

**ANALYSIS BY THE DEPARTMENT OF  
NATIONAL DEFENCE OMBUDSMAN  
IN PARTNERSHIP WITH  
THE VETERANS OMBUDSMAN**

JANUARY 2015



***Canadian Armed Forces Best Positioned to Determine  
Public Service Priority Hiring for Releasing Members***

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releasing members**

***January 2015***

*Analysis*

*By the Department of National Defence/Canadian Forces  
Ombudsman, in consultation with the Veterans Ombudsman*

Transition of ill and injured Canadian Armed Forces members  
from military to civilian life



## Table of Contents

<b>Issue .....</b>	<b>2</b>
<b>The Current Regulatory and Jurisdictional Construct.....</b>	<b>3</b>
Definition of “Attributable to Service” .....	3
The Canadian Armed Forces Medical Release Process .....	4
Public Service Commission and the Priority Administration.....	6
Veterans Affairs Canada and the Administration of Benefits .....	7
<b>Analysis.....</b>	<b>8</b>
Vesting the Public Service Commission .....	9
Vesting Veterans Affairs Canada .....	10
Vesting the Canadian Armed Forces .....	13
<b>Conclusion.....</b>	<b>18</b>

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- 1      **Date:** January 2015
- 2      **Subject:** Public Service Commission *Priority Hiring* for members released from the Canadian Armed Forces for medical reasons that are attributable to service.
- 3      It is the opinion of both the Department of National Defence and Canadian Forces Ombudsman and Veterans Ombudsman that the Canadian Armed Forces is best placed to make the determination of whether a medical release is attributable to service pursuant to Bill C-27.

4      **Issue**

- 5      In accordance with the *Public Service Employment Act*, the Public Service Commission of Canada is responsible for recruiting and appointing qualified persons to the public service. In making appointments to the public service, there are certain individuals who have “priority status” for a number of reasons, some statutory and other regulatory. Qualified individuals with priority must be considered for a position before someone without priority status can be appointed. Currently, all Canadian Armed Forces members who are medically released, regardless of the reason, have a regulatory priority, which ranks below the three statutory priority categories.
- 6      Bill C-27, *An Act to Amend the Public Service Employment Act (enhancing hiring opportunities for certain serving and former members of the Canadian Forces)* (short title *Veterans Hiring Act*), was introduced on March 4, 2014. The bill was referred to the Standing Committee on Veterans Affairs for study.
- 7      Among other amendments to the *Public Service Employment Act*,<sup>1</sup> Bill C-27 would give Canadian Armed Forces members who are released for medical reasons **attributable to service** a priority over all other persons for appointments to a public service position. Canadian Armed Forces members who are released for medical reasons that are **not attributable to service** would still be eligible for priority status, though not at the same level.
- 8      One outcome of the bill would be the need to designate one public service organization to determine whether the medical release is attributable to the member’s service. There are three options as to who could fulfill this role: the Public Service Commission, Veterans Affairs Canada, and the Department of National Defence/Canadian Armed Forces. Our opinion is that there is only one viable option, and that is the Canadian Armed Forces. Discussions undertaken by these departments have resulted in an agreement on how to implement the

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<sup>1</sup>Other Bill C-27 amendments affect Canadian Armed Forces members other than those who are released medically for reasons attributable to service.

**Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members**

changes should the bill become law.<sup>2</sup> Notwithstanding this agreement, discussions between the stakeholder departments are ongoing. Presumably, the final outcome will need to be drafted into regulation under the *Public Service Employment Act*.

9 The purpose of this analysis is to aid in establishing which department is best suited to determine Public Service priority hiring for releasing members.

10 **The Current Regulatory and Jurisdictional Construct**

11 **Definition of “Attributable to Service”**

12 The term “attributable to service” as it is applied to a medical release of a Canadian Armed Forces member is not defined in the *Public Service Employment Act*, its regulations, or Bill C-27. Therefore, the meaning of the term in the context of the Public Service Commission priority administration must be interpreted by looking at how the term is used in related contexts. A thorough analysis revealed the following findings:

- 13 1. Various terms with a similar meaning are used in related legislation. There is no clear legislative definition of the term “attributable to service.”
- 14 2. The term “attributable to service” and its variations are used in the context of entitlement to benefits and find meaning primarily in the rulings of the Veterans Review and Appeal Board and the Federal Court.
- 15 3. There are multiple benefit programs, administered by different organizations, all of which use the term or a variation thereof.<sup>3</sup>

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<sup>2</sup> The Interdepartmental Project Charter SD48 – Bill C-27 Priority Hiring was signed in July 2014 by or on behalf of the Veterans Affairs Canada Assistant Deputy Minister of Service Delivery, the Public Service Commission Vice President Staffing and Assessment Services, the Canadian Armed Forces Chief of Military Personnel and the Project Executive.

