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Senior Officials hold a not-for-attribution technical briefing on receipt of the Third Independent Review of the National Defence Act and the associated recommendations for the ongoing and necessary evolution of the Canadian Armed Forces Military Justice system

MODERATOR: Good morning everyone and thank you for joining us today. Bon matin tout le monde. On vous remercie de votre participation ce matin. Nous avons avec nous ce matin Senior Officials. We have Senior Officials. Today our subject matter experts will be delivering opening remarks which we will follow with a question and answer session for which the usual one question and one follow up will apply.

We request that their comments be attributed to Senior Officials and if you wish to ask a question please let me know in the chat function so we can keep track as to who is asking questions. My name is Moderator. Pour répéter en français nos experts qui sont ici ce matin vont d'abord livrer leurs énoncés et par la suite il y aura une session de questions et réponses.

Comme d'habitude on vous demande de vous limiter à une question et un suivi. Leurs commentaires sont attribuables aux hauts dirigeants et si vous voulez une question veuillez s'il vous plait nous faire signe dans la fonction chat. Faites-le à moi-même, Moderator. Bref sans plus tarder nous allons continuer avec leurs énoncés. Without further ado let's move ahead with opening remarks.

SENIOR OFFICIAL: (Inaudible due to technical problem at source)

MODERATOR: We seem to be having a slight technical issue. Bear with us for a moment.

SENIOR OFFICIAL: Je suis désolée et bonjour à tous. As Senior Official I welcome this timely and comprehensive report by the third independent review authority. In his report Justice Fish

reaffirms that the military justice system is constitutional, legitimate and necessary. It also reaffirms there is a demonstrably justified need for a separate military justice system to maintain discipline, efficiency and morale.

The stated purpose echoes statements made by the two previous independent review authorities and a series of decisions from the Supreme Court of Canada. Justice Fish's report arrives at a time when the military justice system is facing various challenges as does the civilian justice system from time to time.

It also comes at a time when the military is facing a sexual misconduct crisis, the need for culture change and increased public and parliamentary scrutiny. The recommendations contained in Justice Fish's report will go a long way in strengthening the military justice system and enabling it to continue to be an indispensable tool in the maintenance of the discipline, efficiency and morale within the Canadian Armed Forces.

As with previous independent reviews, Justice Fish's review provides a well informed and thoughtful analysis of the military justice system. I believe it will guide the further development of the military justice system so it continues to be what the Supreme Court of Canada has recently observed as a full partner in administering justice alongside the civilian justice system.

Les recommandations contenues dans ce rapport sont à tous les égards les plus vastes pour le système de justice militaire depuis celles formulées par l'ancien juge en chef du Canada l'honorable Brian Dixon à la fin des années 1990. The reforms proposed by this report will further propel the military justice system into its modern era and continues the larger trend of lessening the command centric nature of the military justice system.

This will further strengthen the independence of the military justice actors including the judiciary, the prosecutors, defence counsel and the military police. L'évolution continue du système de justice militaire est marquée en partie par son ancrage avec le système de justice civile. Le Juge Fish considère l'engagement avec le Ministère de la Justice sur des questions spécifiques et dans des engagements formels et durables comme un moyen d'y parvenir.

Throughout its pages Justice Fish's report sets out recommendations to advance the development of the military justice system. Justice Fish proposes profound institutional and legislative changes and he appreciates that significant resources are necessary to navigate the legal and operational complexities to achieve this. He recommends an assessment of the adequacy of funding for military justice policy development.

The report contains 107 recommendations, 64 recommendations specifically related to the military justice system and they may be broken down into the following subject areas: military justice actors 16 recommendations, jurisdiction and service offences and punishments 12 recommendations, the military justice process from investigation through the disposition by a service tribunal 36 recommendations.

There are 43 recommendations in the remainder of the report, the majority of these touching on aspects of the larger military justice system in varying degrees of directness. Most of the 10 recommendations found in the chapter on sexual misconduct involve the military justice system. The chapter on military police oversight contains 11 recommendations, a number of which deal with the use of military justice and formation and consultations with military justice actors.

There are 10 recommendations from the chapter on the independent review process and military justice policy development which involve the military justice system and the Department of National Defence as well as the Canadian Armed Forces capacity to support these subjects.

