a. **Incomplete and inaccurate information.** When the Service Pension Board considered Mr. Wenzel’s case, it did not have complete or accurate information about a number of things, including the length of Mr. Wenzel’s military service, the civilian employment Mr. Wenzel proposed to undertake upon his retirement, and Mr. Wenzel’s transfer to the RCAF Auxiliary immediately upon his retirement from the Regular Force;
- 109 b. **Lack of support.** Officials at different levels who ought to have provided Mr. Wenzel with the information he required to make the case that he should be granted a reduced annuity, did not help him. Instead, they determined that he was not entitled to anything more than a return of his contributions. They made this determination in the absence of complete information;
- 110 c. **Lack of information to retiring members on the interpretation of “public interest”.** Mr. Wenzel was not fully informed as to how the “public interest” requirement in the *CFSA* was being interpreted, which denied him the opportunity to make his case for a reduced annuity;
- 111 d. **Service Pension Board did not request missing information.** The Service Pension Board, contrary to its own procedures, did not attempt to obtain any information about Mr. Wenzel’s civilian employment, even though this information was a crucial element identified in the Policy Guide to determine when a reduced annuity would be recommended as being “in the public interest”;
- 112 e. **Inconsistent application of the criterion regarding “civilian employment of public importance”.** The criterion of “civilian employment of public importance” was applied inconsistently, based on a review of the cases approved by the Treasury Board;

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- 113 f. **Overly restrictive interpretation of “public interest”.** Those
involved in deciding when a reduced annuity would be recommended
focused unduly on the single factor of the member’s intended civilian
employment, which does not fully reflect the breadth of the “public
interest” test set out in the wording of the *CFSA*; and
- 114 g. **Decision-makers did not consider the special circumstances.** Those
involved in deciding when to recommend a reduced annuity followed
too closely the factors in the Policy Guide. In fact, the Guide itself
warned that it should not preclude consideration of individual cases
that, while not meeting the criteria in the Guide, might merit reduced
annuities.

115 What follows is a review of the evidence with respect to each of these
procedural shortcomings, as well as an analysis as to what potential impact
each of them may have had on Mr. Wenzel’s case for a reduced annuity.

116 **a. *Incomplete and inaccurate information***

117 The Director of Accounting was responsible for providing the Service Pension
Board with a “Document Check List” that included a calculation of
Mr. Wenzel’s pensionable service. This document stated that Mr. Wenzel had
19 years, 343 days of pensionable service at the time of his retirement from the
Regular Force. This was wrong. Mr. Wenzel’s service, in fact, totalled 20 years
and 135 days. The Director of Accounting miscalculated and omitted 157 days,
or more than five months of WWII RCAF service. This error was discovered
by Mr. Wenzel’s legal counsel and subsequently acknowledged by DND/CF in
a letter dated March 28, 2003.

118 It is impossible to state with certainty what impact this error in the calculation
of pensionable service time had on the Service Pension Board’s ultimate
decision not to put forward a recommendation that Mr. Wenzel receive a
reduced annuity. To examine how length of pensionable service affected a
member’s chance of receiving a reduced annuity under the *CFSA*, my Office
consulted a report prepared by the DJAG dated October 31, 1961, concerning
the “*Payment of benefits on voluntary retirement to officers and men with 10
or more years regular force [sic] service where statutory entitlement does not
exist under the Canadian Forces Superannuation Act (CFSA)*”.

119 The report shows that between March 1, 1960, and September 30, 1961,
74 officers with more than 10 years pensionable service retired voluntarily.
The following table shows how many of these officers received a return of
their contributions, as well as the number and percentage of them who were
granted a reduced annuity.

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Table 1 Outcome of Voluntary Retirement Requests

Years of Pensionable Service	10-15	15-20	20-25	25-30	Total
Number of Officers given a return of contributions	26	27	3	nil	56
Number of Officers granted a reduced annuity	1 (3.7%)	9 (25%)	7 (70%)	1 (100%)	18 (24.3%)
Total	27	36	10	1	74

120 Based on the above, it is clear that the chances of receiving a reduced annuity increased significantly if an officer had 20 or more years of pensionable service. Although the raw numbers may be small, it is reasonable to conclude that the error in calculating Mr. Wenzel’s period of service may have had an impact on the Board’s decision. It is, therefore, entirely possible that if the correct information concerning his length of service had been available, Mr. Wenzel’s application might have been looked at more favourably and a positive recommendation might have been made.

121 With respect to Mr. Wenzel’s post-retirement employment, the file presented to the Service Pension Board by the RCAF did not have any information concerning his intended civilian employment. The Senior Personnel Officer’s statement in Mr. Wenzel’s file that was forwarded to the Board stated merely that the ‘*contributor requested his release to seek civil employment as he considered his service salary inadequate.*’ No information or details are given about the nature of his employment to enable the Board to consider whether it was of “public importance.” Based on what we have found, the specific details that Mr. Wenzel had provided in his July 5, 1960, initial request for retirement were not noted or included.

