Military Police Complaints Commission

National Defence Act – Part IV

Section 250.53

CHAIRPERSON'S FINAL REPORT

Following a Public Interest Investigation

Pursuant to Subsection 250.38(1) of the *National Defence Act*

With Respect to the Complaints of

Brigadier-General Patricia Samson

Canadian Forces Provost Marshal

And

Ex-Warrant Officer Matthew Stopford

Files: MPCC 2000-023

MPCC 2000-025

Ottawa, January 17, 2001

Louise Cobetto

Chairperson

CAVEAT

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Acronyms

BGen – Brigadier-General

Capt – Captain

Cdr – Commander

CDS – Chief of the Defence Staff

CF – Canadian Forces

CFNIS – Canadian Forces National Investigation Service

CFPM – Canadian Forces Provost Marshal

Col – Colonel

DM – Deputy Minister

DMP – Director of Military Prosecutions

DND – Department of National Defence

DOJ – Department of Justice (federal)

Insp – Inspector

JAG – Judge Advocate General

LCol – Lieutenant-Colonel

MCpl – Master Corporal

MP – Military Police

MPCC – Military Police Complaints Commission

NDA – *National Defence Act*

NDHQ – National Defence Headquarters

OIC – Officer in Command

QR&O – *Queen's Regulations and Orders for the Canadian Forces*

SID – Sensitive Investigations Detachment (of the CFNIS)

SOP – Standard Operating Procedures

SRG – Special Review Group

VCDS – Vice Chief of the Defence Staff

WO – Warrant Officer

Executive Summary

(a) Background

In July 1999, the Canadian Forces Provost Marshal[1] (CFPM), Brigadier-General (BGen) Patricia Samson, directed that the Canadian Forces National Investigation Service (CFNIS) begin a criminal investigation into several events relating to the deployment of Canadian Forces (CF) personnel in Croatia from 1993 to 1995. In early August 1999, BGen Samson was made aware of allegations that CF members had put naphtha gas in the coffee of ex-Warrant Officer (WO) Matthew Stopford - - *protected* - in Croatia in 1993. She directed that the CFNIS task force investigate these coffee tampering allegations. To assist with the investigation, and in recognition of the need for transparency of process and independent legal advice, the task force called upon a lawyer (described by the CFNIS as "external counsel" and referred to as such in this report) from outside the Department of National Defence (DND). The services of this lawyer were provided under an agreement with the federal Department of Justice (DOJ).

On May 30, 2000, the results of the investigation were made public at a press conference held at National Defence Headquarters (NDHQ). The press conference was conducted on behalf of the CFPM by the task force commander, RCMP Inspector (Insp) Russ Grabb,[2] who had been seconded to the CFNIS as the Officer in Command (OIC) Sensitive Investigations Detachment (SID), and by Captain (Capt) Robert Lanouette, spokesperson for the CFPM. A PowerPoint slide presentation at the press conference indicated that:

[1] Note to the Reader: Throughout this report mention of the CFPM refers to BGen Patricia Samson. Please note that Col Dorothy A. Cooper has been named CFPM effective January 15, 2001.

[2] References to the CFNIS or the task force include RCMP Insp Russ Grabb.

- Charges in respect of the coffee tampering allegations would have been laid under section 129 of the *National Defence Act* (NDA) – an act to the prejudice of good order and discipline of the Canadian Forces – but a three-year limitation period prevented such charges from being laid because of the passage of time since the offences were committed (the three-year limitation period has since been repealed);

- It could be established that certain substances were placed in coffee intended to be consumed by ex-WO Stopford, - - *protected* -; and

- Based on an external legal opinion on the evidence and the task force's own analysis of the facts, there was insufficient evidence at that time to refer the Stopford case to a provincial prosecution service for a criminal prosecution.

At a press conference held at NDHQ on June 1, 2000, the Chief of the Defence Staff (CDS), General (Gen) Maurice Baril, announced his intention to ensure that issues of leadership and appropriate administrative action in respect of the officers and non-commissioned members involved in the coffee tampering be identified and addressed "promptly, fairly, and in a coherent fashion." As the first part of the action plan, he established a Special Review Group (SRG), chaired by BGen Gordon (Joe) Sharpe, to examine the CFNIS report and other relevant materials and make recommendations about how these issues should be addressed.

The SRG was composed of BGen Sharpe, Dr. William Bentley and Dr. Allan English. As well, Professor Edward Ratushny was appointed as an observer on behalf of the DND/CF Ombudsman. The SRG began its work on June 5, 2000, and completed its report on June 16, 2000. The report, signed by BGen Sharpe, found no grounds to support the position of the CFNIS task force that legal advice precluded the laying of criminal charges in respect of the coffee tampering allegations. Accordingly, the SRG report

recommended that the task force findings be referred to a provincial Crown Attorney to determine whether criminal charges should be laid. The CDS accepted this recommendation and requested that the Director of Military Prosecutions (DMP) forward the CFNIS investigation report to the appropriate provincial prosecutorial authority for review of action.

The SRG report went on to state that it was "difficult to avoid the conclusion that the CDS received [from the CFNIS] inadequate and misleading advice with regard to the laying of criminal charges." Moreover, the report stated that the CDS then repeated the "inadequate and misleading advice" of the CFNIS at the June 1, 2000, press conference held to announce the formation of the SRG. This, the report concluded, led to the Canadian public being misled about the possibility of criminal charges being laid in the case.

The CFPM disagreed with the SRG's conclusions regarding the CFNIS. In a memorandum dated June 20, 2000, and entitled "Special Review Group – Operation Harmony," the CFPM rebutted the SRG report. The memorandum categorically rejected any notion that the CFNIS had misled the CDS or the Canadian public. The CFPM sent the memorandum to the Vice Chief of the Defence Staff (VCDS). That same day, the CFPM, in correspondence addressed to the Chairperson of the Military Police Complaints Commission (MPCC), requested that the MPCC investigate whether the CFNIS had misled the CDS and the Canadian public.

On June 29, 2000, ex-WO Stopford submitted a related complaint to the MPCC. He was concerned about apparent discrepancies between the information reported to him by CFNIS investigators and that reported by the chair of the SRG about the number of "confessions" by individuals who had apparently attempted to poison him. As well, he was concerned about evidence that military police and the chain of command knew of the alleged poisoning in 1993, yet took no action. He stated that allegations made by the CFNIS and NDHQ may have been inaccurate in material ways, and that these inaccuracies had the effect of devastating his reputation.

On June 27, 2000, the Chairperson of the MPCC wrote to the CFPM that she had decided, pursuant to subsection 250.38(1) of the NDA, that it was in the public interest to cause the MPCC to hold an investigation into the conduct of the CFNIS in the Stopford case. After receiving the related complaint of ex-WO Stopford, the Chairperson decided to conduct a joint investigation into both complaints. Ex-WO Stopford and BGen Samson were informed of this decision.

Subsequently, in accordance with subsection 250.38(3) of the NDA, the military police members whose conduct could be the subject of the complaints were informed of the MPCC's investigation.

From June to November 2000, the MPCC assembled and thoroughly reviewed relevant documents. During this period, between August 15 and August 24, 2000, eleven individuals were interviewed under oath. A further review identified certain avenues of investigation that, in the MPCC's opinion, could have been explored more fully by the CFNIS. Accordingly, the CFPM was requested to undertake a follow-up investigation. The MPCC received this follow-up report on October 27, 2000.

On November 30, 2000 the Chairperson of the MPCC, in accordance with section 250.39 of the NDA, forwarded to the Minister, the CDS and the Judge Advocate General (JAG) her interim report in writing setting out the Chairperson's findings with respect to both complaints. Although section 250.39 includes the CFPM as a recipient of this report, it was decided that, given her involvement as a subject of the complaint, she would not receive a copy. Sending the interim report to the CFPM in these circumstances would be contrary to the spirit of the Act.

Subsection 250.49(2) and section 250.51 of the NDA require the CDS to review the interim report in light of its findings and recommendations and to notify in writing both the Minister and the Chairperson of any action that has been or will be taken with respect to the complaints.

On December 14, 2000, the Chairperson of the MPCC received from the CDS his notice of action dated December 12, 2000. This notice was considered by the Chairperson prior to the preparation of this final report.

(b) Issues

The main issues examined by the MPCC are as follows:

- Did the CFNIS provide inaccurate or inadequate and misleading advice[3] to the CDS and the Canadian public, among other occasions, during the press conference held on May 30, 2000, with regard to the possibility of laying charges pursuant to the *Criminal Code* and the *National Defence Act*?

- Did the CFNIS provide misleading information to ex-WO Matthew Stopford with respect to the "confessions" collected during the conduct of the CFNIS investigation?

- When did the military police and the chain of command become aware of the allegations that ex-WO Stopford was poisoned in Croatia in 1993?

The purpose of examining the last issue was to assess if the CFNIS investigation and comments made at the media briefing of May 30, 2000, reflected whether the military police and the chain of command knew about the coffee tampering allegations and, if they did, when they knew.

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[3] Although the MPCC recognizes that the CFNIS does not provide "advice" to the CDS, the same terminology as that found in the SRG Report shall be used for consistency.