In conclusion, Justice Fish as the third independent review authority has provided a landmark examination of the military justice system. Unique in its breadth and depth of scope it is well informed and provides significant and very thoughtful analysis in support of its recommendations. The third independent review authority's recommendations contain more than proposed changes but also practical paths to follow to achieve them.

I wholeheartedly welcome this report and the invaluable insight and guidance that it contains. The report sets out many complex issues to be addressed. There will be a need for further examination, analysis and importantly increased resources in order to undertake the important and enormous work to give effect to its recommendations. Thank you.

MODERATOR: Merci. Up next we have Senior Official.

SENIOR OFFICIAL: Bonjour à tous. I am pleased to be here today and proud to be part of this important phase of the independent review of the National Defence Act. This is an excellent opportunity to open a discussion on the findings and recommendations of Justice Fish and his team about how to enhance the independence and authorities of the military police.

Having reviewed the report tabled today by the Minister of National Defence I am confident that the implementation of the many recommendations will result in concrete improvements going forward. The military police has remained somewhat outside the main scope of previous independent reviews.

This report however is very consequential. Almost half of the 107 recommendations impact the military police at the institutional and operational levels in a very positive way. Many would bring substantial reforms to the institution, further enabling and empowering independent and professional policing services which will benefit both the Defence community and the public.

The CFPM function in the Canadian Forces military police group are set to undertake a significant evolutionary leap with the implementation of many of Justice Fish's key recommendations. This will allow us to operate under a legislative framework that reflects institutional policing standards, the military police current level of professionalism and Canadian Armed Forces operational requirements and public expectations.

To quote Justice Fish, "the independence of the military police from the chain of command in the context of their policing duties and functions can be bolstered in a number of ways." To this end the report recommends that the CFPM be appointed by the Governor in Council and report to the Minister of National Defence while ensuring no one from the chain of command would have the authority to intervene in ongoing military investigations.

These measures would confer an institutional independence to the CFPM that is comparable to that of the RCMP Commissioner. At the operational level, several recommendations propose pragmatic measures to modernize the framework governing searches, warrants, arrests and pretrial custody.

For example members of the military police would be entrusted with broader responsibilities in regard to charge laying. They would also have the authority to release persons from custody with conditions like their civilian police colleagues. Also charges laid by the military police would be referred directly to the military prosecution service without the intervention of the accused's chain of command as could be the case presently.

I am convinced that measures like these would increase the trust of the Defence community and the public at large in military police investigations and ultimately result in better policing services. Some of these recommendations are potentially actionable right now such as those which involve the relationship between the CFPM and director of military prosecutions and a selection of the military or civilian justice system.

Recommendations which deal with training, duty to report and the relationship between the CFPM and the sexual misconduct response centre can also begin to take shape in short order. Implementing many of these recommendations will demand continued and relentless efforts but for every serving member of the military police it constitutes meaningful and necessary work. We all look forward to moving forward with their thorough implementation in coordination with all stakeholders. Thank you.

MODERATOR: Merci. Up next we have Senior Official.

SENIOR OFFICIAL: Thank you and good morning. Since the sexual misconduct response centre was created in 2015 we have identified a number of issues related to the military justice system that have negative impacts on CAF members who have been affected by sexual misconduct.

While we have tried to address some of these issues within the constraints of existing legislation and policy, it was apparent we would have to wait for the third independent review of the military justice system to seek comprehensive and enduring solutions.

I am pleased to see the report makes recommendations to address all the issues we raised with the independent review authority as well as others intended to further improve victims' experiences within the military justice system. In considering sexual misconduct, the independent review authority focused on four themes.

Military jurisdiction over sexual misconduct, the duty to report, protection and support for victims and restorative justice. While they support the military maintaining jurisdiction over sexual misconduct, they recommend that the declaration on victims' rights should be brought into force as soon as possible and until it comes into force sexual assaults should be referred to civilian authorities.

They also recommend the National Defence Act be amended to afford victims the same rights and protections afforded by the Criminal Code of Canada. With respect to the duty to report, the independent review authority recognized it results in victims losing autonomy over whether, when and how to report their victimization as well as a number of other unintended negative consequences.