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122 From all of the documents my investigators obtained that discuss the policies and procedures for recommending reduced annuities “in the public interest”, it is clear that a primary consideration was the officer’s intended civilian employment. We cannot know what the outcome of the Service Pension Board’s deliberations would have been, had they been aware of what sort of employment Mr. Wenzel intended to pursue on retirement. However, it is not surprising that, in the absence of that information, the Board’s decision was that all Mr. Wenzel was entitled to was a return of his contributions.

123 Another piece of information that was unavailable to the Service Pension Board was the fact that Mr. Wenzel intended to continue, and in fact, did continue his service with the RCAF upon retirement, as a member of the RCAF Auxiliary. At the time the Service Pension Board considered Mr. Wenzel’s file, he was already a member of the RCAF Auxiliary. However, that information was not contained in his file.

124 Again, it is impossible to state with any certainty how this information might have influenced the Board’s decision. Nonetheless, it is a crucial piece of information that Mr. Wenzel considers should have been given to the Board. It may have served to show that Mr. Wenzel intended to continue contributing to the public good – as, indeed, he actually did for several years – by putting to good use the broad experience he had gained in the Air Force.

125 ***b. Lack of support***

126 Mr. Wenzel’s attempts to secure a reduced annuity were not encouraged by his chain of command, or, seemingly, by any of the individuals he approached for assistance with his case. In fact, it appears that, at every turn, his efforts to obtain a reduced annuity were discouraged. Even in internal documents discussing Mr. Wenzel’s claim for a reduced annuity, it appears to have been a foregone conclusion that he would only receive a return of contributions.

127 As early as October 1960, almost a year before his case went before the Service Pension Board, Mr. Wenzel’s chain of command were of the opinion that if his retirement was permitted for the reasons he stated, the maximum entitlement he could expect was a return of contributions. Correspondence among members of the chain of command prior to the meeting of the Board of Officers that approved Mr. Wenzel’s retirement confirms that the possibility of an annuity was never contemplated. While his reasons for retirement were motivated by his desire to pursue commercial ventures to better provide for his young family, it appears no one asked him specifically what he intended to do when he retired from the Regular Force in order to consider whether he met the public interest test as described in the Policy Guide, and been eligible for a reduced annuity.

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128 Mr. Wenzel advised my investigators that after long years in the RCAF, he believed “*the military was a family and that after extensive service in war and in peacetime*”, he would be looked after when he left. As mentioned earlier, when he further pursued the matter by hiring a lawyer to make submissions on his behalf before his case was put before the Service Pension Board, he received a response from DJAG dated June 12, 1961 that stated:

129 *The new provision providing a discretion in the Treasury Board to authorise a reduced annuity was introduced to provide an annuity to a member of the Regular Force whose services are urgently required by other Government Departments or Crown Agencies, or for employment in some other civil employment of public importance...*

130 *...F/L Wenzel’s case has not yet been referred to the Service Pension Board, but taking into account the circumstances of his retirement, I doubt that the approval of a reduced annuity would be forthcoming in his case. [emphasis added]*

131 *It may be that F/L Wenzel is assuming a civilian position that could reasonably be deemed to be of public importance. If so, I would suggest that you convey this information...*

132 Based on all the information we reviewed, this appears to be the first time that the statutory requirement that retirement be “in the public interest” was more specifically explained to Mr. Wenzel to mean that one must be entering “*civilian employment of public importance*”, in order to be recommended for an annuity.

133 After receiving that letter, Mr. Wenzel’s counsel sought an appearance before the Service Pension Board to respond directly to any concerns they might have. In response, however, he was told that the decision had already been made; the Minister had determined that Mr. Wenzel’s retirement was not “in the public interest”. Moreover, Mr. Wenzel says that his chain of command, including his Command Staff Officer Administration knew of his plans to get involved in civil aviation after retirement and he thought that information and the fact that he was transferring to the RCAF Auxiliary at the invitation of a senior Air Force Officer would already be contained in his file and forwarded to the Board. It should also be noted that, as indicated above, the Crown paid for Mr. Wenzel’s move to Toronto with his family, furniture and effects.

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134 Mr. Wenzel was applying for a benefit and was not provided with sufficient and timely information on the criteria by which his application would be evaluated. The first time he was told that his post-retirement civilian occupation needed to be one of public importance in order to be considered for an annuity was in the letter from the DJAG in June 1961. Mr. Wenzel states that he had informed the RCAF in 1960 of his intention to retire and had corresponded with his chain of command during that year. In spite of these lines of communication, he had not been told of that specific criterion.

135 ***c. Lack of information to retiring members on the interpretation of “public interest”***

136 I cannot emphasize enough how Mr. Wenzel’s future was affected by the interpretation of the discretionary “in the public interest” proviso. In his very first letter of July 5, 1960, requesting permission to retire, Mr. Wenzel attempted to demonstrate that his retirement was “in the public interest”. He cited his desire to take advantage of opportunities in his field, the need to provide for his children’s education, and the fact that his retirement would make room for the advancement of younger, more enthusiastic officers. He concluded his letter: *“It is, therefore, suggested that my retirement be deemed as being in the public interest.”* Notwithstanding these efforts to present his case, he had no real way of knowing how persuasive his arguments might be, or what (if any) other information he should be providing to help his case. Even within the Department, the question of what would be considered “in the public interest” was not entirely clear or settled.

