Asymmetric Universality of Service?

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Last October, the Chief of the Defence Staff (CDS) opined that the Canadian Forces (CF) must adopt a more flexible approach concerning the continued employment of wounded CF personnel.[1] This is not a new comment from the CDS.[2] According to Murray Brewster's article, the CDS has suggested that, notwithstanding the concept of 'Universality of Service' (colloquially referred to as 'U of S'), the CF needs to review whether it will seek the
compulsory release of wounded CF personnel or, alternatively, if it will retain personnel who do not meet U of S.

However, Mr. Brewster's article is quite brief and the CDS' comments are generalized. Anyone who is reasonably well-informed of such matters may be left wondering: what is the actual policy shift the CDS is proposing? Are there nuances that Mr. Brewster's article only hints at? After all, as with military planning, the devil is in the details.

This blog article suggests that what the CDS may truly have in mind could constitute discriminatory conduct by the CF. Ultimately, the CDS' proposed policy change must necessarily define what he means by 'wounded' CF personnel, as well as the scope of the potential policy shift. In order to examine the merits of the potential policy, we must first examine, if briefly, the legislative framework for U of S. While the scope of this brief blog article does not permit a comprehensive review of U of S and the justifications for compulsory release from the CF on medical grounds, an examination of the merit of the policy changes hinted at by the CDS requires a basic understanding of the basis for the current policy.

While this article does not purport to be a comprehensive review of the principles of U of S and the issues arising therefrom, it will briefly describe the source of the concept of 'unlimited liability' as it pertains to the CF and the grounds for compulsory release for medical reasons. This article will not examine the merits or shortcomings of the process by which medical employment limitations (MEL) or medical categories are determined

[1] Murray Brewster, "Medically unfit for deployment? We'll try to employ you elsewhere, says Canada's top general" (October 9, 2017), online: CBC News.
[2] Bruce Campion-Smith, "Top general urges new approach to injured soldiers" (June 20, 2017), online: Toronto Star Online.

and changed by statutory decision-makers in the CF; however, that particular thorny issue will be addressed in a forthcoming blog article. Finally, this article will posit the potential bases of what the CDS might be contemplating, and will offer a brief examination of potential pitfalls of such policy proposals.

Universality of Service

The term U of S is not defined by the *National Defence Act (NDA)*[3]. The concept of U of S as it pertains to the CF is based upon section 33 of the *NDA*. In order to have a full appreciation for the impact of this section, it is useful to examine the entirety of the provision, which distinguishes between members of the Regular Force and Reserve Force:

> **Liability in case of regular force**
>
> 33 (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.
>
> **Liability in case of reserve force**
>
> (2) The reserve force, all units and other elements thereof and all officers and non-commissioned members thereof
>
> > (a) may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council; and
> >
> > (b) may be called out on service to perform any lawful duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.
>
> **Exception in case of reserve force**
>
> (3) Nothing in subsection (2) shall be deemed to impose liability to serve as prescribed therein, without his consent, on an officer or non-commissioned member of the reserve force who is, by virtue of the terms of his enrolment, liable to perform duty on active service only.
>
> **Meaning of duty**

[3] RSC 1985, c N-4.

(4) In this section, duty means any duty that is military in nature and includes any duty involving public service authorized under section 273.6. [emphasis added]

Subsection 33(1) essentially means that any member of the Regular Force must be both willing and able to perform any military duty that he or she could lawfully be called upon to perform. While this article will not offer a detailed examination of U of S, for the sake of the discussion that follows, it is posited that a CF member who is permanently disabled, either physically or mentally, to the extent that he or she cannot perform all military duties that could lawfully be expected of him or her, would be in 'breach of U of S'.

It is worth noting that not all disabilities will necessarily result in a breach of U of S. For example, a CF member could suffer an injury – say a knee injury – which results in a permanent reduction of the flexibility and strength of that joint. However, if the CF member can still predictably and consistently perform the functions expected of any deployed CF member, he or she would likely not be in breach of U of S. It is possible that certain, physically exigent, Military Occupation Specifications (MOS) may be closed to him or her, but such limited scope of potential 'employment' does not constitute a breach of U of S. For example, an infantryman (or woman) who suffers an injury that precludes him or her from performing all tasks expected of an infantryman, but who remains capable of performing all generic military tasks, would likely only face obligatory change of MOS. In such circumstances, the CF member might choose release rather than a change of MOS. That, however, is distinct from the topic of Mr. Brewster's article.