(c) Chairperson's Findings Subsequent to the Investigation

The MPCC examined the documents that were made available to the SRG. It also reviewed further documents, some prepared in response to the SRG report, and heard 11 individuals *viva voce*. The persons interviewed, including the military police members whose conduct could be the subject of the complaints, all agreed to give their versions of the events under oath, and cooperated fully with the MPCC. They were also given the opportunity to explain their understanding of the events. The MPCC, therefore, bases its conclusions on a more extensive body of information than that reviewed by the SRG. This has permitted the MPCC to have a fuller understanding of the CFNIS investigation and has also led the MPCC to substantially different conclusions than those reached by the SRG.

It should be noted that the central focus of the SRG's criticism of the CFNIS lay in the SRG's interpretation of the written legal opinions given to the CFNIS. The SRG could not find support in these written opinions for the decision reached by the CFNIS in May 2000 not to proceed with criminal charges at that time. Yet much of a legal opinion rendered by the external counsel on May 18, 2000 consisted of an examination of the evidence that could be used to support a charge of mutiny. The CFNIS task force relied on the analysis of the evidence contained in that opinion to help it decide whether to lay criminal charges, not merely mutiny charges. In light of all the information gathered by the MPCC, which consists of more than those written legal opinions, it was entirely reasonable for task force members to state at the May 30, 2000 CFNIS press conference that they had received external legal advice relating to the laying of criminal charges.

The SRG did not take into account the frequent verbal advice that the external counsel gave the task force. In particular, because it had not asked for or sought additional information, the SRG was apparently not aware that verbal discussions took place about the possibility of laying charges for attempt under the *Criminal Code*.

The strong criticisms by the SRG of the CFNIS for "misleading" would probably not have arisen had the SRG asked for further information about what was obviously a key issue in its report. If the members of the SRG felt that information was missing, they could have asked Capt Lanouette, designated by the CFPM to act as liaison with the SRG. Capt Lanouette had demonstrated a clear willingness during the work of the SRG to provide any information that the SRG requested.

The mandate given to the SRG by the CDS was to address questions of leadership and the possible administrative measures to be taken with respect to the CF members implicated in the coffee tampering. The CDS had explained the scope of the SRG's mandate at a press conference held June 1, 2000. It was apparent from this explanation that the SRG would not be examining whether or not charges could be laid. This had already been addressed by the CFNIS investigators. The SRG extended its mandate on its own initiative to include a review of the process by which the CFNIS decided not to lay charges. The SRG did not inform BGen Samson, the CFNIS task force or other concerned individuals, including the CDS, about this extension of the mandate. Nor would BGen Samson have any reason to think that the SRG mandate would extend to assessing the process by which the CFNIS decided not to lay charges and the conduct of CFNIS members.

It would not have been improper for the members of the SRG to speak with the Provost Marshal. BGen Sharpe did write to ex-WO Stopford inviting his input (the letter arrived too late for ex-WO Stopford to respond). The fact that BGen Sharpe also consulted officers not directly or indirectly concerned or involved with this matter, instead of BGen Samson, in the hope that somehow the concerns of the SRG would filter back to her through them, surprised the MPCC.

If the SRG had doubts or questions about the correctness of the process by which the CFNIS decided not to lay charges or about the conduct of CFNIS members, it should have referred these matters to the MPCC and lodged a formal complaint. One of the mandates of the MPCC, pursuant to Part IV of the NDA, is precisely that – to examine

any complaint about military police conduct in the performance of policing duties or functions prescribed by regulation. It is important to note that the "laying of a charge" is specifically mentioned as a policing duty or function in the regulations made pursuant to section 250.18 of the NDA.[4]

Much of the difference of opinion between the SRG and BGen Samson about whether any "misleading" occurred appeared to arise because of the cursory examination, by the SRG, of the process used by the CFNIS task force which led to a decision not to lay charges. The SRG, driven by its two-week deadline, condemned BGen Samson and the CFNIS before they were given an opportunity to explain fully their rationale for not proceeding with criminal charges. It is unfortunate that, because of the cursory examination by the SRG, the reputations of BGen Samson and the CFNIS were unfairly discredited.

On another issue, at the May 30, 2000, CFNIS press conference, reliance on "external independent legal counsel" was discussed. The MPCC was initially concerned by the failure to mention the involvement of a military lawyer in the preparation of a legal opinion on mutiny. From the interviews conducted by the MPCC, it became apparent that the failure to mention the involvement of a military lawyer flowed from a misunderstanding within the CFNIS. Nonetheless, the involvement of the military lawyer should have been mentioned.

As for the information provided to ex-WO Stopford with respect to the "confessions" collected during the conduct of the CFNIS investigation, there may have been confusion arising from the explanation given to ex-Warrant Officer Stopford. Just as dictionary definitions vary, it would seem that ex-WO Stopford and Insp Grabb may have had a different understanding of the term "confession." Insp. Grabb seemed to understand "confession" to include a statement to a third party, not merely a statement to a police officer or person in authority. Yet it is also quite reasonable to consider a confession to be a statement by a suspect to a person in authority only. Ex-WO Stopford, for example,

[4] *Complaints About the Conduct of Members of Military Police Regulations*, P.C. 1999-2065.

appeared to consider statements to a third party to be hearsay, and understood the notion of confession to be something different. As well, the explanation given to ex-WO Stopford by the investigator who briefed him on May 30, 2000, may have referred to five or six people "confessing" to allegations of coffee tampering, and this explanation might have mistakenly referred to "written" confessions. In any event, such an error, if it occurred, was not made with any intent to mislead.

It is unfortunate that the CFNIS decided to send an investigator who had little knowledge of the case to inform ex-WO Stopford of the conclusions reached by the CFNIS. This is not a criticism of that investigator, who had merely been assigned to meet with ex-WO Stopford because they were acquaintances. However, had an investigator more familiar with the case been sent to explain the results, at least some of the apparent confusion relating to the number of confessions might not have occurred.

Concerning the knowledge of the military police and the chain of command about the coffee tampering allegations, the facts provided by Insp Grabb at the May 30 press conference are somewhat, although not substantially, at variance with the task force investigation report dated May 24, 2000. Insp Grabb appears to have erred about the rank of the individual (a non commissioned member and not an officer) who may have brought the allegations of coffee tampering to the chain of command. The MPCC finds no indication that this was in any way deliberate. The main point – that there was some evidence to suggest that the chain of command in Croatia was aware of the poisoning allegations – was reported by Insp Grabb.

In reviewing the CFNIS report, the MPCC took note of the fact that interviews of certain members of the chain of command, conducted during the initial investigation, were not tape recorded, whereas interviews with non-commissioned members were recorded on tape. This way of proceeding may give the impression of offering preferential treatment to senior officers.

A further review of the evidence identified certain avenues of investigation that, in the MPCC's opinion, the CFNIS could have pursued more fully. Accordingly, the MPCC asked the CFPM to look further into the possible knowledge, by the military police and the chain of command in Croatia, of the coffee tampering allegations. The additional information provided by the CFNIS in response to that request does not enable the MPCC to draw any further conclusions at this time about possible knowledge by the military police and the chain of command in Croatia.

(d) Chairperson's Findings Having Considered the Notice of Action from the CDS

In his notice of action dated December 12, 2000, the CDS, though comforted by the conclusion that there was no misconduct by the CFPM or the CFNIS members and reassured by the finding that neither he nor the Canadian public had been misled, was nevertheless cognizant of the need to address several issues raised.

The CDS stated, in part:

> …
>
> *In particular, I note that your interim report states that the Special Review Group extended its mandate on its own initiative. Coincidentally, the administrative orders, which provide direction on how boards of inquiry and summary investigations are to be conducted, are now in the process of being rewritten. A military administrative law reference manual is also being developed to provide additional guidance in this area and that manual should be completed in the spring 2001 timeframe. Action will now be taken to ensure that these important source documents include direction on investigative procedures and reporting requirements and explain the responsibilities that need to be documented in the mandate (terms of reference) of a review team.*

The Chairperson is pleased that the CDS has decided to take these measures and welcomes the proposed direction and explanations to be documented in the terms of reference for a study or review team.

The CDS goes on to state:

> …
>
> *The interim MPCC report also makes findings and comments that directly pertain to policing functions and policies. In this regard, I can advise you that I intend to ask the CFPM, through the Vice Chief of the Defence Staff, to examine the MPCC report in detail, once it has been made final, in order that the full extent of any necessary amendments to CFNIS or military police practices and procedures may be determined. You will be informed of any specific measures that will be adopted to correct CFNIS or military police practices and procedures once this process of analysis has been completed.*
>
> …

The Chairperson looks forward to being informed of the specific measures to be adopted following the examination of this report by the CFPM. Among the items of interest will be the measures taken in relation to the briefing of persons affected by a military police investigation and the introduction of consistent procedures for the recording of interviews by the military police (regardless of the rank of the person being interviewed).

Finally, with reference to the request by the CDS to have the CFNIS investigation report referred to the appropriate provincial prosecutorial authority, the Chairperson is informed in the notice from the CDS that the Office of the Assistant Deputy Attorney General – Criminal Law for Ontario does not disagree with the CFNIS decision not to lay a charge.