137 As noted earlier, the Service Pension Board had a Policy Guide to assist it in determining which files should be forwarded to the Associate Minister in consideration of reduced annuities “in the public interest”. The Policy Guide set out two specific sets of circumstances under which the reduced annuity would be recommended in cases of voluntary retirement for officers with between ten and twenty-five years of service:

138 (1) when the retiree intended to pursue civilian employment of public importance; and

139 (2) for the purposes of rehabilitation, when the retiree was within three years of mandatory retirement.

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- 140 The distribution of the Policy Guide appears to have been kept very limited. In fact, it appears it was only available within National Defence Headquarters. In a June 29, 1961 report on the one-year review of the Policy Guide, it was noted that the Personnel Members Committee, which had initially drafted the Guide, had “agreed [...] that the provisions of the Policy Guide should not be promulgated outside NDHQ.” One of the reasons given for restricting the distribution of the Guide was that “the number of requests for voluntary retirement might be stimulated by the impression that in all cases reduced annuities will be approved rather than a return of contributions.”
- 141 Therefore, due to the limited distribution of the Policy Guide, it appears that retiring members, including Mr. Wenzel, were not informed of the true nature of the “public interest” test for awarding a reduced annuity on voluntary retirement, or of how it was interpreted and applied.
- 142 Intentionally withholding such crucial information was not fair. In the absence of this information, the arguments Mr. Wenzel put forward did not even give the Service Pension Board pause to consider a reduced annuity. The result was that the one significant piece of information that might have led the Board to consider the recommendation in Mr. Wenzel’s case – his intended civilian employment – was not even on his file when his case was considered.
- 143 As indicated above, the Guide also included the criterion that a reduced annuity could be recommended to facilitate rehabilitation into the civilian world, if the contributor was within three years of his compulsory retirement age. Mr. Wenzel was not aware of this criterion either. While he was not within three years of his compulsory retirement age, it is possible that if he had been made aware of it, he might have deferred his retirement in order to avail himself of this option. However, it is not possible to determine what he would have done. The only thing that can be safely said is that, this information not having been communicated to him, Mr. Wenzel was deprived of the opportunity to make a fully informed choice about his retirement plans.
- 144 In sum, Mr. Wenzel was not given any inkling of the type of information that the Service Pension Board was looking for when determining whether or not awarding an annuity in specific cases was in the public interest. This was clearly unfair. In his request for permission to retire, Mr. Wenzel made an effort to educate himself about the requirements of the *CFSA*, and advanced arguments he thought might show his retirement to be in the public interest. However, the Policy Guide was purposely kept from him and other individuals in his situation, in a clear effort to discourage members from applying for a benefit that they might otherwise be able to access. The information that we found suggests that this came about as a result of what appears to have been a deliberate attempt to frustrate individuals’ ability to advance arguments in order to gain a reduced annuity.

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145 ***d. Service Pension Board did not request missing information***

146 Pursuant to its own rules, the Board should have requested further information, if the information provided to it was insufficient. In the minutes of its meeting of February 1, 1960, the Service Pension Board noted that, when information was lacking from a file placed before it, the Board would “*direct that the file be returned to the Service*” (Special Minute No. 89390).

147 As already noted, in Mr. Wenzel’s case, the Service Pension Board had no information concerning the civilian employment he intended to pursue after retiring. Mr. Wenzel could not have known to provide it, as he was not aware of the criteria being used by the Board. The Policy Guide clearly placed a great deal of emphasis on a key piece of information – the type of civilian employment that the retiring member intended to pursue. However, the Board did not request any additional information on Mr. Wenzel’s case with respect to the nature of his civilian employment.

148 The Service Pension Board had a duty under the *CFSA* to determine the reasons that a member of the armed forces was retiring. The Board was also given the delegated authority to determine when an annuity would be recommended to the Treasury Board. In order to fulfill these duties, the Service Pension Board was obliged and empowered to obtain the information it required. And yet, in spite of the clear criteria set out in the Policy Guide, when a key piece of information was missing from Mr. Wenzel’s file, the Board did not attempt to obtain that information. Instead of requesting the missing information, which I believe would have clearly been the appropriate course of action, the Service Pension Board made its findings based on incomplete information. To conclude that Mr. Wenzel was only entitled to a return of contributions, without knowing or making any attempts to discover his intended civilian employment, appears inconsistent with the Board’s own procedures.