Medical Release

Release from the CF is governed under Chapter 15 of the Queen's Regulations and Orders for the Canadian Forces (QR&O), which includes regulations enacted by the Governor in Counsel or Minister of National Defence under subsection 12(1) of the *NDA*. These regulations are amplified by orders issued by the CDS and statutory provisions from the *NDA*, which are repeated in the QR&O. The table to QR&O Article 15.01 established the various grounds for release, both voluntary and compulsory. For example: Item 4 of the table establishes the various circumstances of voluntary release; the remaining Items (1, 2, 3 and 5) are universally 'compulsory' release items, and describe the grounds (i.e. justification) for a number of different circumstances that could oblige a release of a CF member.

The grounds for compulsory release items range from: misconduct that results in a sentence of dismissal from Her Majesty's service[4]; conviction of serious offences by service tribunals or civil courts, where the misconduct was related to the offender's military duties, that would warrant compulsory release[5]; conviction of an offence by a civil court for offences not related to military duties, or other unsatisfactory civil conduct that reflects discredit upon the CF[6]; or circumstances in which a CF member is no longer advantageously employable – i.e. a CF member "…who, either wholly or chiefly because of the conditions of military life or other factors beyond his control, develops personal weaknesses or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces"[7].

In light of the context of this article, we will focus on Item 3 of the table to QR&O 15.01, which concerns compulsory release for medical reasons. There are two sub-Items: 3a and 3b:

a. On medical grounds, being disabled and unfit to perform duties as a member of the Service.

b. 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.

The latter is much more common an occurrence, and many CF personnel tend to refer to a '3b release' when describing circumstances in which a CF member will be subject to compulsory release due to a breach of U of S.

In Mr. Brewster's article, the CDS refers to the perception that, if a CF member does not recover from an injury or illness within 3 years, the member faces a prospect of compulsory release, presumably under Item 3 of the Table to QR&O 15.01.

This 3-year period does not appear to be established by legislation. Indeed, QR&O 15.05, a Governor-in-Council regulation, indicates that a CF member who is in breach of U of S must be released within 6 months:

15.05 - RETENTION OF OFFICERS AND NON-COMMISSIONED MEMBERS ELIGIBLE FOR RELEASE ON MEDICAL GROUNDS

[4] Table to QR&O 15.01, Item 1a.
[5] Table to QR&O 15.01, Item 1b.
[6] Table to QR&O 15.01, Item 2a.
[7] Table to QR&O 15.01, Item 5d.

> An officer or non-commissioned member of the Regular Force who is suffering from a disease or injury that necessitates his release as medically unfit may, at the discretion of the Chief of the Defence Staff or the officer commanding the command, be retained for prolonged treatment, institutional care or medical observation for a further period of not more than six months, at the end of which time he shall be released unless otherwise directed by the Minister.

Presumably, this is one of the reasons why most Temporary Medical Categories (T Cat) last for 6 months. QR&O 15.05 permits the Minister of National Defence to issue instructions extending the time before compulsory release must be pursued. I am unaware of any such direction given by the Minister. The Minister has enacted QR&O Article 15.06, which states:

> **15.06 - RELEASE AS MEDICALLY UNFIT**
>
> Where an officer or non-commissioned member is to be released as medically unfit, he shall be referred to the Department of Veterans Affairs if he requires treatment or institutional care and, subject to article 15.05 (Retention of Officers and Non-commissioned Members Eligible for Release on Medical Grounds), his release shall be completed as soon as possible after that reference.

Perhaps the Minister has issued additional instructions; however, it does not appear that they have been published in a particularly notorious fashion. Alternatively, a CF policy maker, who is not the Minister, may have decided upon a 3-year period based, perhaps, on observations by a CF medical practitioner or practitioners that 3 years is a reasonable time to permit recovery. That may be a reasonable and logical conclusion to draw in light of what may constitute appropriate recovery time for ill or injured CF personnel; however, absent a policy decision by the Minister, pursuant to QR&O 15.05, to prolong the period, the jurisdiction of such a policy has dubious merit.