Following the investigation by the MPCC, and after having considered the notice of action from the CDS, the Chairperson upholds her interim report conclusions and reiterates them as follows:

- There was no misconduct by BGen Patricia Samson, CFPM, the CFNIS or the military police members whose conduct the MPCC has investigated.

- The CFNIS did not mislead, intentionally or otherwise, the CDS or the Canadian public about the nature of the legal advice on which the CFNIS relied in reaching its decision not to proceed with *Criminal Code* and *National Defence Act* charges.

- A review of the evidence did reveal minor inadequacies in the information provided at the CFNIS press conference on May 30, 2000. However, none of these were of any significance in the discussion of whether the CFNIS had provided inaccurate or inadequate and misleading advice with regard to the laying of criminal charges.

- Varying interpretations of what was meant by the word "confession" led to confusion and, perhaps, the perception on the part of ex-WO Stopford that he had been given misleading information. There was no intent on the part of the CFNIS to mislead.

- A CFNIS investigator more familiar with this investigation should have been sent to brief ex-WO Stopford.

- Upon reviewing the CFNIS investigation report and all pertinent documents in its possession and after interviewing 11 individuals, the Chairperson concludes that the comments made at the CFNIS press conference on May 30, 2000 adequately reflected whether and when the military police and chain of command were made aware of the coffee tampering allegations.

I: The Complaints

On June 20, 2000, BGen Samson wrote to the Chairperson of the MPCC requesting an investigation. The letter stated, in part:

> *On 31 May 2000,[5] the Canadian Forces National Investigation Service (CFNIS) held a press conference to advise the public of the findings of the - - protected - - Stopford allegations of poisoning. The press conference indicated that the matters in question had been referred to legal counsel and the CFNIS had decided not to lay charges. It was explained that the statute of limitations for any action under the National Defence Act had long since expired and that the elements of the offence for any charges under the Criminal Code of Canada could not be proven. As a result, the Chief of Defence Staff (CDS) assembled a team to review the situation and to provide recommendations with respect to any administrative action which should be pursued against personnel involved in the poisoning. This Special Review Group was given 14 days to conclude its review.*
>
> *I have been advised that the Special Review Group concluded that the CFNIS (for which I am the Commanding Officer) had misled the CDS and the Canadian Public. Therefore, I as the Commanding Officer responsible and accountable for the CFNIS, should be investigated with regard to this finding. The investigation should cover the conduct of the CFNIS investigation and the allegation that my unit misled the CDS and the Canadian Public.*

On June 29, 2000, ex-WO Matthew Stopford submitted a related complaint. His affidavit stated, in part:

> *2. In June[6] 1999 I was advised by General Samson that the Military Police were investigating allegations that I had been poisoned by drops of naphtha having [been] put in my coffee.*
>
> *3. On May 31, 2000[7] Inspector Bruce Burton of the National Investigation Service (Sensitive Investigations Unit) met with me at my house. He informed me that they had written confessions from six soldiers who confessed to having attempted to poison me while on tour in Croatia by placing noxious substances in my coffee. These substances included battery acid, anti-freeze, engine coolant, naphtha, boot blackener and visine.*

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[5] The press conference occurred on May 30, not May 31.
[6] In fact, this occurred in August, not June.
[7] This occurred on May 30, not May 31.

4. These comments were confirmed by General Baril, Inspector Russ [Grabb] and Minister Art Eggleton in a news conference which was given May 31, 2000[8] *approximately 30 minutes after my meeting with Inspector Burton.*

5. It was also stated that as many as a dozen troops had been involved in a conspiracy to place substances in my coffee.

6. It was also stated that there was evidence that Military Police and the Chain of Command knew of the alleged poisoning in 1993 and no action was taken.

7. I was not informed of these allegations in 1993 and was unaware of any such allegations until receipt of the letter by General Samson in June[9] *1999.*

8. I am informed by General Sharpe that the facts are substantially different [than] those related to me by Inspector Burton and to the public on May 31, 2000.[10]

9. I am informed by General Sharpe that there is a single confession of a single incident involving drops of visine in my coffee. This was apparently done as a practical joke.

10. I am informed by General Sharpe that there was a single individual as opposed to twelve and that there is a single written confession rather than six confessions.

11. If the facts as related to me by General Sharpe are accurate [then] the allegations made by NIS and NDHQ are inaccurate in material ways.

12. These inaccuracies have had the effect of devastating my reputation as a competent and caring non-commissioned officer operating in war time conditions.

[8] This occurred on May 30, not May 31.
[9] The letter was sent in August, not June.
[10] This visit to ex-WO Stopford and the CFNIS press conference both occurred on May 30, not May 31.

II: Military Police Complaints Commission

The Military Police Complaints Commission was created by amendments in 1998 to the *National Defence Act* (NDA). Subsection 250.18(1) of the Act authorizes any person, including DND and CF personnel, to make a complaint to the MPCC about the conduct of a member of the military police in the performance of prescribed policing duties or functions. As well, subsection 250.19(1) states that any military police member conducting or supervising an investigation and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of DND has improperly interfered with the investigation may make an interference complaint to the MPCC.

The MPCC is a civilian oversight authority. Its creation was intended to make the handling of complaints involving the military police more transparent and accessible. The MPCC carries out quasi-judicial functions pursuant to statutory authority. The MPCC has sole jurisdiction over monitoring and reviewing conduct complaints lodged with the CFPM about the military police in the conduct of their policing duties or functions, and examining complaints of interference in any military police investigation. Also, when it is in the public interest, the Chairperson may hold a public hearing.

The MPCC is external to, and independent of, DND and the CF. It reports directly to Parliament.

The NDA allows the MPCC to investigate only those events occurring on or after December 1, 1999. The CFPM deals with complaints relating to events that occurred before December 1, 1999. However, the MPCC can examine events occurring before December 1, 1999, to provide the necessary background for its investigation into more current events.

(a) Scope of the Investigation

Under the NDA, the CFPM is initially responsible for dealing with conduct complaints such as that by ex-WO Stopford. Also, pursuant to section 250.26 of the Act, the CDS is responsible for dealing with complaints about the conduct of the CFPM.

As previously mentioned, the Chairperson of the MPCC has the exclusive authority to review a conduct complaint and investigate an interference complaint. However, subsection 250.38(1) of the NDA allows the Chairperson, if she considers it advisable in the public interest, to cause the MPCC to conduct an investigation and, if warranted, to hold a hearing into a conduct complaint or an interference complaint.

In the present case, the Chairperson concluded that since the CFPM was among those whose own conduct was being investigated, it was not appropriate that the CFPM investigate the Stopford complaint. Nor should the CDS conduct the investigation, since he himself had allegedly been misled. Instead, it was advisable in the public interest for the MPCC to conduct the investigation. The Chairperson decided that the MPCC would investigate ex-WO Stopford's complaint jointly with that of the CFPM.

(b) Methodology

(i) Documentation Review

From June to November 2000, the MPCC assembled and thoroughly reviewed relevant documents. The MPCC asked the CFPM for a follow-up investigation into the possible knowledge by the military police and the chain of command in Croatia of allegations of coffee tampering. The MPCC received the CFNIS report on this matter on October 27, 2000.

(ii) Designated Members

In conformity with subsection 250.38(1) of the NDA, Louise Cobetto, Chairperson, and Thomas G. Flanagan, S.C., Member, were designated by the Chairperson to constitute the MPCC for the purpose of conducting the investigation.

(iii) Persons Interviewed

The MPCC, at its offices located at 270 Albert Street, 10th Floor, Ottawa, Ontario, interviewed 11 individuals under oath between August 15 and August 24, 2000.

The correspondence sent to each individual informed them that a person of their choosing could accompany them if they felt it necessary.

All those who were interviewed cooperated and demonstrated professionalism even when asked to respond to difficult questions.

(iv) Counsel

Assisting the MPCC were Simon Noël, Q.C., Carole Bonhomme, Senior Counsel, and Marc Pilon, Counsel.

(v) Legal Framework of Investigation

The Chairperson made a brief opening statement before the MPCC interviewed each of the individuals. Among other things, she described the role of the MPCC, pursuant to subsection 250.38(1) of the NDA, in conducting this investigation by collecting any information (oral, written or otherwise) which would allow the MPCC to weigh, as fairly as possible, the complainants' allegations.

The Chairperson also reminded the persons interviewed that this investigation by the MPCC was not a public hearing, nor an adversarial proceeding.

To maintain the integrity of this investigation, the Chairperson requested that each of the persons interviewed not disclose any part of the discussions stemming from their interviews.

Finally, the Chairperson described the issues under investigation.

III: Facts

(a) The Allegations of Coffee Tampering

The CF deployment to Croatia from 1993 to 1995 was named "Operation Harmony," and consisted of seven troop rotations, each lasting for six months.

In late July 1999, the CFPM directed that the CFNIS Sensitive Investigations Detachment (SID) conduct an investigative assessment of allegations that during Operation Harmony CF personnel had been exposed to toxic substances and that there had been a cover-up of this exposure. The assessment was to determine if any criminal or service offences had been committed that would require a CFNIS investigation.