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149 In fact, Mr. Wenzel advised my Office that his intention when he retired from the RCAF was to build a charter airline company, then an industry in its infancy, to provide the Canadian public an affordable option for air travel. While funds were raised and a business plan developed, he worked as a pilot for a charter company and became their operations manager shortly afterwards. He advised my investigators that he had verbally informed his chain of command of these plans, but, as was noted before, the details of Mr. Wenzel's intended civilian career were not anywhere on the record that was the basis for the Service Pension Board's decision that he should only receive a return of his contributions. It may be impossible to determine, 44 years after the fact, whether or not the Service Pension Board would have concluded that Mr. Wenzel's civilian employment plans met the Policy Guide criteria of "*civilian employment of public importance.*" However, the fact that there was no information before the Board about the nature of his civilian employment deprived Mr. Wenzel of the benefit of this consideration.

150 ***e. Inconsistent application of the criterion regarding "civilian employment of public importance"***

151 An Ad Hoc Subcommittee formed to review the Policy Guide reported on June 29, 1961, describing some cases where ministerial recommendations to the Treasury Board had been made. Details of the individual cases are sparse. However, after reviewing the information, I have come to the view that the Service Pension Board did not appear to have a clear objective definition of "civilian job of public importance" and that consistent objective standards were not followed.

152 The report reviewed cases where members requested voluntary retirement before their compulsory retirement age, between July 1959 to April 15, 1961. The Associate Minister recommended an annuity in 14 cases that were deemed to meet the criteria in the Policy Guide; and all but three of those cases were approved by the Treasury Board. During the same period, of the five other cases that were recommended even though they were "not strictly within" the criteria of the Policy Guide, three were approved by the Treasury Board.¹

¹ The *CFSA* was assented to in July 1959 and came into force on March 1, 1960. According to the transitional provisions of the *CFSA*, a contributor retiring on or after the day the *CFSA* was assented to but before coming into force, was deemed to be a contributor under the *CFSA* and could elect to exercise their rights under the new *CFSA* or the former Act (*Defence Services Pension Continuation Act*).

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153 Of the 14 recommendations judged to meet the criteria, 6 were recommended
on the basis that the person was taking up a position of civilian importance,
7 for the purpose of rehabilitation within three years of mandatory retirement,
and 1 for having more than 25 years of service. The three cases that were not
approved by the Treasury Board had all been recommended for the purposes of
rehabilitation.

154 The six post-retirement positions that the Treasury Board deemed to be
'civilian positions of public importance' were the following:

- 155 • An associate professor of Engineering
- 156 • The employee of a NATO organization
- 157 • Two high school teachers
- 158 • The warden of a federal penitentiary
- 159 • Assistant commissioner of penitentiaries

160 The length of service and the proximity to retirement age of these individuals
are not provided.

161 As just mentioned, the Associate Minister also made a recommendation to the
Treasury Board in five cases that were considered not to fully meet the criteria
set out in the Policy Guide but that were thought to have 'elements' of the
criteria.

162 Of these five cases, the Treasury Board approved an annuity in three cases:

- 163 • Civilian employment as high school teacher, 20 years service and
within six years of retirement age.
- 164 • For the purposes of entering the ministry (no information provided on
length of service; however, the annuity was reduced by 55 per cent).
- 165 • Civilian employment as manager in an electronics firm having DND
contracts, four years from retirement age and over 24 years service.

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166 From the limited information available, it is unclear how the criterion “civilian
employment of public importance” was applied. For example, in two cases, it
appears post-retirement employment as a high school teacher was found to
meet the criterion, while in another case, it apparently did not. Nonetheless, in
the latter case, a supportive recommendation was made – and approved – even
though only some of the elements of the criterion were deemed to have been
met. On the basis of the above, it is not possible to discern a sense of objective,
consistent decision-making.

167 *f. Overly restrictive interpretation of ‘Public Interest’*

168 As already discussed, the legislation provided that an officer in Mr. Wenzel’s
situation could receive a reduced annuity if the Minister of National Defence
recommended that his retirement from the forces was “in the public interest
and that it [was] in the public interest that he be paid that annuity”. “Public
interest” was not defined in the *CFSA*, and the Department was left to
determine the criteria to be considered in reaching such a decision. As we said
before, the criteria that were ultimately approved were:

- 169 (i) taking up civilian employment of public importance;
- 170 (ii) facilitating a contributor’s rehabilitation, within three years of his
prescribed retirement age, the contributor having given good and
faithful service;
- 171 (iii) 25 or more years of good and faithful pensionable service.

172 “Public interest” is a very broad concept. As the Supreme Court of Canada
stated in *R. v. Morales*, [1992] 3 S.C.R. 711, in a general sense the phrase
“public interest” refers to

173 *[the] special set of values which are best understood from
the point of view of the aggregate good and are of relevance
to matters relating to the well-being of society[...] The
breadth of the concept of the public interest has been viewed
as a necessary aspect of a notion which accommodates a
host of important considerations which permit the law to
serve a necessarily wide variety of public goals.*

174 Having reviewed the information we have gathered, I am of the view that the
Policy Guide and the considerations that appear to have motivated the Treasury
Board decisions were overly restrictive, given the breadth of the test set out in
the statute.