As a result they recommended that exceptions to the duty to report should be established for victims, their confidants and the health and support professionals they consult and that a

working group should be established to consider other exceptions as well as circumstances under which the duty to report should be retained.

This recommendation is critical and its implementation will be of significant benefit to affected members and those who support them. To better protect and support victims they recommend that the sexual misconduct response centre implement a program that provides independent legal advice to the victims of sexual misconduct including advice on whether, how and where to report and guidance throughout judicial processes.

This program was funded in budget 2021 and work is already underway. They recommended that the SMRC should have access to all of the information it needs to exercise its mandate to investigate systemic issues and to monitor the Canadian Armed Forces adherence to sexual misconduct policy.

SMRC has had this mandate since 2019 and work is underway to access the data it needs. They recommended the mandated independence of the SMRC should be reviewed. Justice Arbour will examine this as part of the external independent comprehensive review.

Related to restorative justice, the independent review authority acknowledged compelling reasons in favour of allowing for restorative justice approaches in the military justice system. They recommended that the Judge Advocate General and the SMRC work together to propose amendments to the National Defence Act which would allow for restorative approaches within the military justice system and to develop a formal restorative justice program suited to the CAF.

This is a natural extension of the restorative engagement program the SMRC is implementing as part of the final settlement agreement related to sexual misconduct. Several of these recommendations are consistent with those made in previous reports and some speak to criticisms that have been publicly discussed in recent months.

They demonstrate the independent review authority's efforts to promote a victim-centric military justice system and one that enshrines the rights and protections of the declaration of victims' rights and the Criminal Code of Canada. SMRC is eager to advance this work, thank you.

MODERATOR: Thank you Senior Official. We now have Senior Official.

SENIOR OFFICIAL: Good morning. I am delighted to be here this morning and welcome the findings and recommendations proposed by the independent review. Recent strategic level CAF grievance initiatives reinforce that the current state of affairs is not acceptable and the grievance authority is poised for change.

A changing grievance culture and mindset is already underway to better deliver on the CAF's grievance mandate, with Justice Fish's report providing welcome support to this important work.

Before focusing on the report as it pertains to grievances, I think it's important to understand the challenge space that is grievances. Almost everything can be grieved. Pedantic adherence to process has been the status quo and the grievance system has been risk managed for years, given a multitude of other pressing institutional change mandates.

Since August 2020 the Canadian Forces grievance authority has produced over 313 decision letters to grievors, over double the average annual output for at least the last decade. This is due in part to the establishment of a small final authority tiger team tasked to develop and implement an expedited process and short decision letter response to triaged files.

Since the end of January nearly 100 of these short decision letters have been produced. Given success is experience, this expedited process has been effectively implemented across my directorate and will be sustained as the way forward for those files meeting file criteria.

We have additionally eliminated a jurisdictional backlog, closed nearly 50 legacy files dating back as far as 2012, prioritized files requiring legal support and re-established a strong relationship with director claims and civil litigation, a move that has resulted in the final negotiation and settlement of several longstanding grievances over the past few months.

All of this to say a concerted focused effort has been made over the past ten months to demonstrate tangible sustainable output. Shifting to Justice Fish's report, the grievance authority is committed to initiating implementation for several grievance recommendations.

Recommendations 86 and 87 already occur with regulatory modifications required to formalize the integration of conflict and complain management services offices into the process to better support grievors and chains of command. Recommendation 92 will consider the continued relevancy of assisting members in supporting grievors and recommendations 93 and 94 reflect current practice with respect to recruit grievance training delivered and conflict and complain management service office interactions with their local military stakeholder community.

With respect to key themes, the report identifies delays as the major impediment to achieving grievance system goals. Recommendations 88 through 91 speak to mechanisms through which (inaudible due to technical problem at source) to enforce accountabilities at both the initial and final authority levels.

I would highlight however that because most everything can be grieved and because the CAF is plagued by antiquated policy as well as under-resourcing, a balanced approach will be an important consideration as implementation planning commences. Unlike in previous independent reviews, this report also strongly endorsed recourse to an independent tribunal for CAF members.