<sup>3</sup> Aside from Veterans Affairs Canada-administered benefits, there are some benefits administered by the Canadian Armed Forces that require medical conditions attributable to service. For example, under Queens Regulations and Orders 34.07, reservists requiring medical care for reasons attributable to military service are entitled to care provided by the Canadian Armed Forces.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- 16        4. There is no consistency with respect to who determines whether something is “attributable to service” or “service related.” Rather, the competent authority in this regard appears to be the administrators of the various benefit programs. Therefore, there are multiple competent authorities making the same determination for the purpose of multiple benefit programs.

**17        The Canadian Armed Forces Medical Release Process**

- 18        Since priority entitlements under Bill C-27 are conditional on the type of release that Canadian Armed Forces members are assigned, the process of releasing from the Forces is relevant to this analysis.
- 19        Canadian Armed Forces regulations require the assignment of a release category when a member is released. Some release categories clearly indicate when a person is released for medical reasons; however, there is no distinction made to indicate whether the release is attributable to military service.
- 20        Members of the Canadian Armed Forces are required to meet minimum standards of health and fitness related to common military tasks (Universality of Service), as well as specific standards related to the requirements of their military occupations.<sup>4</sup> When a member is injured or develops a medical condition, the member is seen by a Canadian Armed Forces medical officer and a CF 2033, *Record of Medical Examination* form is completed.
- 21        In cases where the injury or condition has been caused by a known, identifiable incident, there is a requirement to complete a report of the injury or incident<sup>5</sup> (the CF 98). The CF 98 includes a section where the reporting officer is instructed to “provide a brief explanation which will enable Veterans Affairs Canada to determine whether the injury, disease or illness, arose out of or was directly connected to military service.” Not all medical conditions arise from an identifiable incident. Repetitive stress injuries may also be connected to service.
- 22        Depending on the severity and the expected duration of the injury or condition, the medical officer may assign a temporary medical category with medical employment limitations, recorded on a CF 2088, *Notification of Change of Medical Employment Limitations* form. These limitations can later be removed if the member is well enough to resume military duties.

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<sup>4</sup> A-MD-154-000/FP-000, Medical Standards for the Canadian Forces, Annex D.

<sup>5</sup> Required by Defence Administrative Order and Directive 5018-2, Report of Injuries and Exposure to Toxic Substances.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- 23 Permanent Medical Employment Limitations are recommended by the treating medical officer, and approved by Director Medical Policy after a review of the member's medical file by various levels of the medical chain of command. Once permanent Medical Employment Limitations have been assigned, Director Medical Policy transmits the information to Director Military Careers Administration, the approving authority for medical releases of Regular Force members.
- 24 Members whose permanent Medical Employment Limitations result in their no longer meeting the standards related to their military occupation, but who still meet universality of service requirements, may be retained in the Canadian Armed Forces if Director Military Careers Administration can arrange an occupational transfer. Otherwise the permanent Medical Employment Limitations will prompt an administrative review.<sup>6</sup>
- 25 The Canadian Armed Forces conducts medical and administrative reviews before a member is released from the military for medical reasons. There is a formal release process with procedural safeguards for the member. Director Military Careers Administration will provide the member with all information considered while making the determination that there should be a medical release. The member is also given the opportunity to make a complaint if he or she is opposed to the release.<sup>7</sup> While medical releases are based on medical conditions, diagnoses and limitations, the actual decision to release a member is an administrative decision within the authority of Director Military Careers Administration.
- 26 Release items are assigned according to the *Queen's Regulations and Orders, chapter 15 (Release)*. The usual release item for medical releases is 3 (b), which is described in the *Queen's Regulations and Orders* as "on medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy."
- 27 Nothing in the *Queen's Regulations and Orders* requires any authority to look at the cause of the medical reasons, i.e. whether the medical condition prompting the release is attributable to military service.
- 28 The process from injury or diagnosis to release can be lengthy. During that time, Canadian Armed Forces members are retained and are either employed (subject to their Medical Employment Limitations) or on sick leave. Regular Force members have unlimited sick leave entitlements, so would not have to access any form of disability insurance if they are unable to serve. Reserve Force members

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<sup>6</sup>See Defence Administrative Order and Directive 5019-2, Administrative Review.