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- 175 Incidentally, I am not alone in this view, as a common argument advanced by the Department at the time was that military personnel nearing their mandatory retirement age faced a unique set of circumstances, and that it was in the interest of the armed forces, the members, their families, and Canadian society as a whole that these men be able to take advantage of employment opportunities as they neared retirement age.² I therefore believe that the interpretation, which held that for the payment of an immediate reduced annuity to be “in the public interest” the retiring member had to be undertaking civilian employment of public importance, was overly restrictive.
- 176 Even accepting that there should be some element of public importance in the proposed civilian employment of retirees, I feel that the relevant authorities were overly restrictive in their interpretation of what constituted employment of public importance. A fairer interpretation would have looked more favourably on jobs that were not necessarily in the public or quasi-public sectors, but which might nonetheless have contributed something to the Canadian public, for example, in a private industry sector of growing importance.
- 177 The “public importance” of a contributor’s civilian employment was not a criterion specifically set out in the legislation. The legislation contained a fair and flexible test, which was subverted by the overly restrictive approach adopted by the Department and the Treasury Board. Overall, my view is that, in adopting the restricted criteria that they did, the authorities unduly fettered their discretion in a manner that was detrimental to Mr. Wenzel’s interests.

² In one instance, the Army representative to the Service Pension Board recommended that, instead of the requirement that the proposed employment was of public importance, the public interest should be determined by looking at the nature of the proposed employment, the retiree’s period of good and faithful service, and the proximity to mandatory retirement age. This recommendation concluded that “*Any contributor with approximately 20 years pensionable service would almost automatically qualify for consideration of a voluntary retirement annuity as being ‘in the public interest’ [...]*”

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178 **g. *Decision-makers did not consider the special circumstances***

179 As previously noted, the Policy Guide contained the following caution:

180 *It is desirable that a general policy guide be established upon which to base recommendations for the payment of benefits greater than the statutory minimum entitlement where there is a discretion to approve a greater benefit. A general policy guide must be sufficiently specific and definitive in nature to obviate detailed consideration of every individual case. Such a guide must not, however, be taken to preclude consideration of individual cases and the making of recommendations which may not be fully in accord with the guide.*

181 We noted in an earlier section dealing with our review of cases requesting voluntary retirement before compulsory retirement age, that five cases were recommended to Treasury Board for annuities “in the public interest”, even though they fell outside of the factors contained in the Policy Guide. Three of these were approved by Treasury Board.

182 Here, it does not seem that any consideration was given to putting Mr. Wenzel’s case forward even though he was not deemed to meet all of the criteria set out in the Policy Guide. I think that, in light of the particular circumstances of the case, this was a mistake.

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Summary of Findings

- 183 Mr. Wenzel's case for a reduced annuity was compromised from the start. When first considering his case, the Service Pension Board lacked fundamental information. Mr. Wenzel's file included incorrect information about his length of military service, and no information about his proposed retirement employment or his transfer to the RCAF Auxiliary. These pieces of information alone might have resulted in a favourable outcome for Mr. Wenzel, as indeed some of our research suggests.
- 184 Officials ignored such inadequacies. They did not request further information. And there is no evidence that, at any time, did they assist Mr. Wenzel in putting forward critical information that could strengthen his request. Mr. Wenzel was left in the dark. He had no sense, and no one ever explained to him, that such crucial information was at the very heart of the *CFSA* requirement that his civilian employment must be "in the public interest" and that the Policy Guide defined this as employment "of public importance".
- 185 I have emphasized repeatedly that the criterion of "civilian employment of public importance" and the test of "public interest" were central to our review of the Wenzel case. Within this context, my investigators analysed other cases put before Treasury Board. We found the criterion of "public importance" seems to have been applied inconsistently. We also found, through records and evidence, that the test of "public interest" was interpreted in an overly restrictive manner. In interpreting and applying the legislation as they did, officials unduly fettered their discretion.
- 186 My analysis leads me to one clear conclusion: the system failed Clifton Wenzel.

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The Recommendations

187 Throughout my review, and in framing my recommendations, I have been ever mindful that Canada has historically attempted to treat its veterans honourably and with dignity.

188 By way of an example, I will note that, as far back as 1948, and to the present day, the *Pension Act* has enshrined the notion that when a determination must be made with respect to an individual's right to receive benefits under that Act, such determination must be made on the basis of fundamental fairness and equity.

189 This is borne out in particular by the provisions of the Act [subsec. 5(3)] that direct the Minister

- 190 • to “draw from all circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant”;
- 191 • to “accept any uncontradicted evidence presented to the Minister... that the Minister considers to be credible in the circumstances”; and
- 192 • to “resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case” (emphasis added).

193 I, of course, recognize that, strictly speaking, these provisions do not apply to Mr. Wenzel's case because it arises under a different statute. I do believe, however, that the spirit that underlies and animates them has application here.

194 The facts, as they present themselves in Mr. Wenzel's case, are compelling: there is little doubt that the shortcomings uncovered by my investigation are of a serious nature.