As a result of the investigative assessment, a CFNIS task force began operations on August 3, 1999, in order to conduct a full criminal investigation. At about that same time the CFNIS received unsolicited information that CF members had put naphtha gas in the coffee of ex-WO Matt Stopford - - *protected* - in Croatia between April and October 1993. BGen Samson decided to include this coffee tampering allegation as part of the larger task force investigation.

(b) CFNIS Task Force Investigation

The task force became known as the CFNIS Sensitive Investigation Task Force (called the "task force" in this report). The officer in charge was RCMP Insp Russ Grabb.[11] He had been seconded to the CFNIS and was the Officer in Command of the SID.

Beginning in August 1999 and continuing for the next six months, the task force investigated the allegations of coffee tampering. More than 20 CFNIS investigators participated, along with a detective sergeant from the Ontario Provincial Police. They conducted more than 74 interviews worldwide.

[11] References to the CFNIS or the task force include RCMP Insp Russ Grabb.

Early in the investigation, on August 16, 1999, BGen Samson asked the then Acting Director of Military Prosecutions, Colonel (Col) Kim Carter, to take the necessary steps to seek an external legal counsel (from outside DND and the CF) to help the task force, offering the following explanation:

> *Given the nature of these allegations [all the allegations then being investigated by the task force], and the need for total transparency in the process, it is advisable that the task-force investigators seek their day-to-day and summary legal advice from an external source.... I am seeking your assistance in asking the DOJ* [federal Department of Justice] *Criminal Law Section to identify a suitable lawyer to provide necessary external legal advice to the task-force investigators.*

BGen Samson explained to the MPCC that she decided to seek outside counsel because she wanted to ensure, among other things, transparency and openness. Insp Grabb gave the MPCC essentially the same reasons for seeking external legal advice.

In September 1999, a federal Department of Justice lawyer, Mr. Jim Marshall, began acting as the external legal counsel to the task force. He provided several written legal opinions to the task force in the ensuing months. As well, external counsel and the task force members who met with the MPCC explained that, as the external counsel, he was frequently consulted for verbal advice.

The external counsel prepared written legal opinions dated January 10 and January 25, 2000, that included discussions of possible mutiny charges against those who may have tampered with, or attempted to tamper with, ex-WO Stopford's coffee. Insp Grabb later approached Commander (Cdr) C.J. Price, then Deputy Director of Military Prosecutions, for a further opinion about possible mutiny charges because of his expertise on mutiny issues. Cdr Price informed the MPCC that Insp Grabb provided him with a copy of the Regional Military Prosecution Brief, two CFNIS investigation transcripts as well as the external counsel's legal opinion (presumably a legal opinion on mutiny).

Cdr Price prepared a legal opinion dated March 10, 2000. He found insufficient evidence to form a reasonable belief that the offence of mutiny had been committed. He also, as requested, provided comments on possible *Criminal Code* offences. His legal opinion identified several evidentiary problems:

> *If Naphtha can be shown to be a noxious substance, then there would appear prima facie to be a breach of section 245 of the Criminal Code. Looking at [person A*'*s] statement, there is no indication as to quantities involved or the period of time over which the activity took place. Nor, indeed, is there any evidence that ex-WO Stopford drank the coffee which [person B] and [person C] supposedly contaminated. There is also, of course, no evidence that ex-WO Stopford was affected in any way and Stopford himself does not believe the allegations. It is also of some significance that [person D] denies [person A*'*s] statement that he [person A] told him of these admissions by [person B] and [person C].*

Cdr Price's opinion expressed a number of additional reservations about the quality of the evidence relating to allegations against other CF members. He summarized:

> *The possible charges discussed in paras 11-16 above [mutiny, administering a noxious substance, inciting or inducing a member of the Canadian Forces to commit a traitorous or mutinous act or counselling of insubordination or disloyalty] are all problematic. One does not get a high level of comfort about the reliability and accuracy of the various statements – which is perhaps not surprising, given the offence occurred in 1993. As I have indicated earlier, I would not be disposed to place much, if any, reliance on the [statement of one CF member]. Moreover, the target of all of these alleged attempts denies it ever happened. It may be, however, that a prosecution service will be prepared to go forward with a charge or charges related to the events described in the report. It may be, as well, that a prosecutor may see possible conspiracy charges here as suggested by Mr. Marshall.*

Insp Grabb told the MPCC that he wanted the external counsel to go back to his earlier opinion on mutiny and also wanted to ensure that he had "every available document and transcript." Insp Grabb stated further:

> *[T]he purpose was for him [the external counsel] to provide us an analysis of the facts and his opinion on the nature and weight of the evidence as it related to mutiny, but there was also the recognition right from the very beginning and I*

know this because I'm the one that directed him to give us that opinion – that this opinion would serve as an excellent instrument to analyse all other related issues, whether [they] be criminal or administrative.

Therefore, at Insp Grabb's request, the external counsel delivered a written legal opinion, dated May 18, 2000. The opinion was 47 pages long and was delivered to the task force on May 19, 2000. The legal opinion was entitled "Comments on Available Evidence." Mr. Marshall explained in the introduction to his opinion his understanding of its purpose:

You have asked me to further consider the isolated question of whether it can be said that there are sufficient grounds to support a reasonable belief that a mutiny related offence was committed.... [Y]our interest is specifically focussed upon whether it can be said that there is a reasonable basis upon which it can be concluded that a mutiny related offence has been committed.

The legal opinion examined the elements of the offence of mutiny under the NDA. Much of the legal opinion consisted of an examination of the evidence that could be used to support a charge of mutiny. The opinion concluded:

If there remains uncertainty regarding what transpired in Croatia in terms of the placement of substances in the coffee of WO Stopford, this uncertainty stems, in part, from the large passage of time between Roto 2 and when the information came to light which triggered the investigation. Memories have clearly faded.

However, in my opinion, uncertainty regarding what transpired also stems from a pall of minimization which appears to taint the statements of several witnesses. Investigators doggedly pursued witnesses and attempted to clarify what occurred in Croatia as vigorously as possible. However, given the closed circle of individuals with specific insight into what occurred in this matter, the success of investigators is unavoidably limited by the degree of candor of these witnesses.

In my opinion, based on the results of the investigation there appears to be a reasonable foundation of information upon which certain statements can be made. For example:

> *– that a group of soldiers during Roto 2 discussed, on a number of occasions, the removal of WO Stopford from his position of command through the placement of various substances, including naphtha, in his coffee;*

– that these discussions, although depicted by many as simply venting, appear to have had a practical and serious thread to them;

– that following this discussion, and likely as a result of this discussion, at least three soldiers placed a substance in the coffee cup of WO Stopford;

– that Visine, coolant and naphtha were placed in Stopford's coffee;

– that there was an ongoing awareness of a number of soldiers that a substance was being placed in Stopford's coffee and that these soldiers were looking for a physical effect on Stopford;

– that there was a belief, by some soldiers, that - - *protected* - - - - - - - - - - - - - - - - *was a result of what was placed in his coffee;*

– that there is no precise way to gauge the exact amounts of or the range of substances which may have been placed in Stopford's coffee, however, it appears most likely that the placement of substances in his coffee was in small amounts and of short duration; and

– that there was no intention to cause lasting harm to Stopford – the apparent intention was to render Stopford unable to carry on with his duties.

The passage of time and statutory limitation periods found in the [National Defence Act] greatly restrict the present ability to pursue service offences for the actions of a number of soldiers involved in this situation during Roto 2. The ability to pursue a service offence, which was committed during Roto 2 in 1993, is restricted by a three-year statutory limitation period in the [National Defence Act], except for a limited range of offences.

Of the limited range of service offences not barred by the statutory time limitation period, only offences related to "mutiny" appear to have possible application to the facts discovered during the course of this investigation.

In my opinion, the information gathered within the investigation does not support a conclusion that a mutiny took place in Croatia during Roto 2.