If the Minister has not issued direction concerning periods of retention, it may be that someone concluded that a CF official could act in lieu of the Minister under the doctrine of devolved authority.[8] However, the exercise of devolved powers under the so-called *Caltona* Doctrine may only be relied upon if the legislative regime that delegates powers to the Minister (as under QR&O 15.05) expressly or implicitly indicates that such powers may be devolved. In light of the context of QR&O 15.05 – in particular, reference to the

[8] *The Queen v Harrison*, [1977] 1 SCR 238 [*Harrison*], adopting the *ratio decidendi* from *Carltona Ltd v Commissioners of Works*, [1943] 2 All E.R. 560. See also: Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans), [1997] 1 SCR 12.

CDS' discretion being subject to the Minister's direction – it appears clear that this is a power that the Governor-in-Council did not intend to devolve to anyone below the Minister[9].

What does the CDS mean by 'wounded'?

A common definition of 'wound' is: "injury done to living tissue by a cut or blow"[10]. The term 'wound' or 'wounded' can be distinguished from 'injury or injured'. As described below, I suspect the CDS has made reference to 'wounded' CF members specifically to distinguish them from the more generally 'injured' CF members. However, greater clarity is necessary for a meaningful discussion. Technically, 'wounded' need not imply permanence. A wound may heal, to a varying degree. However, in the context of the discussion described by Mr. Brewster, it appears that the CDS was referring to CF members who suffer from permanent effects of their wounds. These wounds may be physical, physiological, or mental – or even a combination thereof. What appears certain is that the CDS is referring to personnel who suffer a permanent disability due to their wounds.

In other words, the CDS is referring to disabled CF personnel or CF personnel who have incurred a disability, as that term is understood under the *Pension Act*[11]:

> **disability** means the loss or lessening of the power to will and to do any normal mental or physical act

Even more specifically, the CDS is referring to CF personnel whose disability results in their inability to meet the physical and mental thresholds associated with U of S.

But is the CDS referring to all CF personnel who incur a disability during their CF service that results in a so-called breach of U of S? Based upon the limited information conveyed in Mr. Brewster's article, it is possible that the answer is: no.

Although the CDS does not expressly state that the 'wounded' whom he discusses are solely those whose mental or physical disability or disabilities are attributable to military service or, perhaps more narrowly, attributable to deployment on operations, the context of the discussion conveyed by Mr. Brewster has an air of exclusivity. Is the CDS only concerned about those CF personnel whose disability arose in the conduct of military operations, or is attributable to military service?

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[9] *Ibid, Harrison,* 245.
[10] Oxford English Dictionary.
[11] RSC 1985, c P-7, s 2.

Potentially Different 'Classes' of 'Wounded'

CF personnel who fall below the mental and physical threshold of U of S may do so for a variety of reasons. They can be wounded, or injured, in the conduct of operations outside Canada, including in what the press commonly refer to as 'combat operations'. They can be injured in the conduct of 'Special Duty Service'[12], internationally or domestically, but which are not attributable to the conduct of enemy or opposing forces. Such circumstances could range from dangerous maritime search and rescue operations during extreme weather conditions, to the triggering of long-forgotten mines on peace support operations, to vehicle accidents during deployment. CF personnel can suffer permanent disability from injuries attributable to pre-deployment training or from training required for career progression. CF personnel can also suffer injury from regular, authorized, physical fitness pursuits.

In any of these scenarios, an injury that develops into a permanent disability, such that the affected CF member falls below the U of S threshold, will likely result in a compulsory release under Item 3 of the Table to QR&O 15.01, ending that person's military career. In all of the above-mentioned scenarios, it is also likely that the disability will trigger an entitlement to benefits under the *Pension Act* and Veterans' Charter.[13]

However, it is also possible for CF personnel to become disabled as a result of circumstances that have little or nothing to do with their military duties. For example, a CF member on leave (though not leave from Special Duty Service as defined under the Veterans' Charter) who suffers injury and disability due to a motor vehicle accident, and consequently falls below the U of S threshold, would likely not receive benefits under the *Pension Act* and Veterans Charter. However, he or she would still be subject to compulsory release under QR&O Chapter 15, similar to the CF members in the earlier examples.

As described above, the concept of U of S is based upon the need for all CF members (or, at least, those of the Regular Force) to meet universal obligations that apply to all members of the CF (or, again, the Regular Force). Section 33 of the *NDA* is directly

[12] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [Veterans Charter], s 2, definition of 'special duty service'.

[13] While this article does not purport to be a comprehensive examination of entitlement to benefits under the *Pension Act,* the examples described in the preceding paragraph would likely trigger entitlement to benefits by virtue of arising during 'Special Duty Service' (subs 21(1) of the *Pension Act*) or otherwise arising out of or being directly connected with military service (subs 21(2) of the *Pension Act*).

connected to 'Release Item 3' of QR&O 15.01. Within this regime, the cause of the disability that results in the obligatory release is irrelevant.