195 Mr. Wenzel's service to his country has been highly commendable; the circumstances of his case exceptional. This decorated veteran's struggle for an annuity has been long and difficult. I believe the system failed him. I also believe that the type of decency and fairness, that is so characteristic of the Canadian spirit, compels us to address his case in an open, caring, and generous way. It is time, in this, the Year of the Veteran, to set things right.

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196 In view of the above, and in order to repair in a dignified way the damages
suffered by Mr. Wenzel, I recommend that:

197 **1. An appropriate senior authority within DND/CF
acknowledge formally to Mr. Wenzel that he was not treated
fairly.**

198 In addition to an acknowledgement that he was treated unfairly, the result of
that unfairness, particularly in terms of Mr. Wenzel's financial situation, must
be assessed and corrected. The goal should be to put Mr. Wenzel in the same
financial situation he would be in today, had he been granted the reduced
annuity he applied for. If Mr. Wenzel had been awarded a reduced annuity in
1961, he would have had the benefit of that annuity for the last 44 years. At the
same time, I do appreciate that other factors need to be taken into account
when determining the value of the lost annuity to Mr. Wenzel for purposes of
awarding compensation. Calculating the financial value of annuities is an area
that requires specialized technical expertise. Although such expertise may be
available within the Department or elsewhere in government, it would be
appropriate in this case for an independent valuation to be conducted. I
therefore recommend that:

199 **2. DND/CF offer such compensation to Mr. Wenzel as would
put him in the same financial situation he would be in today,
had he been granted a reduced annuity when he retired from
the regular force in 1961 based, in particular, on the
legislation as it then existed and on his years of service at the
time, and considering the amount he received by way of
return of contributions.**

200 **3. DND/CF retain, at its own cost, the services of an
independent actuarial firm to evaluate the amount of
financial compensation due to Mr. Wenzel under
Recommendation 2.**

201 In order to pursue his quest for fair treatment, Mr. Wenzel retained counsel in
2002. He was 80 years of age at the time. The decision to retain counsel was
done for practical reasons, including his age and the fact that he did not reside
in Ottawa, but also because his efforts to set things right on his own behalf had
fallen on deaf ears over the years and received the same blanket rejection.

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202 I believe that without the assistance of a lawyer, it is unlikely that Mr. Wenzel would have been able to successfully pursue his case on his own. Mr. Wenzel's lawyer was instrumental in gathering a large volume of information, which assisted this Office in its work once the Minister referred the case to the Office. I also believe that counsel was instrumental in convincing the Minister to refer the case to my Office for an outside examination of the circumstances leading to the decision not to grant Mr. Wenzel an annuity.

203 I am of the view that now, at the age of 83, and in the light of the particular circumstances of his case, Mr. Wenzel should not have to dip into his retirement savings to pay for the legal costs he incurred in attempting to get what he should have been granted in 1961. In keeping with the principle that Mr. Wenzel's financial situation should be restored to what it would have been had he been treated fairly and equitably in the first place, I therefore recommend that:

204 **4. Mr. Wenzel receive an amount equivalent to the costs he reasonably incurred for legal representation since 2002 in order to obtain advice and to resolve the issue surrounding the denial of an annuity when he retired from the RCAF in 1961.**

205 **5. If there is a dispute between Mr. Wenzel and DND/CF with respect to the amount to be paid under the previous recommendation as reasonably incurred legal fees, DND/CF retain, at its own cost, an outside, independent legal expert to determine the appropriate amount of compensation.**

206 As I am recommending that Mr. Wenzel be granted compensation, it might be useful to provide some indication as to how that could be accomplished. I believe this could probably be accomplished most efficiently by an *ex gratia* payment to Mr. Wenzel.

207 Under the Treasury Board *Policy on Claims and Ex gratia Payments*, an *ex gratia* payment is defined as a 'benevolent payment' that may be made to anyone in the public interest for a loss incurred for which there is no legal liability on the part of the Crown. It is an 'exceptional vehicle' used only when there is no statutory regulatory or policy vehicle to make the payment. The Policy prescribes a number of matters that must be considered before an *ex gratia* payment is made, but principal among them is that there are no other reasonable means of compensation and that there is no liability on the Crown. Clearly, the Crown has no legal obligation to reopen Mr. Wenzel's case, and given the passage of time, there is no other reasonable means of compensating Mr. Wenzel. Therefore, I believe that Mr. Wenzel's case meets the requirements to qualify for an *ex gratia* payment under this policy.