(c) Report of the CFNIS Task Force

The final CFNIS report concerning the coffee tampering allegations was dated May 24, 2000. The report was signed by Insp Grabb and Capt W.H. Garrick, the investigation case manager. It concluded:

> *Due to the three-year statute of limitations under the [National Defence Act] the ability to pursue charges is restricted. The only possible [National Defence Act] offence, which does not have a three-year statute of limitations, is mutiny. However key elements to prove an offence of mutiny are missing, these elements include the fact that the investigation was unable to conclusively prove that an agreement to "poison" ex-WO Stopford was reached in a group discussion. Further criminal charges of Administering a Noxious Substance (Sec 245 Criminal Code of Canada) and Assault (Sec 267 Criminal Code of Canada) are unable to be pursued. It has not been proven that ex-WO Stopford actually ingested the coffee into which substances were inserted.*

In a covering letter dated May 25, 2000, that accompanied the CFNIS report, BGen Samson summarized the results of the investigation. In part, the letter stated:

> *The CFNIS investigation has determined that a group of soldiers during Roto 2 discussed, on a number of occasions, the removal of ex-WO STOPFORD from his position of command, through the placement of various substances, including naphtha, in his coffee. These discussions, although depicted by many as simply venting, appeared to have had a practical and serious thread to them. Following these discussions, and likely as a result of the discussions, at least three soldiers placed a substance in the coffee cup of ex-WO STOPFORD. These substances included naphtha, Visine and [engine] coolant. It has also been determined that there was an ongoing awareness on the part of a number of soldiers that a substance was being placed in ex-WO STOPFORD's coffee and that these soldiers were looking for a physical effect on ex-WO STOPFORD. However, this investigation has been unable to determine the exact amounts of or the range of substances that may have been inserted or if, in fact, ex-WO STOPFORD actually ingested the coffee into which the substances were inserted. There does not appear to have been any intent to cause any lasting harm to ex-WO STOPFORD. Rather, the intention was to render him unable to carry on with his duties.*
>
> . . .
>
> *Due to the three-year statute of limitations under the National Defence Act (NDA), the ability to pursue charges is restricted. The only possible NDA offence, which does not have the three-year statute of limitations, is mutiny. However, key*

elements to prove an offence of mutiny are missing, including the fact that the investigation was unable to conclusively prove that an agreement to "poison" ex-WO STOPFORD was reached in a group discussion. Further, criminal charges of Administering a Noxious Substance (Section 245 of the Criminal Code of Canada) and Assault (section 267 of the Code) can not be pursued as it has not been proven beyond a reasonable doubt that ex-WO STOPFORD actually ingested the coffee into which the substances were inserted. Therefore, this investigation report is forwarded to the Commanding Officers of the personnel involved for consideration of administrative action. This case is considered concluded.

(i) May 30, 2000 CFNIS Press Conference

On May 30, 2000, the results of the investigation were made public at a press conference held at NDHQ on behalf of the CFPM by Insp Grabb and Capt Lanouette. - - *protected* - -
- -
- -

Insp Grabb reported that the evidence relating to ex-WO Stopford supported the conclusion that a number of identified soldiers did in fact place substances such as naphtha, anti-freeze, anti-irritant eye drops like Visine, and boot blackener in coffee intended to be consumed by ex-WO Stopford. Insp Grabb said that many of the soldiers involved had confessed to fellow soldiers and sometimes to police during the criminal investigation. The alleged motive was to temporarily render ex-WO Stopford unable to carry out his position of command.

Insp Grabb further reported that the CFNIS would have laid charges against about six soldiers under section 129 of the NDA – namely, "an act prejudicial to the good order and discipline of the Canadian Forces." However, a three-year limitation period in force applied to commencing proceedings for this offence and, given the passage of time, charges could not be laid. (Amendments to the NDA in 1998 repealed the three-year limitation period in respect of service offences.)

Insp Grabb then addressed possible charges under Canada's *Criminal Code*. He stated that charges were not laid for the following reasons:

> *[W]e looked at other options such as possible charges under the Criminal Code of Canada, and there are options to do just that for offences that occur in foreign countries greater than three years ago under certain circumstances. So we directed our attention to the Criminal Code of Canada. And what we were able to determine based on our external legal opinion and our own analysis of the facts is that although it can be established beyond a reasonable doubt that certain substances were in fact placed in coffee intended to be consumed by Stopford, there's insufficient evidence at this time to refer this matter to a provincial prosecution service somewhere in Canada for possible charges. Had such a referral been possible, and had it been made, a charge of administering a noxious thing under section 245 of the Criminal Code of Canada would have been given consideration.*
>
> *Now, criminal charges in this case cannot be laid at this time because of essentially seven factors. Firstly, there's insufficient evidence to establish beyond a reasonable doubt that the substances in question were actually ingested by Matt Stopford. Actual ingestion can only be established on balance of probabilities. Again, how do we know this? The people who were directly involved confessed to their fellow soldiers and to police. The amount of substances placed in the coffee and the frequency in which they were administered cannot be clearly established. And there is no medical evidence to help clarify these points either.*
>
> *Now, although the findings of this case flow from the voluntary statements of those very soldiers who were there, of the very soldiers who were involved, the passage of time has precluded many of these witnesses from being able to remember precise details of very important events which is crucial when putting together a Criminal Code prosecution. Again, I remind you these conclusions do not come out of thin air, they are not the conclusions of the NIS, they are findings that flow from the statements, the voluntary statements of the very people who were involved.*
>
> *Sixth, although we can prove beyond a reasonable doubt which soldier[s] actually put substances in coffee intended to be consumed by Matt Stopford, we cannot prove beyond a reasonable doubt which one of them actually delivered or attempted to deliver what the courts might clearly consider as a noxious thing. And finally, although some ROTO 2 soldiers made incriminating and admissible statements to fellow soldiers and police, the overall investigation was greatly hampered by an absence of candor and cooperation by those believed to be involved. We were limited by their willingness to be candid in this particular investigation. Again, it's important to stress that in a criminal case you cannot*

compel people to talk, you can't issue them a subpoena like the Board of Inquiry might. You can't force them to be entirely truthful.

(ii) Response of the Minister of National Defence

During a media scrum after Question Period on May 30, 2000, the Minister was asked how he felt about the fact that men would admit to having tried to poison their superior and yet no legal action could be taken. He stated:

> *[I]t is regrettable that that three-year [limitation period in the National Defence Act] was there but it was there at the time that this occurred so we could do nothing about it with respect to that.*

The Minister also mentioned that consultations with an independent legal counsel had led to the conclusion that *Criminal Code* prosecutions could not be pursued successfully. The Minister called the actions about which the CFNIS reported "absolutely disgraceful" and said he would seek to determine what administrative action could be taken against those involved in the coffee tampering. He said that he would speak to the CDS later that day.

(iii) Response of the Chief of the Defence Staff

At a June 1, 2000, press conference held at NDHQ, the CDS stated:

> *The independent NIS investigation has been done thoroughly and in great detail, and they have had outside legal counsel on whether charges could be laid according to the Criminal Code of Canada or NDA. Their answer at that time, their opinion is no.*

The CDS prepared a memorandum dated June 2, 2000, entitled “Terms of Reference – Special Review Group, Operation Harmony (Roto Two).” This was sent to the Minister, Deputy Minister, the VCDS and several others. In it, the CDS stated that he was deeply concerned by the findings of the CFNIS task force report. He noted the CFNIS conclusion that these events were not amenable to action under the Code of Service Discipline, given the three-year limitation period that applied when the alleged offences were committed. He also referred to the conclusion of the CFNIS that there was not sufficient evidence at the time of the May 30 press conference to refer these matters to a provincial prosecution service [for prosecution under the *Criminal Code*].

(d) The Special Review Group

In the June 2 memorandum, the CDS stated that he intended to ensure that issues of leadership and appropriate administrative action in respect of the officers and non-commissioned members involved were identified and addressed “promptly, fairly, and in a coherent fashion.” As the first part of an action plan to address this matter, he announced the establishment of a Special Review Group to examine the CFNIS task force report and other relevant materials and make recommendations about how these issues should be addressed. The SRG was to provide recommendations for further action within 14 days. The CDS had explained the scope of this mandate in his comments the day before, June 1, 2000, at the press conference held to announce the creation of the SRG:

> *But any advice that General Sharpe [the chair of the SRG] will need, but I didn’t ask him to go, whether we can lay charges or not.*

The SRG would be composed of:

> Chair: BGen Gordon (Joe) Sharpe
>
> Member: Dr.William Bentley
>
> Outside member: Dr. Allan English
>
> Observer: Professor Edward Ratushny, consultant for the DND/CF Ombudsman.

The SRG began its work on June 5, 2000 and BGen Sharpe signed the final report to the CDS on June 16, 2000.

In the days following the start of the SRG's work, BGen Samson instructed her staff to provide the SRG with documents concerning the investigation. She asked Capt Lanouette, spokesperson for the CFPM, to act as liaison with the SRG. Capt Lanouette was to gather the files associated with the investigation and the transcripts of interviews, then bring them to the office of the CDS. In a memorandum dated June 8, 2000, and directed to the DM, CDS, VCDS and others, BGen Samson reported on steps taken to provide documents to the SRG:

> *At the request of the CDS, my office has conducted a search of its files to identify documents that may be relevant or related to the Special Review Group's examination of information regarding the Op HARMONY/Roto Two missions. In doing so, we have identified, and confirmed with the DND/CF Legal Advisor, that the attached four (4) documents are subject to solicitor-client privilege.*
> *…*
> *In my opinion, the attached documents should be provided to the Special Review Group in order to facilitate a full review of the issues. …[Y]our concurrence is requested to my transferring these documents to the Special Review Group.*

The four legal opinions were later provided to the SRG.

BGen Sharpe briefly explained to the MPCC the work of the SRG and the contribution of each of its members. He said that although he initially wrote the report, phases of it were written by the other members. He said that Professor Ratushny wrote the section of the report that dealt with the poisoning and Professor Bentley wrote the section that dealt with the background on leadership.