Notably Justice Fish stated that while the creation of such an organization seemed to have merit, the fact that other Five Eyes countries had not yet adopted this solution gave him pause.

That said, strategic patience is advised to allow independent review quick wins and ongoing grievance initiatives to take hold to aid in determining where best to focus efforts for the wider stakeholder community and to highlight where perhaps a parallel independent tribunal may complement the CAF grievance system.

Equally striking was Justice Fish's commentary on the lack of additional resources allocated to the grievance system where greater responsiveness is desired. Commitment will be required at the most senior levels with respect to task prioritization and additional resource allocation to bolster grievance authority capacity.

The report was highly supportive of the recent CDS directive for grievance enhancement flagship initiatives. The first initiative involves the establishment of an off ramp process for policy centered grievances that the CDS has no authority to grant given their alignment with Treasury Board.

Given evaluations comprise approximately 25% of grievances, this second initiative will see the development of an amended or alternative evaluation contestation process with a view to reducing grievance numbers. Justice Fish supported both as great examples of initiatives to both divert highly complex policy files as well as to further help identify systemic issues related to Treasury Board and other policies early in the process.

In turn allowing the CDS to engage external implicated departments for reform. In summary of the 12 grievance related recommendations tabled, work towards implementation can commence for 5 with another 2 falling to other organizations for action. The remaining recommendations require additional analysis prior to implementation to enable precision of effects, unity of effort, clearly articulated workplans and resource requirements to be identified.

Assuming an ongoing priority by the CAF with respect to improving the grievance process for our members and resourcing to the grievance authority to that effect, I am highly optimistic about our ability to continue in this positive direction.

While a much needed change in grievance culture and mindset is already underway, Justice Fish has reinforced our efforts and offered a unique opportunity to re-evaluate our processes and be better for CAF members. Thank you.

MODERATOR: Thank you Senior Official. I believe that's it for opening remarks. We will continue with the question and answer portion. Let us know through the chat function and unmute yourselves when you are called. The first question we have is from Jacques Gallant from the Toronto Star.

QUESTION: My first question is for Senior Official. In the findings and recommendations pertaining to sexual misconduct and to the SMRC, was there anything in particular that isn't there that you would have liked to see?

SENIOR OFFICIAL: No, in fact I was very pleased to read Justice Fish's report and we had multiple meetings with the external review authority and made written submissions. In fact they made recommendations related to every single issue that we raised with them. We were very pleased to see that.

QUESTION: My follow up is also to Senior Official. If I understand correctly, these recommendations, would it be fair to say they strengthen the powers of the SMRC in some ways by giving you the power to investigate systemic issues for example and perhaps even compel production of evidence? Is it fair to say these recommendations would strengthen the powers of the SMRC?

SENIOR OFFICIAL: What I would say to that is that some of the recommendations he made are things that are already within our mandate and where we're working right now is to implement those aspects of our mandate. He did use some fairly strong language about basically I think to reinforce the need for us to have access to data in order to do some of the things we are mandated to do.

With respect to our independence, as I mentioned our independence, our mandate, he did make a recommendation with respect to that but that is something that Justice Arbour will be looking at.

MODERATOR: Thank you Jacques. Our next question is from Ken Pole of Frontline Magazine.

QUESTION: Good morning and thank you for this. I have a historical question. Justice Lesage in the second independent review report made 45 recommendations. Can anyone say, perhaps this would be up to a member of Judge Fish's team, how many of those recommendations were acted upon beyond being accepted in principle?

SENIOR OFFICIAL: I don't have a precise count of the recommendations out of the 55 that were implemented. Some were implemented in regulations, a few were implemented in legislation, others were not implemented at all. Out of those that were not implemented Justice Fish is re-endorsing certain changes and re-issuing those recommendations as his own in certain places.

A good example would be the repeal of the military rules of evidence and in other places he's formulating his own recommendations. Unfortunately I don't have the precise count.

QUESTION: Could this be attributed to the continuing command-centric policy that's in effect? The lack of implementation I should say.

SENIOR OFFICIAL: I don't believe that the lack of implementation – there are observations in the report as to policy making in the military justice system as to make it more efficient and more aligned with the civilian justice system. There are also recommendations as to the independence of the various actors involved in the system from the chain of command. I don't believe the report makes a link between those two aspects.