However, the context of the CDS' comments may leave a well-informed reader with a nagging suspicion that, perhaps, the CDS classifies 'his' wounded in discrete categories. If that is the case, there is marked potential for discriminatory decision-making and action by CF and governmental decision-makers and actors.

At the recent appointment of the present Judge Advocate General, the CDS stated that he is committed to ensuring that the 'Rule of Law' is upheld in the administration of the affairs of the CF. Consequently, my optimistic view is that he would not wish to pursue a discriminatory policy. However, my pessimistic (pragmatic?) outlook acknowledges that many senior CF leaders tend to regard the 'ill and injured' in a stratified manner:

1. those who are ill and injured – or, perhaps more to the CDS' liking, 'wounded' – due to Special Duty Service (Category 1);

2. those who are ill and injured due to military service generally (Category 2); and

3. those who are ill and injured for reasons that are not attributable to military service (Category 3).

Unfortunately, the order of relative importance for some decision-makers is likely obvious.

Universality of Service is Either Universal or it is Discriminatory

If, as my inner pessimist insists, the CDS' intent is to pursue a policy whereby only Category 1 or Category 1 & 2 'wounded' CF personnel are somehow retained in the CF, notwithstanding the statutory basis for U of S, then he would be presenting a policy that is manifestly discriminatory and, consequently, unlawful.

First, there is section 33 – or, perhaps more accurately, subsection 33(1) – of the *NDA*. While the CDS has control and administration of the CF, this does not extend to rewriting legislation that Parliament has enacted. Not even his masters, the Minister of National Defence or the Governor-in-Council, may do that.

However, the observant will note that subsection 33(1) only applies to the Regular Force. While it will undoubtedly raise the hackles of some to suggest the following, it is nevertheless true: U of S only applies fully to the Regular Force. Conceivably, it would

be possible to organize either a sub-component of the Reserve Force or one or more elements of an existing subcomponent of the Reserve Force, to permit CF personnel to continue to serve, notwithstanding that their medical status falls below the U of S threshold established by subsection 33(1) of the *NDA*.

However, if the CDS pursued such a policy, it would be difficult to distinguish between the aforementioned categories of wounded (or disabled) CF personnel in a manner that is not discriminatory. Conceptually, U of S is established in the *NDA* in order to ensure that the CF – or, perhaps more accurately, the Regular Force – is capable of meeting its broad range of potential military tasks and missions. The concept does not distinguish between different causes of disability that would prevent the accomplishment of tasks and missions.

If the CDS were to introduce a policy that would permit certain CF personnel to remain in the CF because their disability arose during Special Duty Service or otherwise arose out of, or was directly connected to, military service, but deny such opportunity to CF personnel whose disabilities arise other than from military service, it is likely that a challenge under the *Canadian Human Rights Act* (*CHRA*)[14] and the *Charter*[15] would be successful.

Canadian Human Rights Act

Generally, under the *CHRA*, an employer is prohibited from discriminating against an employee by reason of physical or mental disability[16]. This prohibition does not apply where refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.[17] One might consider this exception sufficient to support the concept of U of S applicable to the CF. However, subsection 15(2) of the *CHRA* also expressly requires employers to accommodate an employee's disability:

> **Accommodation of needs**

[14] RSC 1985, c H-6 [*CHRA*].
[15] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
[16] *CHRA*, n 13, subs 3(1) and s 7. Although members of the CF are not in a contractual employment relationship, the prohibitions under the *CHRA* apply to the CF as if it were an employer, which is tacitly acknowledged under DAOD 5516-0 Human Rights.
[17] *Ibid*, para 15(1)(a).

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph
(1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.[18]

Nevertheless, the CF need not demonstrate that reasonable accommodation would impose an undue hardship on the CF:

Universality of service for Canadian Forces

(9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.[19]

It could be argued that subsection 15(9) of the *CHRA* exists for administrative efficiency: where the armed forces raised by Her Majesty in Canada must remain efficient, flexible, and cost-effective, any accommodation of someone who cannot meet U of S would be an undue hardship.[20] Note, too, that subsection 15(9) does not prohibit accommodation by the CF; it simply relieves the CF of that obligation. What, technically, prohibits the CDS from exercising his own (arbitrary) discretion to permit select CF personnel to remain in the CF indefinitely, notwithstanding a breach of U of S, is the compulsory direction from the Governor in Council, under QR&O 15.05.