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208 Finally, given the longstanding nature of the complaint, and the complainant's
stage in life, I cannot emphasize enough the need to finally resolve this matter
as quickly as possible. I therefore recommend that:

209 **6. The above recommendations be implemented with utmost
urgency.**



Yves Côté, Q.C.
Ombudsman

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Summary of Recommendations

210 I, therefore, recommend that:

- 211 1. An appropriate senior authority within DND/CF
acknowledge formally to Mr. Wenzel that he was not treated
fairly.
- 212 2. DND/CF offer such compensation to Mr. Wenzel as would
put him in the same financial situation he would be in today,
had he been granted a reduced annuity when he retired from
the regular force in 1961 based, in particular, on the
legislation as it then existed and on his years of service at the
time, and considering the amount he received by way of
return of contributions.
- 213 3. DND/CF retain, at its own cost, the services of an
independent actuarial firm to evaluate the amount of
financial compensation due to Mr. Wenzel under
Recommendation 2.
- 214 4. Mr. Wenzel receive an amount equivalent to the costs he
reasonably incurred for legal representation since 2002 in
order to obtain advice and to resolve the issue surrounding
the denial of an annuity when he retired from the RCAF in
1961.
- 215 5. If there is a dispute between Mr. Wenzel and DND/CF with
respect to the amount to be paid under the previous
recommendation as reasonably incurred legal fees, DND/CF
retain, at its own cost, an outside, independent legal expert to
determine the appropriate amount of compensation.
- 216 6. The above recommendations be implemented with utmost
urgency.

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Appendix A: Referral Letter from the Minister of National Defence



MAY 0 5 2005

Ms. Barbara Finlay
Office of the Ombudsman
100 Metcalfe Street, 12th Floor
Ottawa ON K1P 5M1



Dear Ms. Finlay:

As you are aware, I have decided to refer the case of retired Squadron Leader Cliff Wenzel to the Ombudsman for investigation in accordance with paragraph 4(a) of the Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces.

Mr. Wenzel was an officer in the Royal Canadian Air Force (RCAF) with 20 years, 186 days of pensionable service to his credit, including wartime service, Regular Force service, and service with the Royal Air Force. Most notably, during World War II, Flight Lieutenant Wenzel, as he then was, was awarded the Distinguished Flying Cross and the Air Force Cross. In 1960, he requested his voluntary release from the RCAF. I am informed that prior to accepting his application for release, Flight Lieutenant Wenzel's chain of command advised him that under the legislation, an officer who did not have to his credit at least 25 years of pensionable service was not entitled to a pension as of right. In a memorandum dated 26 October 1960, Flight Lieutenant Wenzel confirmed that it was still his desire to proceed with his release in order that he might pursue civilian employment. He was subsequently released in 1961. On retirement, Mr. Wenzel transferred to the Reserve Force and continued to serve at the rank of Squadron Leader until reaching his compulsory retirement age in 1969.

Flight Lieutenant Wenzel's entitlement to a pension benefit was governed by legislation. In this regard, I am informed the *Canadian Forces Superannuation Act* provided that, as a general rule, an annuity was only payable to a retiring member who had to his or her credit at least 25 years of pensionable service and that a member's entitlement to an annuity was determined at the time of release from the Regular Force. As a result, subsequent Reserve Force service did not count towards a pension and therefore could not create an entitlement to an annuity. However, the legislation provided discretion to Treasury Board to grant a reduced annuity in respect of members who had less than 25 years of pensionable service to their credit if the Minister of National Defence recommended that the retirement was in the public interest and that the payment of the annuity was in the public interest.

In terms of the public interest determination, applicable departmental guidelines provided that "before any voluntary case will be eligible for consideration of a recommendation for approval of an annuity reduced by 5% for each full year under retirement age, one of the following categories had to apply:

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- a. the voluntary retirement was for the purpose of taking up civilian employment of public importance;
- b. the voluntary retirement was for the purpose of facilitating the individual's rehabilitation, is within three years of his prescribed retirement age, and the individual had given good and faithful service; or
- c. the individual had to his credit 25 or more years of good and faithful pensionable service."

I am advised that a member's past accomplishments, including distinguished service, were not factors that were considered when applying the guidelines. Indeed, departmental records confirm that during the two-year period preceding Mr. Wenzel's release, there were only 14 cases in which the Minister made a recommendation and Treasury Board approved the payment of a reduced annuity. In virtually all of these cases, the individuals were within two to five years of retirement and were entering public sector employment of some importance or interest: university professor, teacher, magistrate, city solicitor, federal department, etc.

At the time, service authorities, including the Service Pension Board, reviewed the circumstances surrounding Mr. Wenzel's release. They determined that his circumstances did not meet the criteria set out in the guidelines and the Minister of the day did not make a recommendation to Treasury Board to grant a reduced annuity. Consequently, Mr. Wenzel was only entitled to a return of his pension contributions, which he received.

Not satisfied with the decision, in 1962, Mr. Wenzel retained legal counsel in an attempt to obtain an annuity. The Minister of National Defence reviewed Mr. Wenzel's file and confirmed that as the retirement was not considered to be in the public interest, no recommendation would be made to Treasury Board.

On a number of occasions, Mr. Wenzel has requested that Ministers of National Defence reconsider his case with a view to awarding him an annuity. On each occasion, the previous decision has been upheld. Based on these reviews, I am of the opinion that Mr. Wenzel has been treated consistently and as authorized by the legislation applicable at the time.

In 2003, Mr. Wenzel brought an application in the Federal Court for judicial review of the decision of the Minister of the day. The Court dismissed the application based on the passage of time and in doing so noted that the application had "no likelihood of success whatsoever." A copy of the Court decision is enclosed for ease of reference. As the facts of this case are fully set out in the Affidavits filed with the Court, all pertinent facts are in the public domain and are not protected by the *Privacy Act*.