BGen Sharpe explained to the MPCC that Professor Ratushny's involvement in the SRG became much more than that of an observer from the Ombudsman's office. According to BGen Sharpe, Professor Ratushny became an observer, a participant and an adviser. Among his contributions, Professor Ratushny reviewed and advised on the four legal opinions. To that effect, BGen Sharpe stated:

[H]is function there was to – to provide us, you know, review that legal – the legal opinions that were available, and – and tell us whether or not the conclusion reached and broadcast to me in the press conference was valid. And that – that was really his – his input....

BGen Sharpe also mentioned that he wrote to ex-WO Stopford on June 9, 2000, advising him that the SRG had been asked to make recommendations on possible actions that the CDS could take to address the allegations of coffee tampering. The letter read, in part, as follows: "Given your central involvement in this affair, I would welcome any input you would like to make to the current review." However, ex-WO Stopford told the MPCC that he received the letter only on Thursday, June 15, and that the letter did not give BGen Sharpe's telephone number. Ex-WO Stopford managed to contact BGen Sharpe only around the time the SRG report was released.

Finally, BGen Sharpe told the MPCC that he revealed part of the draft report to other senior officers not involved in the CFNIS:

We did not give them a full draft of the report ... I took, in fact, the intentional and misleading information paragraph and showed it to one – at least one 3-Star General to make sure that that got fed into the system so that if there was something that people wanted to bring forward….

He stated that "we were pretty candid in passing this information forward well before we submitted the final report." He said that he did this to show them where "we were going" so that if there was more information available, it might come forward.

(e) Report of the SRG

In the covering memorandum, dated June 16, 2000, to the CDS and accompanying the SRG report, BGen Sharpe stated:

In reviewing the legal opinions/advice received by the Department [of National Defence], this Group can find no grounds to support the contention that legal advice precluded the laying of criminal charges. Accordingly, the Group recommends that the NIS findings be immediately referred to a Provincial Crown Attorney to determine whether criminal charges should be laid.

. . . [I]t is difficult to avoid the conclusion that the CDS received inadequate and misleading advice with regard to the laying of criminal charges.

The SRG report explained these conclusions in greater detail:

The Special Review Group does not take issue with the conclusion that a charge related to mutiny under the National Defence Act could not be proven. The decision was based on a legal opinion by counsel in the Department of Justice after a detailed review of the evidence and applicable law....

We are unable to reach the same conclusion with respect to the manner in which the criminal charges were handled. No such legal opinion was ever produced in relation to possible criminal charges.

The SRG report continued with an analysis of the May 30, 2000 CFNIS task force press conference that dealt with the Stopford case and the four written legal opinions that had been provided to the task force about various aspects of the investigation:

Under the heading, "Findings in the - protected- Stopford Case", the power point presentation of the press conference began:

> *"A thorough investigation of the allegations was conducted by the Task Force and a comprehensive written legal opinion on the evidence was submitted by external legal counsel on 19 May 2000."*

After a number of other observations, the presentation continued:

> *"Although it can be established that certain substances were, in fact, placed in coffee intended to be consumed by Ex-Warrant Officer Matt Stopford, there is insufficient evidence to refer this matter to a provincial prosecution service for possible criminal charges."*

The presentation then stated that the relevant criminal charge would have been the administering of a noxious thing and listed seven reasons why criminal charges "cannot be laid." The first reason given for not laying charges exaggerates the legal threshold which guides prosecutorial discretion in the laying of charges.

The clear message communicated by the statements is that "external legal counsel" provided a "comprehensive written legal opinion" advising that a criminal charge was not possible. Related to this message is the suggestion that

the legal opinion advised against referring the matter to a provincial prosecution service.

These assertions are inaccurate and misleading. In referring to them at a press conference held on 1 June 2000 to announce the formation of this Special Review Group, the Chief of Defence Staff repeated the inaccurate advice and that advice, in turn, led to the Canadian public being misled about the possibility of criminal charges being laid.

…

Concerns.** The Special Review Group has three concerns arising out of the handling of possible criminal charges in relation to this matter**:

(1) The matter should have been referred to a provincial prosecuting authority to determine whether criminal charges should be laid. Where an investigating police force has evidence of the commission of an offence, the normal and proper outlet for determining whether charges should be laid is the authority with the jurisdiction and responsibility to prosecute those charges. It is particularly important that the proper authority be provided the opportunity to exercise that authority for the events are of national concern and engage public confidence in the Canadian Forces.

…

In this case, possible criminal charges take on an increased importance since service charges are barred by the statutory time limitation. There are serious issues at stake such as the need for the denunciation of such conduct and general deterrence to others. This matter simply did not receive the professional scrutiny it deserved.

(2) Even though there may have been questions about the adequacy of the evidence to support a charge under section 245 (administering a noxious substance) of the Criminal Code, it is perplexing why consideration was never given to charge under section 24 (1) (attempting to commit an offence).... In other words, a possible criminal charge would be attempting to administer a noxious substance. This is obviously an avenue of prosecution that would have to be considered by a provincial prosecuting authority in assessing possible criminal charges.

(3) It is difficult to avoid the conclusion that the Chief of Defence Staff and the Canadian Public were misled about the manner in which the issue of criminal charges was handled. The opinion dated May 18, 2000, had nothing to do with criminal charges. The prominent public reference to this opinion suggests a blatant attempt to draw on the "external" status of the Justice department counsel as a justification for the failure to deal adequately with this matter. None of the

other legal opinions foreclosed the avenue of a criminal prosecution. More importantly, they never addressed the jurisdictional and public confidence dimensions of the importance of referring the matter to the appropriate provincial authority for determination.

Conclusion. *The allegation that soldiers attempted to poison a superior officer is serious. The conclusion of an official investigation that this actually occurred, is a matter of broad public concern. The Special Review Group did not address whether the observations, analysis or conclusions in the legal opinions referred to above are well founded. However, the obvious course of action to us, in all of the circumstances, is simply to refer the results of the NIS investigation to the local Crown Attorney so that the appropriate prosecutorial authority may exercise the appropriate discretion as to whether or not criminal charges should be laid. This is a responsibility for which the provincial attorneys general are constitutionally accountable to the public. The referral should occur forthwith.*

(i) Concerns Expressed to the SRG

Before the report was made public, BGen Sharpe received a comment about it in a June 18, 2000, e-mail to him from Col D.E. Martin, Executive Assistant to the CDS. Col Martin stated, "I believe there may be some interpretations and factual errors in the report that should be addressed." In part, his e-mail stated:

I am particularly concerned that the process we have to ensure independence of investigators is not misinterpreted. If the Special Review Group does not agree with the conclusions of the NIS, then I would suggest it should be stated as such. In view of this, you may wish to reconsider the appropriateness of the statement that "the Chief of Defence Staff was badly advised and that advice, in turn, led to the Canadian public being misled about the possibility of criminal charges being laid." A similar statement appears in your cover letter in para 3. Additionally, the latter is not specific as to whose or what advice is misleading and inadequate.

When asked by the MPCC how he responded to the e-mail from Col Martin, BGen Sharpe stated:

We – we had a – we had an exchange with the CDS's EA over some information that could, again, they had seen the cover letter and that stuff ahead of time, and – and the young Colonel called me and said we're making – I would suggest you make some changes, et cetera.

There were some inaccuracies and that concerned me because I thought, well, if we've made a mistake here this is serious –

Q: And you made a correction on what the CDS had said in the past –

A: It was a date, yeah, we mixed up the dates of the press conference –

Q: Other commments that he made?

A: Well, I said I don't – I don't like to deal with this over the telephone because it's just you and I, I would like you to send me an E-mail and --

Q: Just officialize –

A: – then I can share it with the other guys –

Q: Yeah.

A: – so he sent me the E-mail and I shared it with – and nobody's being subtle here, but the – in sharing it with the other members of the review group, it became very evident that they were not prepared to make some of the changes that I was prepared to make and so we sat down and talked about it and went back to more or less to the original, we corrected some of the error, the error on the date and then went back to the original format.

(ii) June 20, 2000 SRG Press Conference

On June 20, 2000, BGen Sharpe, accompanied by Dr. Bentley, Dr. English and Professor Ratushny, reported the findings of the SRG at a press conference:

From the information that we reviewed in the timeframe that we had to review it, walking through the advice that was provided to the National Investigation Services people, we were led to the conclusion that indeed the advice that was provided was misleading. That sounds a bit like tap dancing but what we looked at led us to believe that the statement that criminal charges, the external advice had suggested that criminal charges could not be laid was not accurate.

… [W]hat we reviewed led us to the conclusion. …[Y]ou need to understand that we reviewed the written information, the written advice that was provided. Obviously we couldn't review the verbal advice that was provided nor could we review advice that was not given to us to review. Based on the information that we reviewed, we came to the conclusion that that statement was inaccurate that criminal charges could not be laid based on advice from external sources.

At the press conference, BGen Sharpe also expanded on the SRG's written criticism of the CFNIS:

[W]hen you read the four legal opinions that were submitted they do not lead to the conclusion that was drawn and the inference in the [May 30 CFNIS] press

conference that the decision not to proceed with a criminal charge is based on external legal advice, is in our opinion, again based on what we've read a blatant attempt to tie something to an external legal review that is not connected to it.

