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BY EMAIL

The Hon. Harjit S. Sajjan, PC, OMM, MSM, CD, MP
Minister of National Defence
Ottawa, ON K1A 0K2

Dear Minister Sajjan:

RE: Independent External Comprehensive Review of the Department of National Defence (DND) and the Canadian Armed Forces (CAF)

In accordance with my Terms of Reference, I have the ability to provide interim assessments and recommendations, addressing issues for immediate action that may become apparent during the conduct of the Review. Below is such an interim assessment and related recommendations.

Introduction

Sexual misconduct is not the exclusive preserve of the CAF. Indeed its prevalence in all parts of Canadian society, and abroad, has become painfully apparent in recent years. So has the public mobilisation to denounce it. From the media's interest in and exposure of the issue, to the damning Report of the Honourable Marie Deschamps and the Final Settlement of the Heyder-Beattie class actions, the issue of sexual harassment and misconduct in the CAF has opened the institution to unprecedented scrutiny and an equally unprecedented opportunity for change. Closer attention to the issue, including the recent Report by the Honourable Morris J. Fish on the military justice system, invites a broad, comprehensive approach to the causes of this important failure, and to the measures that will be necessary for the CAF to live up to its stated values and the expectations of Canadians. My Review will serve, among other things, to identify the causes of the continued presence of sexual harassment and misconduct in the CAF, and the means to prevent and/or eradicate it.

In the months leading up to my appointment as Reviewer, several allegations of historical sexual misconduct were made against high-ranking CAF members, namely General Officers and Flag Officers (GOFOs), including the Chief of the Defence Staff at the time. Since my appointment, it has been made public that survivors have continued to come forward and have raised allegations against several GOFOs, who were in important command positions and were subsequently put on leave.

These recurrent allegations of historical sexual misconduct against senior CAF leaders and the related Canadian Forces National Investigation Service (CFNIS) investigations, have led me to conclude that immediate remedial actions are necessary to start restoring trust in the CAF.

In his Report, tabled on June 1, 2021, the Honourable Morris J. Fish recommends, at recommendation No. 68, that sexual assaults should not be investigated or prosecuted under the *National Defence Act* and should instead be referred to civilian authorities, on a temporary basis.

I have heard criticisms in response to this recommendation, including that civilian authorities do not have the appropriate level of understanding and knowledge of the military, that it may lead to a patchwork of investigative and prosecutorial approaches between provincial authorities, that longer delays and less severe sentences may ensue, and that it creates a missed opportunity for discipline and dissuasion among the CAF's members.

On the other hand, I have heard, in the course of my Review, significant skepticism on the part of stakeholders and most importantly survivors, with respect to the independence and competence of the CFNIS (and Military Police). This perception is pervasive in the CAF and the DND and, I believe, a large segment of public opinion. It has created serious mistrust in the military justice system and, in particular, in the investigative phase.

While the secrecy that surrounds the early stages of a police investigation may be necessary, in the current climate it serves to increase suspicion about the CAF's ability to police itself. Further, the fact that CFNIS investigations are meant to be kept confidential, even from the CAF's leadership, inevitably invites suspicion and disbelief, and puts the CAF leadership in a difficult if not impossible position. This has been recently illustrated by the disclosure of promotions granted to GOFOs undergoing investigation, inviting speculation about the motivations and competence of CAF leadership. Such speculation would not happen if, as is normally the case, the investigations were demonstrably at arm's length, conducted by outside investigative authorities.

Interim Recommendations

In light of the above, I believe that it is necessary to establish a process that will facilitate the handling of allegations of sexual offences in an independent and transparent way outside of the CAF.

Without prejudice to my Final Report and additional findings and recommendations, I recommend, on an interim basis, the following:

1. The Honourable Morris J. Fish's recommendation No. 68 should be implemented immediately. All sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*, including historical sexual offences, alleged to have been perpetrated by a CAF member, past or present ("sexual offences") should be referred to civilian authorities. Consequently, starting immediately, the Canadian Forces Provost Marshal (CFPM) should transfer to civilian police forces all allegations of sexual offences, including allegations currently under investigation by the CFNIS, unless such investigation is near completion. In any event, in all cases charges should be laid in civilian court.

Correspondingly, civilian authorities should exercise investigative and prosecutorial jurisdiction over all sexual offences by CAF members. Should civilian authorities decline to proceed, the matter should be returned to the CAF to determine whether disciplinary action is desirable under the *National Defence Act*. Administrative Review related to sexual

misconduct in the CAF should continue to proceed, for the time being, in parallel to, in addition to or in the absence of the criminal charges.

2. In parallel to the immediate transfers described above, the Minister of Defence should confer with the relevant federal, provincial and territorial authorities, to facilitate the transfer process and the sharing of expertise, between civilian authorities and the CAF, and consider the resources that could be made available to facilitate this work.
3. Throughout this process, the provision of assistance by the CAF to the civilian authorities in respect of investigations and prosecutions should be solely on an advisory basis.
4. Particular consideration should be given to, among other things:
 - a. when and how civilian authorities – in the course of an investigation – should convey relevant information about the investigation to the CAF leadership; and,
 - b. effective communication with and support to complainants regarding the transfer and progress of investigations.

I also recommend that I be informed of all steps taken to implement this interim report as they occur, and on no less than a monthly basis.

These recommendations should be implemented immediately. They are without prejudice to any recommendation I may make in my Final Report.

I welcome an opportunity to discuss these interim recommendations further.

As per my Terms of Reference, I expect that the present letter, constituting an interim report, will be made public.

Yours truly,

BORDEN LADNER GERVAIS LLP



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General Wayne Eyre, Acting Chief of the Defence Staff
Lieutenant-General Frances Allen, Vice Chief of the Defence Staff
Heather Walsh, External Liaison Officer
Joanne Lostracco, Corporate Secretary, Department of National Defence