

Unfair Demand to Repay
Overpayments Made Under the
Forces Reduction Program

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INTRODUCTION

In the early to mid-nineteen nineties, the Department of National Defence encouraged members to take early retirement. This was part of a program to reduce the complement of the Canadian Forces. Members were provided by DND with details of the early retirement incentives. Members were cautioned to familiarize themselves with those details before making a decision. As part of the program, members were told that they could opt to receive payment in lieu of unused leave. They were furnished with a formula for quantifying the amount of payment they would receive. A significant number of members retired, accepted the payment in lieu of leave option, and were paid the amounts promised. Then DND discovered that it had erred. The payments it made in lieu of unused leave between 1992 and 1996 exceeded Treasury Board guidelines. Using appropriate channels, DND took steps to have the overpayments forgiven. Those efforts were unsuccessful. As a result, DND demanded repayment from former members who had been paid in excess of the guidelines. Indeed, I am advised by one complainant, that when his repayment was not made voluntarily, DND deducted the amount from his pension, an action that may not have been in keeping with government regulations.

While there may be some issue as to whether it was appropriate legally to have demanded repayment or to have used pension set-offs, that is not the question I am concerned with. My concern is more basic. Legal or not, clawing back the promised payment was unfair. Members who made their decision to retire and who committed to terms according to the offer that had been made should not have had the expectations that were held out by DND defeated because of a mistake made by DND. The amounts involved for each complainant are not substantial, but even where they did not cause demonstrable hardship to former members, they unquestionably caused stress and a feeling by those affected that they had not been treated fairly. This kind of debacle can damage the morale of both the retired members and current members who are dependant on the actions of DND. As a result, at the end of this report, I will recommend that even though DND did all that it could do at the time to repair the damage it had done, that it should now renew its efforts

to have the overpayments forgiven, and, if successful, those promised amounts that have been clawed back should be repaid to the former CF members from whom they were taken.

THE COMPLAINTS

This investigation arose as the result of complaints from four former CF members who retired under the Forces Reduction Program (FRP) that was approved by the Minister of National Defence in 1991 as a means of encouraging early retirement. Although my Office has declined to investigate individual complaints I received with respect to the eligibility of individuals for the FRP, the issues raised with respect to the collection of overpayments of FRP benefits inspired me to undertake a systemic investigation of the FRP incident, with the approval of the Minister.

All four of the complainants who brought this matter to my attention retired in 1995 and 1996. Each of them complained that they had accepted the terms that were offered as part of the FRP, including an option to receive payment at a promised rate for all or a portion of their unused leave. Each noted that after retiring and foregoing their unused leave, they received a letter of demand dated September 3, 1997, from DND advising them that there had been an administrative error. In the letter, DND admitted that it had failed to adhere to Treasury Board guidelines as to the formula for payments in lieu of unused leave. The letter also advised each complainant that DND was required by law to obtain repayment of the overpayment. Ultimately, each complainant repaid the amount that exceeded Treasury Board guidelines, either by installment, lump sum payments, or by set-offs from their superannuation entitlements. Each complainant complained that this clawback was unfair, because they had made the decision to take early retirement on the basis of the information DND had provided, and on the footing that they would receive the amount promised.

The Forces Reduction Program was implemented in April 1992 and continued until the end of the 1997-98 fiscal year. DND records indicate that 10,500 CF members took advantage of the FRP between 1992 and 1995. Of those 10,500, more than one-third, or 3,612 members, were taxed with overpayment as the result of the DND error.¹

The *Ministerial Directives* state that the Ombudsman shall not investigate any complaint relating to an occurrence prior to June 15, 1998. Of course, the four complaints that I received occurred before that date. The *Directives* go on to provide, however, that if the Minister considers it to be in the public interest, including the interest of members of the DND and the CF as a whole, he can approve of an investigation that relates to matters predating June 15, 1998.

I was struck by the size and the systemic nature of the problem. I was struck by the implications that DND's treatment of this matter would have on the morale of those who have served until the end of their career in the Canadian Forces. It was obvious to me that an affair like this could also impact on the morale of current members, and on their confidence that the institution they serve has their best interests in mind. I therefore asked the Minister for special permission to undertake an investigation into the Forces Reduction Program repayment incident. The Minister granted my request, hence this report.

INVESTIGATIVE PROCESS

After my Office received the Minister's direction to investigate the complaints, the file was assigned to an investigator. An investigation plan was formulated and approved, and waivers of confidentiality and consents to the release of personal information were obtained from the complainants.