<sup>7</sup>Ibid.

## ***Canadian Armed Forces best positioned to determine Public Service priority hiring for releasing members***

who sustain an injury as a result of military service may have their periods of employment extended<sup>8</sup> in order to ensure continued access to medical treatment provided by the Canadian Armed Forces.

- 29 Members who disagree with the decision that they should release, or contest the release category assigned to them, can use the Canadian Armed Forces redress of grievance process to challenge the decision. Only serving members can access the grievance process, so the grievance must be submitted before release. Members who grieve can ask to be assigned an assisting member to help with the preparation of their grievance and assist “until the griever is satisfied by the determination of an Initial Authority or the Final Authority has made a final determination.”<sup>9</sup> Grievances related to release or release category can be considered and decided entirely by the chain of command.
- 30 There is some question as to whether a member’s release category, once final, can be changed. Current practice dictates that when someone who was released under a non-medical category is subsequently shown to be in breach of the Universality of Service standards, his or her release will be “annotated” disabled, as opposed to being amended. Canadian Armed Forces members with an annotated non-medical release category are not eligible for the Public Service Commission priority as a result of this determination.<sup>10</sup>

## **31 Public Service Commission and the Priority Administration**

- 32 The Public Service Commission priority administration allows for persons affected by career transitions to be appointed ahead of those with lower priority or without priority status, to a position in the public service for which they meet the essential qualifications. Currently, Canadian Armed Forces members released for medical reasons are entitled to priority status with the Public Service Commission. They are not, however, given first-ranking priority.
- 33 According to the *Public Service Commission Guide on Priority Administration* (September 12, 2013), a Canadian Armed Forces member who is releasing for medical reasons and who wishes to activate his or her priority, must do so through the authorized Director Casualty Support Management staff with the Department of National Defence. The Department submits registrations and all

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<sup>8</sup> Compensation Benefits Instruction 210.72, Reserve Force – Compensation During a Period of Injury, Disease or Illness.

<sup>9</sup> Defence Administrative Order and Directive 2017-1, *Military Grievance Process*.

<sup>10</sup> Note that under other changes proposed by Bill C-27, Canadian Armed Forces members with more than three years of military service who were released honourably (as defined in the *Queen’s Regulations and Orders*) would be eligible to apply for positions open to members of the public service as though they were members of the public service.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

supporting documentation to the Public Service Commission on the members' behalf.<sup>11</sup>

- 34      Veterans Affairs Canada and the Administration of Benefits**
- 35**     Veterans Affairs Canada currently has no role in the priority process for Public Service Commission employment of former Canadian Armed Forces members.
- 36**     This department administers compensation and benefits to Canadian Armed Forces and Royal Canadian Mounted Police veterans with debilitating medical conditions that have arisen out of or have been exacerbated by service. Veterans Affairs Canada's process is generally triggered by an application by a veteran who may be eligible for benefits. In other words, the onus is on the veteran to initiate the process.
- 37**     Many of the benefits administered by Veterans Affairs Canada require a determination that the individual in question is totally or partly disabled, and that the disability was caused or aggravated by military service. As such, Veterans Affairs Canada has expertise in determining whether a medical condition is attributable to service or service-related.<sup>12</sup>

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<sup>11</sup> The following documents are required by the Public Service Commission to support registration: The Personnel Information Management System electronic on-line Registration Form; Privacy Consent Form for Priority Persons (keep in the organization's Canadian Armed Forces medical release file for that member); a letter from the Director, Casualty Support Management concerning the person's release; and a letter from a competent authority indicating the date on which the person can return to work, with a description of any accommodation that is required to assist with referral and appointment. The Director, Casualty Support Management will provide to the local Department of National Defence Human Resources Service Centre, for each case, a single letter which will state that the person was released on a given effective date and that the release was for medical reasons. In signing this letter, Director Casualty Support Management is confirming that they have reviewed the relevant pension document from Veterans Affairs Canada and the release document provided by the Director Military Careers Administration (formerly Director of Military Careers and Resource Management, as well as other career-oriented information within the Canadian Armed Forces.