...[I]n essence what we're saying there is that conclusion that appeared to be made in the press conference, that the reason for not laying charges was related to advice from the Department of Justice is not accurate. So any attempt to connect the decision not to lay criminal charges to the written advice from the Department of Justice appeared to us to be a blatant attempt to mislead the results. Again, and I don't apologize, my language is my language in terms of directness. That is how we saw it and so that's how we wrote it down so as not to confuse.

Shortly after, BGen Sharpe was asked if he was saying that the misleading had any objective. He stated:

Quite frankly no, we're not saying anything. We're not drawing any conclusions that are not stated. I think that's roughly correct.

At the press conference, the observer from the DND/CF Ombudsman's office, Professor Ratushny, stated:

I think that there is clearly a discrepancy between the opinions and conclusion which was stated at these press conferences. And I think that that is very clearly stated in the report. There's no question that there's a discrepancy. I think the report clearly states as General Sharpe has said that the group concluded that the Chief of Defence Staff was misled and the question of who might have been responsible for the misleading was not something that the group could review from observation because they had a limited amount of material, a limited amount of time and it was not possible to start investigating, talking to different people who might have been involved, the JAG perhaps or the Public Relations people in the department, that was not under the mandate. So, the conclusion the group reached, which I thought was a principled one, was to come to the conclusion that they found hard to believe that there wasn't misleading here. Going further than that I don't think we're in a position to do it.

…

I think that what's specifically dealt with here is the reference in the [May 30 CFNIS] press conference to an opinion which was received on May 19th. Now one of the opinions that the [CFNIS task force] received was an opinion dated May 18th … so I think the [SRG] assumed that that was the opinion [the CFNIS

task force] were referring to and that opinion was referred to as being the justification for not laying criminal charges but at my invitation when the [SRG] reviewed that opinion it was very clear that that opinion had nothing to do with criminal charges. The opinion dealt totally with a charge under the National Defence Act. So it was a pretty blatant error I think is what that comes down to and you can draw whatever inferences from it you might wish.

… I shouldn't have used ... the word error and it's really not a report, it's the group's report but the juxtaposition of an opinion tied to a legal, an external legal source being used as a justification for saying that criminal charges could not be laid when the opinion had nothing to do with criminal charges is blatant whatever the rest of those words are.

BGen Sharpe told the MPCC:

But I don't think we actually thought there was misleading taking place. We thought there was misleading information provided. And again, to me there's a difference there. The information can be misleading, but that doesn't necessarily mean someone is trying to mislead. … But it was way beyond our – our ability to assess whether there was mis – an intent to mislead or it was intentional.

Q: But the way it came out is that the intent … appeared to be there?

A: Yeah. And I – and I've gone back and read many of my transcripts from – from some of the press conferences and found that the words I said have not been exactly what I meant to say.

(iii) Response of the Chief of the Defence Staff

At a press conference on June 20, 2000, the CDS stated that, after reviewing the report, he had requested the Director of Military Prosecutions to forward the CFNIS investigation to the appropriate provincial prosecutorial authority for review and action. The CDS also reported that BGen Samson had formally requested that the MPCC review the actions of the CFNIS in the Stopford case.

When asked at the press conference whether he had been misled, given that "in fact, it turns out that the Department of Justice looked at [the coffee tampering case] and said that there's maybe possible criminal charges," the CDS replied:

The information that I had at that time was the decision of the NIS based on the legal advice that they had both written and unwritten and their decision which was according to procedure and according to the law was that they would not lay charges and that's the report I was given.

Later, when asked who made the decision that criminal charges should not go forward, he replied:

The NIS – it was based on the information that they had written and verbal and it's their responsibility, it's their authority to lay charges or not and at that time their decision based on their assessment was not to lay a charge. Now when I went to the review group they came up with another recommendation and other legal advice, definite legal advice and I think professionally I have no choice but to pursue this legal recommendation or the report that I have received.

Also, the CDS stated that he was not investigating the CFNIS:

What I'm talking about is the review group that came up with a different opinion and I just stated that I will pursue the different opinion. ... Now as to investigating the NIS, I'm not investigating the NIS at all. It's a very independent police force, totally independent of the chain of command. They have come up with their decision, with their conclusion based on the information and the legal advice that they had at the time....

When asked if he felt misled about the issue of criminal charges and who had misled him, he stated:

[Translation] Absolutely not. It's not a question of misleading. It's that the National Investigation Service came to a conclusion that they would not pursue criminal charges. Now I have put together a group to evaluate the decision of the NIS. This group arrived at a different conclusion based on the documents and above all the very short time period that they had to look into this matter that the NIS had been examining over a lengthy period with a very large team.… I have had one decision taken by the police and I also have another recommendation. It is not a question of being embarrassed or misled or whatever. This unfortunately happens often when one speaks to several lawyers who have opinions that somewhat vary.

Neither did the CDS show any indication in a June 20, 2000 memorandum about the SRG report that he felt in any way misled. This memorandum, entitled "Report of the Special Review Group – Operation Harmony (Rotation Two)," and directed to the VCDS and others, made no reference at all to the issue of misleading.

(iv) Response of the Minister of National Defence

Also on June 20, 2000, the Minister of National Defence addressed the SRG report at a press conference. A reporter asked the Minister if he had been misled. The Minister responded:

> *Well that's what the ... Military Police Complaints Commission is going to have to determine. I mean there is a suggestion that that may have happened. There is a counter suggestion that it didn't happen. Now it will be up to that independent civilian commission to determine what really did happen.*

(v) Response of the Canadian Forces Provost Marshal

The CFPM responded immediately to the report of the SRG. In a memorandum to the VCDS dated June 20, 2000, and entitled "Special Review Group – Operation Harmony," she categorically rejected any notion that the CFNIS misled the CDS or the Canadian public. The memorandum challenged the SRG report on several fronts:

> *a. It is apparent that the SRG has incorrectly deduced that the CFNIS was to be guided strictly by the four written legal opinions described in their report. The fact of the matter is that the CFNIS relied heavily upon the myriad of verbal legal opinions which were intended to complement and expand upon the four written legal opinions cited;*
>
> *b. It is also apparent that the SRG has incorrectly assumed that the discretion to not lay criminal charges in any given criminal investigation rests solely with the applicable prosecution service. As a matter of common law, peace officers conduct their investigations and lay charges entirely independent of Crown Counsel;*

c. It was never stated or implied in the CFNIS public presentation that the written legal opinion of 18 May was the sole basis of our final analysis of the evidence in the - protected - *Stopford case. It was merely stated that a comprehensive written legal opinion was submitted on 19 May, and that the evidence supported a number of articulated conclusions. The 18 May legal opinion did, however, lead to discussions between the investigators and external legal counsel on the strength of the evidence within the investigation. The comprehensive analysis of the facts provided within this written legal opinion offered the investigators an excellent opportunity to assess all of the evidence. The investigators understood from these discussions that the only evidence which could support a reasonable prospect of conviction, should charges be laid, was a statement by the soldier who admitted to placing four drops of Visine in ex-WO Stopford's coffee;*

d. The final CFNIS analysis of the evidence in this case was based upon an overall assessment of all the facts, ***including*** *the assessment provided within the 18 May legal opinion, but was primarily derived from the extensive verbal legal consultations which took place between 22 May and 31 May. In fact, external legal counsel participated directly in the wording of the PowerPoint presentation delivered to the CDS and the Canadian public [on May 30, 2000], and approved the final wording of the slides. It was entirely accurate and fair, therefore, for the CFNIS to state publicly that the findings were based upon extensive consultation with external legal counsel;* [Emphasis in original]

e. The investigators went to great lengths to ensure that their public presentation and PowerPoint slides were completely accurate and detailed. The presentation given at the 31 May[12] *news conference greatly exceeded any presentation ever given before under similar circumstances. Rather than being misleading, it provided a detailed explanation, in lay terms, of the CFNIS decision to not lay charges in this matter. The CFNIS presentation did not preclude criminal charges from being laid. It was merely stated that, for the reasons provided, no charges could be laid* ***at this time****;* [Emphasis in original]

f. At an earlier stage of the investigation, the investigators received preliminary advice from external legal counsel that there was evidence collected at that point of the investigation that supported a basis to further pursue the possibility of charges under the Criminal Code of Canada and the National Defence Act. The external counsel prefaced all the advice that he provided in the opinion by stating that "given that the investigation is still ongoing, it has to be understood that any commentary in this memorandum is not offered as being definitive, or the final word in any way. Rather, the comments are simply for your information and assistance;"

[12] This should read 30 May.