Although there was a discretion left to the Minister in the legislation to determine whether the retirement was in the public interest and whether the payment of an annuity was in the public interest, the Act has since been amended and today the discretion no longer exists. As a result, there is no existing authority under the *Canadian Forces Superannuation Act* to now award Mr. Wenzel an annuity.

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After repeated reviews and the passage of more than 40 years, I am advised that there are few options available to the Government and clearly, it would be improper for me to ask you to review a decision of the Federal Court of Canada or the Service Pension Board. I am not asking that you do so.

I appreciate that this request is somewhat unusual and is motivated in part by the extraordinary fact that this decorated war veteran believes quite strongly that his country has not treated him fairly, a view he has expressed over an exceedingly lengthy period. In this respect, I consider that your investigation of this matter would be in the interests of the Department and of Canada.

Sincerely,



The Honourable William Graham, PC, QC, MP

Enclosures: 2

Appendix B: Canadian Forces Superannuation Act, S.C. 1959

*The Canadian Forces Superannuation Act, S.C. 1959,
7-8 Eliz. II, c.-21*

10.(6) A contributor who, not having reached retirement age, retires voluntarily from the forces is entitled to a benefit determined as follows:

- (a) if, in the case of an officer, he has served in the forces for less than twenty five years or in the case of a contributor other than an officer, he has served for less than twenty years, he is entitled to
 - (i) a return of contributions, or*
 - (ii) in the discretion of the Treasury Board, if he has served in the forces for ten or more years, an annuity, reduced by five percent for each full year by which his age at the time of his retirement is less than the retirement age applicable to his rank:**

(...)

10.(10) Notwithstanding anything in this section,

(...)

- (c) a contributor who, not having reached retirement age, retires voluntarily from the forces is entitled to an annuity determined under subparagraph (ii) of paragraph (a) of subsection (6) only if a recommendation has been made by the Minister that his retirement from the forces was in the public interest and that it is in the public interest that he be paid that annuity.*

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Service Pension Board

20. (1) *The Minister shall appoint a board, to be known as the Service Pension Board, consisting of a chairman, one member from each of the Services and a member to represent the Minister.*
- (2) *It shall be the duty to the Service Pension Board to determine, in the case of any contributor who is retired from the forces, the reason for his retirement from the forces, and the Board shall on the making of any such determination, certify in writing the reason for such retirement as determined by the Board.*
- (3) *No payment shall be made of any annuity or other benefit under this Act to a contributor who is retired from the forces except upon certification in writing by the Service Pension Board of the reason for such retirement as determined by the Board, and upon the certification thereof, the contributor shall be presumed, prima facie, to have been retired from the forces for that reason.*
- (4) *Subsections (2) and (3) do not apply, in any case or class of cases specified by the Treasury Board, to or in respect of any contributor who has served in the forces for less than ten years.*

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Appendix C: Letter to the Minister of National Defence



October 6, 2005

The Honourable William Graham, P.C., M.P.
Minister of National Defence
National Defence Headquarters
Major-General George R. Pearkes Building
13th floor, North Tower
101 Colonel By Drive
Ottawa, Ontario
K1A 0K2

Dear Minister Graham:

Please find enclosed 6 copies of my Special Report entitled: *For the Sake of Fairness: The Case of Squadron Leader (Retired) Clifton Wenzel*. This report concerns the complaint of Mr. Clifton Wenzel, who retired from the Royal Canadian Air Force in 1961, and did not receive a discretionary reduced annuity as was permitted by the *Canadian Forces Superannuation Act* as it read at that time.

On May 5, 2005, you referred this complaint to our office for investigation pursuant to paragraph 4(a) of the *Ministerial Directives* governing the Office of the Ombudsman. You asked this Office to investigate Mr. Wenzel's case, in order to determine whether or not he had been treated fairly by DND/CF when he was denied a reduced annuity at the time of his retirement.

This Special Report is submitted to you, pursuant to paragraph 38(1)(b) of the *Ministerial Directives* for my Office. As per established practice, a copy of my report and recommendations is being provided to the complainant, Mr. Wenzel, on an undertaking that he will not disclose the contents of the report before its publication.

Pursuant to paragraph 38(2)(b) of the *Ministerial Directives*, and in light of the public interest in this matter, I intend to publish the report on the expiration of 28 days from the date of this letter, on or after November 3, 2005.

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100, RUE METCALFE STREET, 12th FLOOR - 12^e ÉTAGE, OTTAWA, CANADA, K1P 5M1 • TEL/TEL. : 613 992-0787 • FAX/TELÉC. : 613 992-3167

TOLL-FREE - SANS FRAIS : 1 888 828-3626

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Please note that the final published version of the report may be edited for style purposes. However, this will not affect the findings and recommendations in the attached version.

I look forward to receiving your response to my recommendations in this case. Should you wish to discuss with me please do not hesitate to contact me directly.

Yours truly,



Yves Côté, Q.C.
Ombudsman