<sup>12</sup> There currently exists a body of policy and law related to how Veterans Affairs Canada determines if an injury or condition is service-related. These sections (and others like them in predecessor legislation) have been given a broader interpretation by courts to include chronic conditions caused by cumulative physical or psychological stress, and quotidian activities performed in a military environment by necessity or under orders. Further, the various legislation administered by Veterans Affairs Canada include a review process that allows veterans to challenge unfavourable decisions and rules of evidence that give the benefit of any doubt to the veteran.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- 38 Applicants who are not satisfied with the determination can appeal to the Veterans Review and Appeal Board – an independent tribunal with two levels of hearing (review and appeal). Veterans electing to go to the Veterans Review and Appeal Board also have access to free legal representation from the Bureau of Pension Advocates.
- 39 In dealing with applications from veterans, both Veterans Affairs Canada and the Veterans Review and Appeal Board are required to follow rules that give the benefit of the doubt to the veteran. In particular, Veterans Review and Appeal Board must accept the evidence of a veteran, unless contradictory evidence is presented or the Board finds that the applicant or person presenting the evidence was not credible.<sup>13</sup>

40 **Analysis**

- 41 The key to attaining first ranking priority entitlement under Bill C-27, is the determination that the reasons for a medical release are “attributable to service.” The Interdepartmental Project Charter, signed in July of this year, establishes Veterans Affairs Canada as the project lead – meaning that it would be the department responsible for determining ‘attribution.’ The Interdepartmental Project Charter does not, however, elaborate the reasons why Veterans Affairs Canada, as opposed to the Public Service Commission or the Canadian Armed Forces, is best placed to make the determination. The following analysis examines the merits and possible caveats of vesting responsibility in each of the departmental stakeholders, as well as the potential implications of the process outlined in the Interdepartmental Project Charter.
- 42 The fundamental assumption at the heart of this analysis is that:
- 43 • Releasing Canadian Armed Forces members should not be disadvantaged;

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<sup>13</sup> Section 39 of the *Veterans Review and Appeal Board Act*, sets out the following rules of evidence:

39. In all proceedings under this Act, the Board shall
- draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
  - accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
  - resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- 44        • The entry point into the priority administration should be as uncomplicated and expeditious as possible; and
- 45        • The administrative mechanisms put into place in order to give effect to Bill C-27 must be both efficient and cost effective.

46        **Vesting the Public Service Commission**

47        As overseer of priority administration, the Public Service Commission decides, based on supporting evidence, whether a claimant meets the eligibility criteria for entitlement. Under the current public service priority administration, a member's priority status can only be activated once the Public Service Commission receives information from the Canadian Armed Forces attesting to the member's release for medical reasons.

48        The increase in benefits introduced by Bill C-27 means that the Public Service Commission would be required to develop further eligibility criteria. These criteria would necessitate expert assessment. Clearly the substantive knowledge required to make that assessment is beyond that of the Public Service Commission. While, theoretically, it would be possible to set up the necessary systems, vesting the Public Service Commission with the responsibility would entail significant costs and practical challenges. It would also fundamentally change the service delivery model upon which the Public Service Commission priority administration operates.<sup>14</sup>

49        Challenges would include:

- 50        • Obtaining and verifying personnel and health records under the control of other departments with its associated privacy concerns;
- 51        • Developing the expertise to assess whether the release was attributable to service with its associated implications on other benefit programs; and
- 52        • Instituting a mechanism by which the claimant could challenge an unfavourable decision impacting on his or her priority status.

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<sup>14</sup> The administrator of benefit programs customarily decides whether the claimant meets the eligibility criteria based on supporting evidence, including professional assessments as required. The administrator does not have nor is expected to make an assessment that requires substantive expertise in a given discipline.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

53 For the governmental machinery as a whole, vesting the Public Service Commission with this authority would result in wasted resources, increased bureaucracy, duplication of efforts, and potential inconsistencies in the delivery of its programs. For the released member, it would mean unnecessary delays that might make the benefit itself useless. It could also cause inconsistencies and inequities.