¹ *Briefing Note for the Deputy Minister of National Defence and the Acting Chief of Defence Staff on the Recovery of FRP Overpayments*, October 24, 1996, prepared by Director of Pay Services, Paragraph 7

Interviews were then conducted with the complainants and with personnel from Director Accounts Processing, Pay and Pensions 4 (DAPPP 4),² who are responsible for inquiries related to pension issues. DAPPP 4 was also responsible for collection of FRP overpayments.

During the investigation, relevant documentation was reviewed, including:

- Material provided by each individual complainant;
- *Canadian Forces Administrative Order* (CFAO) 203-3;
- *Queen's Regulations and Orders* 203.04;
- *Financial Administration Act*, R.S.C. 1985, c. F-11;
- *Overpayment to Certain Members of the Canadian Forces Remission Order*, SI/99-99;
- *Canadian Forces Superannuation Act*, R.S.C., c. C-17;
- *The Canadian Forces Superannuation Regulations*, C.S.C., c.396;
- *War Veterans Allowance Act*, R.S.C. 1985, c. W-3;
- *Pension Act*, R.S.C. 1985, c. P-6;
- Relevant Treasury Board Policies and Guidelines;
- Proposal to Remit Overpayments, submitted by DND to Treasury Board, 13 February 1997.

FINDINGS

The Mistake

The FRP was the first time a cash-out value for unused leave had been authorized for CF members. DND officials thought erroneously that there were no specific policies or procedures in place for calculating the cash-out value of unused leave. Therefore, the

² previously Director of Pay Services 4 (DPS 4)

Director of Pay Services, the Director Personnel Administration and Services and the Director Compensation and Benefits Administration all agreed upon the method of calculating the cash-out value that was held out to members.³ The method of calculation exceeded that provided for in a Treasury Board Policy that was in place since 1991.⁴

Reliance on the Mistake

The purpose of the FRP was to induce early retirement. Members were expected to rely on the details of the program and were expected to be enticed by those details. Issues of the *Personnel Newsletter* each year the FRP was offered provided specific information on the program.⁵ Members were encouraged to consider the FRP offer.

There is no question that members did rely on the details of the program in making their decision whether to take the payment in lieu of unused leave option, and even whether to retire. This is not only obvious from the nature of the representations made, but the complainants we spoke to told us as much. They have advised us that it was only after careful study of the information provided that they decided to accept the early retirement package. Some have said that had they known the cash value that Treasury Board guidelines would ascribe to unused leave, it would have made a difference in their decision regarding early retirement. They would have either opted not to take their early release, or take the leave at the time of release. They relied on the figures provided by DND and, because they took that option, they have suffered a financial loss. Moreover, the loss cannot now be made “right” by restoring them to the position they would have been in had the error not occurred. They have been prejudiced by the error.

³ *Briefing Note for the Deputy Minister of National Defence and the Acting Chief of Defence Staff on the Recovery of FRP Overpayments*, October 24, 1996, prepared by Director of Pay Services, Paragraph 3

⁴ *Ibid*, Paragraph 4

⁵ For example: *Personnel Newsletter* 12/95; *Personnel Newsletter* 10/94; *Personnel Newsletter* 5/94

The Reasonableness of the Reliance

It was entirely reasonable for members to rely on the terms promised to them in the FRP. In its *Personnel Newsletter*, DND stated that it was imperative that members “understand the financial compensation and benefits offered as part of the program as well as other financial implications of being released under the FRP.”⁶ DND established a system to handle specific enquiries and provide advice to members concerning the FRP. It encouraged CF members interested in the FRP to contact designated officials for information and calculations with respect to anticipated benefits and financial implications. DND also provided members with access to individuals who possessed the necessary special skills, judgment and knowledge to enable them to make an informed decision. Therefore, DND recognized the significance of the decision that it was asking CF members to make and it was fully aware that its representations would be acted upon.

The Prejudice

In 1996, the Director of Pay Services learned of the Treasury Board Policy and the discrepancy between the FRP and the Treasury Board Guidelines became apparent. On September 3, 1997, DND wrote to all former members who received an overpayment, informing them of the error and demanding reimbursement of the overpayment. The letter said:

...as a result of an administrative error on the part of the Department of National Defence, you received a greater financial benefit upon release from the Canadian Forces than your correct entitlement. Unfortunately, even though the error was not your fault you are required to reimburse the amount of the overpayment.

⁶ *Personnel Newsletter* 12/95, p.1

As you know, one of the optional benefits of release under the Force Reduction Program (FRP) was the cash-out of unused leave. This proved to be a popular provision that was used extensively by retiring members. However, after the FRP had been in place for the years 1992 to 1995 inclusive, we learned that the method used by the Department to calculate the value of the leave cash-out was not consistent with Treasury Board direction. The approach that we used undervalued the FRP special leave and overvalued annual and accumulated leave....