MODERATOR: Next question comes to us via Janice Dixon with the Globe and Mail.

QUESTION: I think Senior Official is probably best positioned to answer this. It's just one technical question about paragraph 515 under sexual assault. My impression is that when Justice Fish says Parliament gave victims the same rights in both military and civilian proceedings.

He is not talking about the full array of procedures that protect complainants in the Criminal Code and is instead comparing the military declaration of victims' rights to the Canadian victims' bill of rights. I'm wondering if you can confirm that my interpretation is correct.

SENIOR OFFICIAL: You're correct. As for this paragraph it's a comparison with the Charter of Rights in the civilian system and the declaration of victims' rights. The immediately ensuing paragraph refers to the rights and protections afforded by the Criminal Code to victims and to the accused in the civilian system.

Some of those protections are already being informally through judicial interpretation extended within the military justice system. In respect of those, the recommendation is that they be expressly incorporated in the National Defence Act.

MODERATOR: Our next question comes to us from Murray Brewster at CBC.

QUESTION: Thank you for taking my question. I'm looking to ask about Justice Fish's emphasis on the declaration of victims' rights and the speedy implementation of it. We know that the regulations supporting that portion of legislation have not been written. I'm wondering what the holdup is and when you can conceivably get it done.

SENIOR OFFICIAL: Thank you for this very important question because it's at the heart of recommendations being made by Justice Fish. We'll recall that when Bill C77 proceeded through Parliament one of the directions that were received from Parliament through this legislation is that the military justice system be now seen through the lens of a victim-centric approach.

Commitments were made by the Minister of National Defence and various officials including myself during the legislative process that we would consult with victims, victims groups, with experts in the elaboration of the declaration of victims' rights within the military justice system to ensure that it met the requirements of victim survivors and that they would be given a voice in the regulatory development process.

My team has been working extremely hard for the last two years. I want to note without making excuses about it that the COVID pandemic really caused a challenge in the consultation process but as soon as we were able to pick it up again we did and we ran with it. Extensive stakeholder consultation has occurred with the sexual misconduct response centre, Dr. Preston and her team.

We consulted with the federal ombudsman of victims of crime, the province of Quebec equivalent. We consulted with victim survivors' groups. We are currently administering a survey so that those who have had experience with the military justice system or have something to say about the military justice system can do so both for civilian and military members.

We have also a website where we are soliciting the input of the general public about this. We're well advanced and underway. I asked my team yesterday to provide me with the most up to date data regarding the state of advancement of their regulatory process. What I can indicate is that we've now completed 85% of the issue identification.

That's in close work also with the Department and the Canadian Armed Forces because they need to be able to tell us what are the policies that are needed, what are the training development bills, etc. so 85% of the issue identification. As far as stakeholder engagement is concerned, 75% is complete.

We have provided drafting instructions to the Department of Justice for 50% of the required regulations and the Department of Justice has completed 20% of the drafting of the regulations. It's comprehensive. It's complex. It's needed. We fully acknowledge Justice Fish.

I personally welcome Justice Fish's strong emphasis on the requirement to bring into force the declaration of victims' rights. It puts fire under our collective feet to make it happen and so it's not something that can be left as is.

There needs to be continued momentum and in that regard I would personally want to see this be brought into force no later than the spring of 2022 when all of the regulatory process that is required by federal rules and legislation is accomplished. I hope this answers your question.

QUESTION: Very thoroughly but if I can have a supplementary question it would be why wasn't this consultation with victims' groups done before the legislation was passed? They were promised that. That didn't happen and it seems we're going to have an almost three year delay before this important part of the legislation and the overhaul of the military justice system is actually put into place. Can you say why that consultation wasn't done during the actual legislative process itself?

SENIOR OFFICIAL: What I want to indicate is there was some consultation that was done as the memorandum to Cabinet was devised and during the legislative process that's proper, you're correct. There wasn't consultation but as the proposed legislation was being drafted there was some consultation.

What became evident is that consultation was not sufficient. Clearly those who came and testified in front of the various parliamentary committees indicated they had more to say. They wanted to be heard. They wanted to contribute to the regulations' development and we did not ignore that request that was made, that demand that was made by the various groups and victims and survivors.