**54 Vesting Veterans Affairs Canada**

55 The appeal of making Veterans Affairs Canada the competent authority to determine whether a medical condition is attributable to service in the context of Bill C-27, is that Veterans Affairs Canada is already making such determinations pursuant to its own jurisdiction. Currently, the department has no role in priority administration. The question is whether Veterans Affairs Canada's existing expertise is enough to justify the introduction of a third departmental stakeholder into the process of the Public Service Commission priority administration.

**56 Interdepartmental Project Charter**

57 As previously noted, the Interdepartmental Project Charter favours Veterans Affairs Canada as the vested authority. The Charter anticipates that the department would build a process, inclusive of an administrative review, whereby Canadian Armed Forces members who are being medically released could apply for a determination of whether their release is attributable to service. This determination would then allow eligible members to go to the Department of National Defence to be registered for statutory priority with the Public Service Commission. The details of the process and the administrative review are not elaborated in the Interdepartmental Project Charter.

58 This proposal has several implications. The issue of data sharing is addressed in the Interdepartmental Project Charter, though not in detail. The remaining issues outlined below have not been dealt with in the Charter.

**59 Duplication of Administration Systems**

60 First, while the creation of a new system would avoid the challenges inherent in transferring processes designed for one purpose into another, it also begs the question of administrative efficiency and duplication of effort, particularly when there is a possibility of capitalizing on existing systems.

## ***Canadian Armed Forces best positioned to determine Public Service priority hiring for releasing members***

### **61 Additional Steps in the Process and Delays**

- 62 Second, the involvement of Veterans Affairs Canada would create further steps in the process, thereby delaying access to the benefit for the former Canadian Armed Forces member. It would also add an unnecessary layer of bureaucracy and cost.
- 63 All Canadian Armed Forces members released for medical reasons are identified as such by Director Casualty Support Management, having followed a thorough process of medical evaluation, administrative review and a possible grievance related to the release. This means that yet another individual, and possibly more, would have to review the documentation. Although the question is different (the cause of the medical condition rather than the reason for release from the Canadian Armed Forces), much of the information relevant to the decision would be the same. So in addition to the Canadian Armed Forces medical review and the three Canadian Armed Forces members involved in the administrative review, the member's file information would be seen and reviewed by at least one more person. (See next section on *Information Sharing*)
- 64 The necessity of an additional decision maker (Veterans Affairs Canada) makes little sense. It would entail frustration and costs for the Canadian Armed Forces member due to the duplication and/or overlap of bureaucratic efforts.
- 65 Additionally, once the determination is made, the former Canadian Armed Forces member would have to go back to the Department of National Defence to be registered for the statutory priority. This means that the advantage of the existing automatic entry point to the priority administration would be lost for the Canadian Armed Forces members who are supposed to be given top priority. Under the current priority administration, a veteran's priority status is activated through the Canadian Armed Forces<sup>15</sup> and not by the members themselves.

### **66 Information Sharing**

- 67 Third, the Interdepartmental Project Charter recognizes the need for data sharing and calls for Privacy Impact Assessments, theorizing that the responsible departments would be able to mitigate any risks identified.
- 68 The main information required for the determination of attribution is contained in a member's medical and personnel files, both of which will have been created and controlled by the Canadian Armed Forces. The Canadian Armed Forces would also have information concerning an individual's health status at recruitment and during service in the CF 2034 (medical records). In some cases,

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<sup>15</sup> The Director, Casualty Support Management (DCSM).

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

- the files may contain a CF 98, *Report on Injuries, Disease or Illness*, where an incident results in an injury and a description of the incident is set out for the purpose of determining whether the injury is connected to service. The files may also contain the findings of a Board of Inquiry or a Summary Investigation related to the connection between an incident and an injury. Where members have been released medically, the Canadian Armed Forces would also have a record of the administrative review related to the release process, and if the release was contested, will have representations of the member's objections to the release.
- 69 Pursuant to the Interdepartmental Project Charter for Bill C-27, Veterans Affairs Canada would be required to review the information in the member's medical file in order to determine the reasons for the medical release. The intent outlined in the Interdepartmental Project Charter is to establish a process for the electronic transmission of files between departments. This raises many issues. The sensitivity of medical data, the multiplication of people having access to the information, and the security issues inherent in electronic systems suggest that the risks may outweigh the benefits, particularly when there is another viable option without these privacy related risks.
- 70 The current priority registration for released Canadian Armed Forces members does not present these privacy concerns. The Canadian Armed Forces is currently responsible for activating a releasing member's priority registration with the Public Service Commission and provides limited personal information. The information provided consists of a letter from the Director Casualty Support Management concerning the member's release, a letter from a competent authority indicating the day on which the member can return to work and a description of any accommodation required. The member's consent to release this limited information is obtained and is kept in the Canadian Armed Forces medical release file.
- 71 A final issue with information sharing is that Veterans Affairs Canada does not have the legislative authority to use or have control over information shared by the Canadian Armed Forces for the purpose of determining a member's statutory priority under the *Public Service Employment Act*. Veterans Affairs Canada would have to collect the same information again pursuant to its own authorities. This is enormously inefficient and would likely be an additional source of delay and frustration for the Canadian Armed Forces member. There would have to be an amendment to Veterans Affairs Canada's current legislation.
- 72 **Fairness**
- 73 The Interdepartmental Project Charter suggests a process for veterans who are not satisfied with the determination made by Veterans Affairs Canada.