When financial errors of this nature occur, Treasury Board policy requires the Crown to reimburse those who were underpaid and to recover the overpayments from those who were overpaid. Given the circumstances and its responsibility for the error, the Department sought special authority to waive the overpayments so that recovery from affected members would not be necessary. That request was denied.

After receiving this letter, some former members paid the requested amount. Some of the complainants attempted to resolve the matter by corresponding with DAPPP 4, and up the chain of command, but without success. Those who did not respond received further demand letters and it appears that some who did not voluntarily pay the repayment eventually had funds set-off against the annuity the former member was entitled to receive under the *Canadian Forces Superannuation Act*. By way of example, the four complainants in this matter were required to repay overpayments in the following amounts:

Complainant 1:	\$ 947.86
Complainant 2:	\$1,657.98
Complainant 3:	\$ 721.33
Complainant 4:	\$ 346.27

Steps Taken by DND to Avoid the Clawback

There is legislative authority to allow debts owing to the Crown to be remitted or cancelled. Section 23(2.1) of the *Financial Administration Act* allows the Governor in Council, on the recommendation of the Treasury Board, to remit or forgive certain debts, including any interest, where it is considered that the collection of the debt would be unreasonable or unjust, or that it is otherwise in the public interest to remit the debt.

In a December 11, 1996 memorandum to the Minister of National Defence, the Deputy Minister advised that this option had been discussed with Treasury Board staff and that they would not agree to that solution. The Deputy Minister also indicated that another option, to apply to Treasury Board to have the payment formula legitimized, was also available, but was not adopted. The memorandum states:

...The first option considered (...) was to seek TB authority to legitimize the formula that had been used. Had this approach been adopted, the overpayments would not have been recovered and the underpayments would not have been reimbursed.

A second option considered was to apply to TB for authority to remit the debts caused by the overpayments and correctly pay those who had been underpaid. Discussion with TB staff concluded they would not agree to this solution.⁷ This stance was confirmed to me personally by the Secretary of the TB.

As neither of these options were considered viable, the decision was made to apply the approved TB formula to each FRP case, identify those members which were overpaid and/or underpaid, and action recovery or payment as required.

⁷ “remitting” the debt would amount to forgiving the debt

In spite of the negative reception that was received when Treasury Board was first approached, the decision was made to make a formal request to Treasury Board, effectively to put the ball in Treasury Board's court. On February 13, 1997, a proposal signed by then Minister of National Defence, the Honourable Doug Young, requesting that the overpayments be forgiven, was forwarded to Treasury Board. On March 13, 1997, Treasury Board responded, declining the proposal, stating:

While the concerns of the Minister of National Defence in recovering overpayments from former members of the Canadian Forces were fully appreciated, Ministers did not recommend to the Governor in Council authorizing the Minister of National Defence to remit overpayments ... that were paid to certain members of the Canadian Forces

The repayment demand letter of September 3, 1997, that was sent to members, records that DND recognized its responsibility, and unsuccessfully sought special authority to waive the overpayments.

The Legitimacy of Demanding Repayment

There is no question that the Department of National Defence was obliged by Treasury Board guidelines to take steps to obtain reimbursement of overpayments. The Judge Advocate General was consulted by DND and confirmed this. Still, there may be some issue as to whether it was legal for the Government of Canada, through the Department of National Defence, to demand repayment, notwithstanding Treasury Board policy. The law of restitution for mistaken payments is complex, but might arguably “estop” the Government from demanding repayment of funds it paid under a mistake of fact or law, where there has been reasonable, detrimental reliance by the recipient.⁸

⁸ “estop” prevents someone from asserting something contrary to what was implied by a previous action or statement of that person

Indeed, the legal issue may be cast into further doubt when it is appreciated that the mistake was about internal Government policy. Should one branch of government be able to excuse itself from what may amount to contractual promises, on the basis that its promised payment does not satisfy requirements imposed on government departments by another branch of the same government? This is not a simple case of gratuitous, mistaken overpayment.