Provided that the CF treats all personnel in breach of U of S in the same fashion, the risk that CF practices will be held to be discriminatory is low. Essentially, if CF personnel in breach of U of S face compulsory release based upon *bona fide* operational requirements, then such compulsory release should not be held to be discriminatory. Equally, if the appropriate statutory authority establishes a regulatory and/or policy

[18] *Ibid*, subs 15(2).
[19] *Ibid*, subs 15(9). I note, parenthetically, that subs 15(9) of the *CHRA* does not appear to recognize the distinction drawn at subs 33(1) of the *NDA* regarding Regular Force personnel.
[20] Nevertheless, it is a fair comment that the CF has not been particularly effective at communicating the precise parameters of U of S or the justification of those parameters. Often, a compulsory release on medical grounds will be justified by a general (if not vague) conclusory statement by Director Medical Policy regarding a CF member's Medical Employment Limitations (MEL) or his or her permanent medical category (P Cat). However, closer examination of that particular issue must wait for another Blog article.

regime by which U of S is, or can be, suspended for all personnel in breach of U of S, then the risk of discrimination is low.

However, if some CF personnel face compulsory release because their disability is not attributable to military service, but other CF personnel, who are equally in breach of U of S, do not face the same consequences, then there is a marked increase in the risk of discrimination.

This is because the justification for compulsory release – *bona fide* operational requirements – does not distinguish between the cause or the source of an injury or disability. It is the existence of the permanent injury or disability that is the justification for the release.

Perhaps the CDS believes that such discrimination can be justified by a politically expedient appeal to emotion: 'But these soldiers were wounded in the service of their nation!' However, such a position implies that those whose injuries or disability arose otherwise are less deserving of sympathy or non-discriminatory treatment.

Moreover, that's not how the *CHRA* is constructed. Nor, objectively, is that an appropriate policy within the broader concept of human rights. Discrimination is presumptively prohibited. This does not mean that relevant distinctions cannot be drawn. However, if a person is to be refused employment, there has to be a rational justification for doing so. In this manner, a person who cannot meet U of S due to a non-military-related injury is no different than a person who cannot meet U of S due to a military-related injury.

Canadian Charter of Rights and Freedoms

The same would hold true under the *Charter*. Section 15 prohibits discrimination based upon both enumerated and analogous grounds:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Mental or physical disability is an enumerated ground. In the context presented above, a CF policy that resulted in the compulsory release of select CF personnel based upon the origin of their disability, but not for others who were also in breach of U of S, would

be contrary to the *Charter.* Presumably, such discriminatory practice would not be the subject of an 'affirmative action program' that related to the exception under subs 15(2) of the *Charter* – it would be difficult to comprehend how discriminating against one class of disabled CF personnel compared to one or more other classes of disabled CF personnel could constitute an affirmative action program. Moreover, the Governor in Council could not enact regulations, nor could Parliament enact legislation, that would create such a policy framework. The universal nature of U of S is what justifies its existence and application under the *Charter.*

It is possible for an impugned practice or legislation, which is discriminatory under enumerated or analogous grounds, to be saved either under the 'substantive contextual approach' to section 15 of the *Charter*[21] (what can colloquially be referred to as the '*Law* test'), or, failing that, under the general exception at section 1 of the *Charter*, as a reasonable limit, prescribed by law, and which is demonstrably justified in a free and democratic society. It is unlikely that the potential policy described above would be upheld under either of these regimes.

Under the '*Law* test', it was necessary to examine three general issues:

1. Does a law impose differential treatment between the claimant and others, in purpose or effect;
2. Is the basis for the differential treatment one or more enumerated or analogous grounds of discrimination under s. 15 of the *Charter*; and
3. Does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee under the *Charter*?

This analysis included regard to whether the claimant's dignity was demeaned. In *R v Kapp*[22], the Supreme Court of Canada further refined the test for discrimination under subs 15(1) of the *Charter*:

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

This refinement was driven, in part, by the ambiguous nature of what could constitute demeaning 'dignity' within the context of the 'Law test'.

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[21] *Law v Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 [*Law*].
[22] [2008] 2 SCR 483.