## ***Canadian Armed Forces best positioned to determine Public Service priority hiring for releasing members***

These individuals would be able to re-apply and have Veterans Affairs Canada conduct an administrative review. The process and resources for this review have not yet been put in place, and there is little detail about it in the Interdepartmental Project Charter.

- 74 It is not clear whether there would be any assistance offered to veterans who are unsatisfied with the initial determination, or what the rules of evidence would be for the administrative review. What is clear, however, is that unsuccessful applicants would not be able to apply to the Veterans Review and Appeal Board for a review or appeal.

## **75 Vesting the Canadian Armed Forces**

### **76 The Merits**

- 77 In the context of Bill C-27, it is our opinion that the Canadian Armed Forces is best placed to determine whether a medical release is attributable to service. The Public Service Commission does not have the capacity, the expertise, or the systems in place to make the determination. Veterans Affairs Canada, while having the expertise, is not looking to capitalize on its existing system and will require significant administrative changes to design a functional process.

- 78 Vesting the Canadian Armed Forces with the responsibility to make the determination would also be the most cost-efficient and timely option. The following reasons support our view:

### **79 Existing authority to determine attribution to service for benefits**

- 80 The Canadian Armed Forces already determines if an illness or an injury is attributable to service for the following benefits:

- 81 a) Entitlement to medical care;
- 82 b) Reserve Force compensation during a period of injury, disease or illness; and
- 83 c) *The Service Benefits for Ill and Injured Members of the Canadian Forces*, namely: the home modifications, the home modifications move, the vehicle modification, home assistance, attendant care, caregiver benefit, spousal education upgrade and next of kin travel.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

**84      Canadian Armed Forces – Definitions of “Attributable to Service”**

85      In *Canadian Forces Administrative Orders 24-6*, para 30 (in place since 28 February 1975) “attributable to military service” is interpreted as meaning “arose out of or was directly connected with service.” It goes on to state: “this meaning is also used when considering the aggravation of an existing injury or illness. While most injuries that occur while on duty are attributable to military service, the one does not necessarily follow the other. For instance, if a member was injured while on duty as a direct result of his improper conduct, it should not be considered attributable to military service. On the other hand, an injury might occur while not on duty but the circumstances make it attributable. For instance, if a member was injured not while on duty but as a result of the dangerous condition of military quarters, it could be considered attributable to service.”

86      More recently, the Treasury Board Secretariat-approved (7 June 2012) *Canadian Forces Compensation and Benefits Instruction, Chapter 210.72(1) (b)* states that “attributable to military service means that the injury, disease, or illness must have arisen out of or be directly connected with military service. This meaning shall also be used when considering the aggravation of an existing injury, disease or illness.”

**87      Canadian Armed Forces Determination of Attribution to Military Service  
for Reservists**

88      The Canadian Armed Forces currently administers benefits which require medical conditions attributable to service. For example, under *Queens Regulations and Orders 34.07* and *Canadian Forces Compensation and Benefits Instruction 210.72(2)*, Reservists requiring medical care for reasons attributable to military service are entitled to care provided by the Canadian Armed Forces. The Canadian Armed Forces itself makes a determination of attribution to military service by means of the following process:

- 89      1. A Commanding Officer orders an investigation in all cases where compensation for injury, disease or illness is potentially payable. To do so, an investigating officer is named.
- 90      2. For all requests for Reserve Force Compensation under *Compensation and Benefits Instruction 210.72*, a completed Department of National Defence Form 2398, *Reserve Force – Compensation during a Period of Injury, Disease or Illness*, must be forwarded to the Director Casualty Support Management.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

91           3. In that form, Parts II, III and IV are filled by the investigating officer; he/she has to answer two questions:

92           a. Was the member on duty at the time of the injury or illness? Yes (explain) or no.