Moreover, there appears to be an issue as to whether, even if the Crown is entitled to repayment, it can secure that repayment in the form of pension set-offs. Under law, DND is entitled and has the authority to try to collect or recover a valid debt that is owing to the Crown. Section 155 of the *Financial Administration Act* provides that any debt owed to the Crown may be recovered or collected by deducting the amount against any monies that may be owed by the Crown to that person. It also seems to be the case that pay accounts are not closed when a member ceases to be a member of the CF, and any credits or debits related to pay, including the overpayments in question, are considered part of the pay account. However, it appears that under the *Canadian Forces Superannuation Act*, a debit balance in the pay account of a former member may only be recovered from any annuity or other benefit to which he/she is entitled in certain situations. Section 53 provides that recovery of a debit balance in the pay account of a former member (whether the debit balance existed at the time of his retirement or was ascertained after that time) shall only be effected in such manner and extent as may be prescribed by Regulations. Section 27 of the *Canadian Forces Superannuation Regulations* only allows for the recovery of such a debit balance against the former member's annuity "where the debit balance has resulted directly or indirectly from [...] an overpayment of pay and allowances that the former member fraudulently obtained or knowingly accepted." When the overpayment was received by the complainants, they were not aware that the amount represented an overpayment; therefore, it may be that they had not "knowingly" accepted this overpayment.

It is not the function of the Ombudsman to resolve such legal disputes. The current point is that, while DND was bound by Treasury Board policy to seek reimbursement, there appears to be a real issue about whether the repayment was one that the Government as a whole was entitled to.

Other Comparators

I note that other federal legislation has opted for a more lenient approach in similar circumstances where an overpayment is received as a result of an administrative error. For example, the *War Veterans Allowance Act* and the *Pension Act*, which deal with disability or death benefits, economic support in the form of allowances, health care benefits and services to war veterans, both provide that where the Minister is satisfied that an overpayment was the result of an administrative error, delay or oversight on the part of a public servant, the Minister may remit or forgive all or any portion of the overpayment. It is evident that had a similar provision been in place to cover this situation, the Minister of National Defence would have forgiven the overpayments.

Our investigation also revealed that DND has successfully obtained authority from the Treasury Board to remit overpayments made to CF members in other circumstances. The *Overpayments to Certain Members of the Canadian Forces Remission Order*, SI/99-99, provides for the remittance of overpayments made to CF members who were reclassified from the general service officer classification to the pilot classification during the period beginning on December 1, 1977, and ending on December 31, 1994. As a result, they received overpayments of the amount representing pay and allowances and, in certain cases, annuities or other benefits under the *Canadian Forces Superannuation Act*, rather than the amount that they should have been paid under the CFAO governing transfers to the pilot occupation. The *Overpayments Order* specifically states that it was “in the public interest” to remit the overpayment.

RECOMMENDATIONS AND REASONS

Based on the foregoing, it is obvious that early retirement was encouraged by the FRP. Those who accepted early retirement, including the pay in lieu of unused leave arrangements that were held out, relied reasonably on the terms offered by DND. They relied on that advice to their detriment because they were induced to retire early and to forego their unused leave in return for the promised payment, and the clock cannot now be turned back. Those members have been prejudiced by their decision because of the mistake of DND. Whether or not the Government of Canada, through DND was legally entitled to demand repayment, the act of doing so was, in the circumstances, unfair. It was unfair because it was reasonable for those members to rely on the information provided by DND. In fact, that information was wrong, and as a result these members have suffered a loss. It was unfair because a promise was made, consideration in the form of early retirement was provided by members in exchange for that promise, and then the terms of the deal were retroactively varied because of an internal policy of one branch of government that another branch of government had overlooked. In the end, in one form or another, the government has relied on limitations created by itself in an effort to absolve itself of promises made and acted on.

I realize that the approval of Treasury Board will be required to implement these recommendations. The Ombudsman's authority comes, however, from the Minister of National Defence. I am therefore limited to making recommendations within DND/CF at the level at which they can most efficiently and effectively be resolved. I have no authority to make recommendations to the Treasury Board or the Governor in Council and therefore refrain from doing so. My focus is on DND.

As for the Department, the initial mistake was made. Having made that mistake, DND took all reasonable efforts to rectify it without prejudicing its members. Even though all reasonable steps were, in fact, taken at the time, that does not prevent them from trying again. I therefore recommend that the Minister of National Defence:

- 1. Remit another application to Treasury Board that it make a recommendation to the Governor in Council, under section 23(2.1) of the *Financial Administration Act*, to remit the overpayment made to former CF members for the cash-out value of unused leave benefits during the 1992-1995 FRP, accompanied by this report.**
- 2. Upon receipt of Governor in Council approval, take steps to identify the former CF members involved and remit the above-mentioned overpayment to them.**

Without question, current DND members look to the treatment of those who have retired from the system as an example of the kind of treatment that they can expect on their retirement as a reward for their commitment and service. By taking these extraordinary steps to ensure just treatment of those CF members who retired under the Forces Reduction Program, the Minister will be sending a message to currently serving members that the Department is committed to fair treatment of CF members and that this commitment does not end when they take their retirement after a lengthy career of service to their country.