Assuming that the CDS seeks to have the relevant legislation amended (since altering the legislative basis of U of S is beyond his authority), it is likely that a legislative amendment of U of S to permit 'Category 1' or 'Category 1 and 2' disabled CF personnel to remain in the CF, but which enforces compulsory release for 'Category 3' disabled, will be discriminatory under subs 15(1) of the *Charter*.

Such distinction between the Categories of disabled CF personnel would clearly be based upon a personal characteristic – not only the disability, but the origins thereof – and would fail to take into account the already disadvantaged position that such personnel have both within Canadian society, and within the CF community. They would thus be subject to substantively differential treatment compared to the other categories of disabled CF personnel. The differential treatment would be based on one or more enumerated grounds under section 15 of the *Charter*. The distinction drawn would clearly perpetuate a prejudice, and potentially stereotyping. The differential treatment would clearly be discriminatory, by withholding a benefit from one Category of disabled CF personnel in a manner which has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

In light of the nature of the potential discrimination, it would be difficult to conceive of an argument under a 'section 1 *Charter* analysis' that would establish that such discrimination would be proportional. Assuming that the objective would be to permit CF personnel, who become disabled in the performance of their duties, to carry on their duties, the prospect of discriminating against those whose disability did not arise out of military service does not seem to be rationally connected to such an objective and certainly does not minimally impair the right against discrimination of that category of CF personnel.

Retention in the Reserve Force

The analysis above holds true even if the CDS' intent is to retain disabled CF members in the Res F. If the opportunity is extended to any disabled CF personnel, or, more precisely, a specific category or class of disabled CF personnel, it must be extended to all within the same policy framework. Otherwise, it would likely be discriminatory.

There is scope for such policy. Although some CF policy makers may be reluctant to acknowledge the statutory distinctions between the Regular Force and Reserve Force, those distinctions do exist, and they highlight the distinction regarding U of S. While it

may be 'politically incorrect' to draw such a distinction in light of the 'all for one, and one for all' sentiment expressed in such past slogans as the 'Total Force', the distinction between Regular and Reserve Forces service is actually established by and under the *NDA*.

This article has already highlighted a significant difference under section 33 of the *NDA*. Another difference is that Regular Force members serve on continuing, full time service[23], whereas members of the Reserve Force serve other than on continuing, full time service, except when on active service[24]. This distinction can sometimes be muddied by common practices in, and commentary about, the CF. For example, the comments that someone is a long-serving, full-time member of the Reserve Force tends to belie that distinction. This does not mean that Reserve Force personnel are less committed to their nation's service – frankly, many Reserve Force personnel sacrifice much of their personal time to their part-time service in addition to their civilian employment or work – but it does mean that their status under the *NDA* is different from Regular Force personnel.

The distinction under section 33 of the *NDA* is reinforced by the complementary statutory framework established under the *Canadian Forces Superannuation Act (CFSA)*[25]. This act was amended in 2003[26] (which amendments came into force in 2007) to create the Reserve Force Pension Plan under Part I.1 of the *CFSA*. This created a parallel superannuation regime for the part-time members of the CF. Select Reserve Force personnel who had been on extensive full-time service at the time the amendments came into force, and reservists who subsequently joined the Regular Force would be irrevocably part of the Part I (Regular Force) Pension Plan. However, part-time Reserve Force personnel could elect to contribute to the Reserve Force Pension Pan.

Where a member of the Regular Force can no longer continue to serve because he or she has a disability that places him or her in breach of U of S, that Regular Force member can be entitled to an immediate, unreduced annuity under the *CFSA*, if the member has 10 years or more of pensionable service.[27] The trigger for this entitlement is a disability that would prevent the Regular Force member from continuing to serve in

[23] *NDA*, n 5, subs 15(1).
[24] *Ibid*, subs 15(3).
[25] RSC 1985, c C-17.
[26] *An Act to amend the Canadian Forces Superannuation Act and to make consequential amendments to other Acts*, SC 2003, c 26
[27] *CFSA*, n 24, para 16(1)(d).

the Regular Force.[28] This threshold is significantly lower than the threshold of disability entitlements for most civilian employment regimes or, for example, under the *Canada Pension Plan*[29]. Section 2 of the *Canada Pension Plan* defines 'disabled' as follows: "disabled has the meaning assigned by section 42". Section 42 describes 'disability' as follows:

> (2) For the purposes of this Act,
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> (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
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> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
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> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and
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> … [emphasis added]

Consequently, the threshold for disability within the statutory framework for broad benefits plans such as the Canada Pension Plan is markedly higher than that for entitlement of benefits for Regular Force personnel under the *CFSA*. Objectively, this is due to the nature of military service, and is predicated on the same justification for the exemption under subsection 15(9) of the *CHRA* as well as the nature of subsection 33(1) of the *NDA*.