93           b. Was the injury / illness attributable to military service? Yes (explain) or no.

94           Annex A of the same form is the medical statement, to be completed by a medical authority answering the question: is this injury, disease or illness attributable to military service? Yes, no or unknown.

95           **Expertise**

96           The Canadian Armed Forces also has the expertise to decide whether the member's medical release was in any way caused or related to the member's military career. In fact, this is already being done in the context of Reservist entitlements to medical care and compensation. The Canadian Armed Forces has full control and decision making authority over the member's military career and is best-placed to know whether there is a causal link between career-related activities and a medical condition which would render the member unable to continue serving. Furthermore, whether a medical release is attributable to service is a factual determination often obvious on the face of the record held by the Canadian Armed Forces. The process of a medical release entails the review of the member's medical file and career file by numerous levels of medical officers and administrators. In other words, the Canadian Armed Forces has the relevant information as well as the expertise and systems in place to make the decision, and is already making this determination in a small number of cases.

97           **Existing Entry Point to the Public Service Commission Priority Administration**

98           There is already a system in place between the Canadian Armed Forces and the Public Service Commission that gives the released member a direct entry point to priority administration. There would be no delays for the member to access the benefit if the Canadian Armed Forces were to make the determination.

99           There would, however, be significant delays if Veterans Affairs Canada or the Public Service Commission were to have the responsibility. Taking advantage of this existing system also eliminates the complexity and risk associated with the sharing of sensitive personal and the involvement of additional decision makers.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

**100      Control of the Information and its access**

- 101     The Canadian Armed Forces has created and has control of the member's complete medical record, including health status at recruitment. One of the key factors to ensuring that a fair and equitable decision and appeal are made is to consider all relevant information. All required files are already in the possession of Department of National Defence and Canadian Armed Forces medical and administrative authorities. Should supporting documents be lacking, the member, while in service, still has access to medical officers who can conduct further tests, refer to specialists, obtain supporting documents or obtain Base/Wing Surgeon and Command Surgeon's input.
- 102     In other words, this information is already within the control and knowledge of the chain of command. Given the sensitive nature of the information, as well as the number of individuals already involved, it does not make sense for the data to be transferred to another decision maker.

**103      Timely Decision**

- 104     The Canadian Armed Forces is also best placed to make a timely decision with respect to the condition of being attributable to service. If this determination is not made by the Canadian Armed Forces at the time of release, the main advantage intended by the creation of Bill C-27 – speedier access to public service jobs – is greatly eroded. If the Canadian Armed Forces is not assigned this responsibility, the already lengthy medical release process would be further prolonged by additional processes.

**105      Continuous service and Canadian Armed Forces recognized employment for Public Service applications**

- 106     The determination of whether a medical release is attributable to service by the Department of National Defence and Canadian Armed Forces early on in the release process would increase the chances that members and veterans will benefit from priority hiring employment opportunities, hence maximizing the probability of continuous employment<sup>16</sup> and its direct benefits. Those benefits are: the rate of pay on appointment; drawing a *Canadian Forces Superannuation Act* pension while contributing to the public service pension plan; the Public Service Health Care Coverage Plan; the Dental Care Plan; vacation leave entitlements (recognition of CF service);<sup>17</sup> and the possibility to transfer the security clearance.<sup>18</sup>

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<sup>16</sup> *Public Service Pension and Benefits, Retired Member – Re-employment After Retirement.*

<sup>17</sup> *Treasury Board Directive on Terms and Conditions of Employment.*

<sup>18</sup> CANFORGEN 052/09, *Transfer of Security Clearance Record After Release.*

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

**107      The Caveats – No matter which department is vested**

108     Vesting the Canadian Armed Forces with responsibility to make the determination under Bill C-27 eliminates the problems related to information sharing and efficiencies. It does, however, leave questions about **how** the decision maker should consider the evidence in determining whether a release is attributable to service; what procedural protections should be given to the releasing member; and the potential consequences on the member's future benefits. Note that these questions are identical whether the Canadian Armed Forces, Veterans Affairs Canada or the Public Service Commission is vested with making the determination under Bill C-27. We have outlined how these questions could be addressed if the Canadian Armed Forces is vested with the responsibility.