That's why we committed to further engage and to engage in depth with them to give them a voice in how these regulations would form up and the content of the regulations proper to ensure they would be informed, that they would be protected, that they would have entire participation in the process and that there could be restitution for wrongs done.

MODERATOR: Our next question comes from Lee Berthiaume, the Canadian Press.

QUESTION: Thanks again for talking to us today. I wanted to pick up on Murray's questions about the declaration of victims' rights. One of the recommendations in the Fish report is that until the declaration comes into force and unless the victim consents, sexual assaults should not be investigated or prosecuted under the NDA and should instead be referred to civilian authorities. Will you be implementing that recommendation or not? If so, why and if not why not?

SENIOR OFFICIAL: If you will allow me, I will begin and then I will ask Senior Official to speak to this. I will start by saying that one of the tenets of Justice Fish's report is that there needs to be entire independence of the actors within the military justice system, that their independence needs to be increased, bolstered.

This is a landmark characteristic of a constitutional democracy like Canada. I wanted to highlight that first and in that regard and in keeping with that observation, we'll turn it to the independent actors who would be called upon to implement that recommendation.

SENIOR OFFICIAL: Bonjour et merci pour la question. All I can say to recommendation 68 is that we will examine carefully how the military police can best address the concerns raised in this recommendation related to sexual assault for the victims' needs and we'll take action to this end until a declaration of victims' rights is in force.

QUESTION: Just for clarification, is that a yes or a no? It sounded like you'll look at it but no decision yet. Am I understanding that correctly?

SENIOR OFFICIAL: What we need to do is I need to carefully examine this recommendation and concerns raised and also I am maintaining police independence and discretion in examining that recommendation. We need to look at it carefully before looking at the way to address those concerns.

QUESTION: You referenced in your opening remarks that the military justice system is obviously facing a number of challenges. Obviously we have what's going at CMAC as well as everything else. But you also said the military justice system – that the civilian justice system also faces challenges and I'm trying to understand.

Are you basically saying the challenges that the military justice system is facing are not unique, that this is just a normal issue, circumstance or situation or I'm just trying to understand what you meant by that?

SENIOR OFFICIAL: Thank you for this question. I'll start by addressing the first issue you alluded to which is judicial independence. What I want to indicate and to highlight is that Justice Fish has not questioned at all the independence of the military judiciary. What he is indicating in this report is that he spoke with the four military judges that he has no reason to think that in fact they are not independent.

What he's offering as a path to further strengthen their independence is to address issues that may be related to perception, perception of those who are impacted by the military justice system. He also clearly notes that he'll defer to the current judicial process and the decision of courts in that regard.

What I wanted to highlight in my opening statement and I think you understood it. The civilian criminal justice system also faces challenges on a regular basis and I'd like to point out for example on the final report on the review of Canada's criminal justice system that was published by the Department of Justice in 2019.

In that report we can read things that relate to victims and survivors of crimes being disillusioned with and disappointed by the criminal justice system. Despite the advancements of victims' rights, many victims continue to lack confidence in the system. Some feel revictimized.

The challenges faced by the civilian criminal justice system is that there are long delays, that victims often choose not to report crimes to the police for fear of repercussions or retaliation. They feel when they do report there is not always full compassion and respect. The system is not timely, there's no affordable support for victims and survivors.

When I read that report and put it side to side with some of the challenges that we're currently faced with and the criticism that we're currently faced with in the military justice system, it became clear to me that not only are there large similarities but that I needed to really reach out to my counterparts at the federal provincial territorial level and ask them what are you doing to address these things.

Can we share notes? Can we ensure that we coordinate our approaches so that we as an entire system of justice are more responsive to the needs of victims and survivors and have a system that is also fair for accused members.

MODERATOR: We do not have any questions in the queue. We'll give it a few seconds to see if anyone else sends a quick chat with any questions. We'll wait a bit. Nothing is coming in and we don't want anyone to feel or to look awkward on a Zoom call so I'll guess we'll call it a day on this one. Everyone stand by for our press event at 13:00 and until then thank you to our (inaudible) and thank you to our reporters for calling in.

Goodbye.