Conceptually, the statutory entitlement to an unreduced, immediate annuity under para 16(1)(d) of the *CFSA*, notwithstanding that the CF member has not otherwise reached the service threshold for an immediate annuity (e.g. formerly 20 years of unbroken service, presently 25 years of pensionable service) is to compensate the Regular Force member who faces compulsory release earlier than expected, for reasons that do not involve misconduct on the part of the CF member. Technically, Parliament could set the threshold for entitlement under such circumstances at any level. It has chosen to set the

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[28] *CFSA*, n 24, s 2 definition of 'disabled': "disabled, as applied to any member of the regular force, has reference to any condition rendering him mentally or physically unfit to perform his duties as such member".

[29] *Canada Pension Plan*, RSC 1985, c C-8.

threshold at 10 years. Equally, Parliament has established immediate, rather than deferred, indexation for such annuities. Again, that can be viewed as a policy decision by Parliament to compensate for early obligatory release due to factors that are ostensibly beyond the service member's control.

The same threshold is not established for the Reserve Force Pension Plan. Under Part I.1 of the *CFSA*, a contributor to the RFPP is not entitled to an immediate, unreduced annuity when the Reserve Force member breaches U of S established for Regular Force personnel. A reservist triggers entitlement to an annuity under the RFPP only if the reservist is disabled and cannot seek gainful employment. Para 43(1)(d) of the *Reserve Force Pension Plan Regulations*[30] states:

> 43 (1) A member who ceases to be a participant and has to their credit not less than two years of pensionable service is entitled to an immediate annuity, if
>
> …
>
> (d) they are disabled by reason of suffering from a physical or mental impairment that
>
> (i) prevents the member from engaging in any employment for which the member is reasonably suited by virtue of education, training or experience, and
>
> (ii) can reasonably be expected to last for the remainder of the member's lifetime; …

Note that the threshold for an immediate unreduced annuity under the Reserve Force Pension Plan is much more similar to the threshold under the *Canada Pension Plan* than the threshold established for the Regular Force under para 16(1)(d) of the *CFSA*. The threshold for the Reserve Force Pension Plan is consistent with the threshold for civilian employment disability. This difference in threshold, established in the same statutory regime as the Regular Force pension plan reinforces the contention that the expectations of service for Regular Force personnel are more stringent than Reserve Force personnel. Certainly, Reserve Force personnel who serve with Regular Force units or elements, particularly in an operational framework, will be expected to meet not only the U of S applicable to Regular Force personnel, but must also meet the specific

[30] SOR/2007-32 [*RFPPR*]. Note that, while the provisions for the Regular Force (and select members of the Reserve Force who are deemed to be Regular Force contributors under Part I of the *CFSA*) are enacted in statute (the *CFSA*), this provision is enacted in a regulation, enacted by the Governor in Counsel pursuant to s 59.1 of the *CFSA*.

medical, physical, and mental thresholds for a particular MOS or operational element, during that service with regular force units. However, such exigencies are distinct from their status as members of the Reserve Force.

Conclusion

Based upon Murray Brewster's brief on-line article, it is not clear what the CDS truly intends regarding his proposed policy changes relating to retention of CF personnel who are in breach of U of S. It is clear that the CDS wishes to change policies, many of which are beyond his authority to amend or alter. In light of the context of the discussion – the appropriate manner of addressing the desire of many wounded CF personnel to continue to serve in the CF – the policy shift signalled by the CDS might potentially try to draw a distinction between: (i) CF personnel who suffer a permanent physical or mental injury or illness due to Special Duty Service or whose injury or illness is otherwise attributable to military service; and (ii) CF personnel who suffer permanent physical or mental injury or illness that is not attributable to military service. Drawing such a distinction would likely be discriminatory.

While there is scope under the *NDA*, as it is presently written, to create a regulatory regime that would permit retention of CF personnel who are disabled within the meaning of the *Pension Act* and who are in 'breach of U of S', any change to the regulatory structure that discriminates against a 'category' of ill and injured runs a strong risk of being discriminatory under the *CHRA* and inconsistent with section 15 of the *Charter*.