**109      Rules of Evidence**

110     Veterans Affairs Canada legislation includes rules of evidence, including the duty to give the benefit of the doubt to veterans.

111     Since the Interdepartmental Project Charter scenario plans for a new process design, the rules of evidence found in the legislation set up and administered by Veterans Affairs Canada would not automatically apply to determinations made under Bill C-27.

112     If the Canadian Armed Forces is to make determinations about the attribution of a medical condition to service, it is recommended that the department follow similar rules of evidence and interpretation that Veterans Affairs Canada uses in order to reach its decisions. The rules of evidence are intrinsically tied to the precedents on the interpretation of the term attributable to service making it important to keep both the interpretative rules as well as the evidentiary rules. Defence Administrative Order and Directive 5019-2, *Administrative Review*, already has a section on “the standard of proof and evidence” for different releases. It would not be difficult to amend that section to include guidance as to how attribution to service should be weighed.

**113      Procedural Protections**

114     The procedural protections outlined in Defence Administrative Order and Directive 5019-2, should be afforded to the releasing member with regard to all of the following: the decision to release him or her; the basis or reason for the release (release category); and the question of attribution.

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

115 For this to occur in an efficient and meaningful way, a preliminary determination about attribution should occur early on in the administrative review process, and all relevant information should be provided to the releasing member as part of the disclosure package. This is critical because a member who is not satisfied with the decision may challenge it through the military redress or grievance process. For the sake of procedural fairness, the member requires sufficient notice and all relevant information in order to decide whether to proceed with a grievance.

**116 The Surgeon General's Point of View**

117 If the Canadian Armed Forces becomes the decision maker under Bill C-27, objections by the Surgeon General can be anticipated. The Surgeon General, who is responsible for overseeing the provision of medical care to Canadian Armed Forces members, has been hesitant in the past to have medical officers decide whether an injury or condition is attributable to military service. As noted earlier, medical officers are already making this decision in the context of Reservists' entitlements to care and benefits. This issue has come up in the context of the administrative review and medical employment limitation process and also with reference to serving members who have approached Canadian Armed Forces medical personnel to provide opinions in support of Veterans Affairs Canada applications. The argument has always been that it puts medical personnel in a conflict of interest, as they have to balance the needs of their patient and the interests of their employer.

118 In most cases, however, it should be possible to attribute the cause of an injury or condition without medical expertise. Should medical expertise become necessary, Director Medical Policy, who would not have been involved in treating a specific member, is empowered to advise release authorities under Defence Administrative Order and Directive 5019-2.

119 It would therefore make sense to have the Canadian Armed Forces determine whether the medical condition requiring the release of a member is attributable to military service. This would eliminate the need for duplication of effort, and would ensure that the decision maker could get input from medical policy experts and the member himself or herself.

120

## **Conclusion**

121 Despite its substantive expertise in determining the meaning of the term "attributable to service" with regard to its own legislation, there would be no other benefit in assigning Veterans Affairs Canada as the competent authority under Bill C-27. The design and implementation of new administrative and review processes (rather than capitalizing on existing processes), the risk and

***Canadian Armed Forces best positioned to determine Public Service priority hiring  
for releasing members***

complexity of data sharing, the additional steps and delays for releasing Canadian Armed Forces members, the lesser procedural protections for the member, and the potential implications on future benefits amount to a potential for unfairness for ill or injured Canadian Armed Forces members.

- 122 It is the considered opinion of both the Department of National Defence and Canadian Forces Ombudsman and the Veterans Ombudsman that the Canadian Armed Forces are best placed to make the determination of whether a medical release is attributable to service pursuant to Bill C-27. The Canadian Armed Forces has control of the evidence as well as an existing infrastructure that could be adjusted to accommodate the new requirement. More importantly, the ill or injured Canadian Armed Forces member stands to gain significant benefit from quicker access to enhanced hiring opportunities in the Public Service.
- 123 This option would be the most efficient means of giving timely access to the benefit, and encourages a straightforward and uninterrupted transition for former Canadian Armed Forces members who have become ill or injured as a result of their service.