g. In the subsequent written legal opinion of 25 Jan 00, external legal counsel offered views on the potential to refer the evidence collected within the investigation to different prosecution services – both military and civilian. Counsel commented upon various factors that the CFNIS might want to consider when determining if, and when, the CFNIS might refer the matter to a particular prosecution service. What occurred between the preliminary advice from external legal counsel and the final decision not to refer the matter to a Provincial Crown Attorney, was further investigation, the collection of additional statements and a thorough review of the evidence of potential witnesses and how that evidence fit together, or did not fit together. Based upon the final picture of available evidence, it was assessed that Criminal Code charges were not viable. Accordingly, a decision was taken that the matter would not be referred further. For the reasons already stated at length, the investigators simply did not feel that they had an evidentiary basis to pursue criminal charges ***at this time****.* [Emphasis in original]

h. The choice of language used during the 31 May[13] *CFNIS press conference was also highlighted in the Report of the SRG. Several points need to be addressed here. The report makes a specific reference to language used in the presentation. For example, it is pointed out that reference to a reasonable doubt in the explanation of a decision not to lay charges overstates the standard by which charges are laid. The CFNIS is aware of the standard by which charges can be laid and no sight was ever lost of that. The choice of words used in the PowerPoint presentation was intended to explain a complex case in simple, thematic terms, which would be understandable to all, including those not familiar with the court process. The conclusion in the report that this language was misleading is certainly not supported;*

i. Contrary to the Report of the SRG, the CFNIS did in fact seek legal advice, and did give consideration to a charge of attempting to commit a criminal offence, as per the provisions of Section 24(1) of the Criminal Code of Canada. The legal advice on this issue, that was articulated verbally in detail to the Task Force Commander, was that only the actions of the soldier who placed four drops of Visine in Ex-WO Stopford's coffee could possibly be considered as an attempt, as defined by Section 24(1). The legal advice was that no evidence existed to prove such an attempt in relation to any other living suspect;

j. After careful consideration of the evidence, the Task Force Commander concluded that there was insufficient evidence to form the requisite reasonable grounds to lay a charge of attempt. In coming to this conclusion, the Task Force Commander took into consideration the seven factors delineated on pages 28 and 29 of the PowerPoint presentation, as well as the facts that there was no forensic evidence to argue that four drops of Visine amounted to a noxious substance as defined by law; that from a criminal-law

[13] This should read 30 May.

perspective, the overall case was fraught with convoluted and contradictory evidence; that EX-WO Stopford adamantly refuted any suggestion that such an attempt ever took place; that EX-WO Stopford stated that any suggestion should be taken as an ***unreliable*** *attempt to sully his reputation as a leader; and that the only clear evidence of such an attempt was the statement of the soldier made to police under caution, seven years after the fact;* [Emphasis in original]

k. In discussions held with a Senior Crown Attorney for the Province of Ontario, at the commencement of this investigation, the investigators were told that- - protected -
- -
- -
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- -
- ; [Emphasis in original]

l. This matter was not referred to a Provincial Crown Attorney because extensive consultation had already taken place with a ***fully qualified*** *external legal counsel from the Federal DOJ, and because the investigators had decided that they could not lay criminal charges in any event. The investigators concluded that they could not lay criminal charges because of the factors delineated on pages 28 and 29 of the PowerPoint presentation, and because* ***all*** *things considered, they did not feel that they had the requisite reasonable grounds. Such a conclusion is also supported by the OPP major-crime detective assigned to assist in the investigation. The joint CFNIS-RCMP-OPP investigation team exercised proper and lawful discretion to not pursue criminal charges in a case where the criminal evidence did not support such action;* [Emphasis in original]

m. A common denominator of the various unfounded concerns raised by the SRG is the complaint that the decision not to proceed on this matter "did not receive the professional scrutiny it deserved." Such an assertion suggests that the CFNIS, staffed by highly trained officers, who have been involved with the criminal law and service offence investigations for many years, are not to be considered "professional," nor they can provide professional scrutiny. Such is clearly not the case. Additionally, this assertion disregards the presence of external legal counsel in the investigation who was an experienced criminal lawyer, and a former Assistant Crown Attorney for the Province of Ontario.
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- We simply did not need to ask the Provincial Crown Attorney to tell us what a very credible and suitable external legal counsel had already told us; and

n. While the allegations in this case are undeniably serious, peace officers cannot swear an Information when they do not believe that they have the requisite reasonable grounds to do so. Nor can they be ordered to swear such an Information. The discretion to do so rests with the police, not with the prosecution. The investigators in this case very much wanted to lay charges, and sought every legal opinion to do so where the requisite reasonable grounds existed. They properly exercised their duty to assess the credibility of the evidence, and to not pursue the case where they did not have requisite grounds. They were also very much alive to the folly of maliciously pursuing a criminal prosecution, and vilifying identified soldiers in the national media in order to placate public outrage. The investigators were also mindful of the ***verbal*** *comments of the Deputy Director of Military Prosecutions that although some evidence existed to suggest that an offence of administering a noxious substance existed, the case was fraught with evidentiary gaps, and that this was best handled administratively.* [Emphasis in original]

The memorandum continued that, had the SRG consulted with task force investigators or external legal counsel, "they would have been made aware of all these very important factors. They would also have appreciated that there was simply no intention to mislead, and that no one had in fact been misled:"

[T]here was absolutely no intention to mislead anyone, and in particular, members of the Canadian Forces and the Canadian public at-large. Rather, the intention was to be clear. In detailing the factors that formed part of our decision, it was important to be clear and transparent regarding the matters that factored into the analysis and the decision not to lay criminal charges at this time.

The CFPM memorandum concluded:

It is important to emphasize that the decisions made with regard to this case were made in good faith, and not in bad faith as seems to be implied by the conclusions of the SRG Report. Given the information gleaned from the investigation, the judgement of the original decision-maker that was aware of all the facts continues to have my full support.

[T]o suggest that CFNIS misled the CDS and the Canadian public is not only a false conclusion based on limited information, but could inevitably tarnish the

> *results of this [coffee tampering] investigation and credibility of the CFNIS. It is my belief that this issue should be addressed immediately. Therefore it is my intention to bring this concern to the attention of the Military Police Complaints Commission for its assessment.*

(f) June 29, 2000 Press Conference of Ex-WO Stopford

At a press conference held on June 29, 2000, ex-WO Stopford, accompanied by Mr. Art Hanger, Member of Parliament and the official defence critic of the Canadian Alliance party, read the affidavit that he submitted to the MPCC as his complaint. He also explained, among other things, his confusion about the information that had been provided to him about the coffee tampering allegations.

IV: Analysis of the Evidence

Issue 1 – "Inaccurate or Inadequate and Misleading"

Did the Canadian Forces National Investigation Service (CFNIS) provide inaccurate or inadequate and misleading advice to the CDS and the Canadian public, among other occasions, during the press conference held on May 30, 2000, with regard to the possibility of laying charges pursuant to the *Criminal Code* and the *National Defence Act*?

(a) "Misleading"

The SRG report stated that it was difficult to avoid the conclusion that the CDS and the Canadian public were misled about the manner in which the issue of criminal charges was handled. Similar statements were made by BGen Sharpe and Professor Ratushny at the SRG press conference on June 20, 2000. The central focus of the SRG's criticism of the CFNIS lay in the SRG's interpretation of the legal opinions given to the CFNIS. The SRG could not find support in these legal opinions for the decision reached by the CFNIS not to proceed with criminal charges at that time.

(i) The Legal Opinion of May 18, 2000

The May 18 legal opinion, submitted by the external counsel to the CFNIS on May 19, 2000, was entitled "Comments on Available Evidence." Much of the legal opinion consisted of an examination of the evidence that could be used to support a charge of mutiny. The external counsel indicated to the MPCC that:

> *My objective … during the … writing of the mutiny opinion was to … try to piece together … the relevant evidence to try to depict the situation … as described by the information collected within the investigation. And that information would cover – can be seen to cover charges of mutiny and Criminal Code charges.*

The May 18 legal opinion was therefore more than a legal analysis of the offence of mutiny. The opinion also contained an extensive discussion of the evidence that helped the task force decide whether there was a solid evidentiary basis for laying criminal charges, not merely mutiny charges. At the May 30 press conference, Insp Grabb described the May 18 legal opinion as a comprehensive written legal opinion on the evidence. He later told the MPCC that the legal opinion was an excellent instrument to analyze the entire case criminally, whether or not it was intended to be an opinion on mutiny:

> *Our own analysis of the facts, Commander Price's observations and Jim Marshall's written opinion, which regardless if it was intended to be giving an opinion on mutiny or not, it was an excellent instrument to analyze the entire case, whether criminally or administratively as well.*
> …
> *Well at the end of the day the decision not to lay charges was predicated on an analysis of the facts that there was not an evidentiary basis to lay criminal charges.*

BGen Samson's response to the SRG report makes the same observation about the May 18 legal opinion:

> *The comprehensive analysis of the facts provided within this written legal opinion offered the investigators an excellent opportunity to assess all of the evidence.*

Language almost identical to that in the May 18 legal opinion appeared in the May 25, 2000, memorandum from BGen Samson to the VCDS that accompanied the CFNIS report on the Stopford case.

Although not identical to the language of the May 18 opinion, language in the PowerPoint presentation at the May 30, 2000 CFNIS task force press conference was also very similar.[14] This demonstrates clearly that the task force did rely on the May 18 legal opinion – in this case, the analysis of the evidence contained in that opinion – to determine the viability of *Criminal Code* charges, not merely mutiny charges.

[14] A comparison of the language in the May 18 legal opinion, the May 25 memorandum of BGen Samson and the May 30 PowerPoint presentation is found in Annex A to this report.

It was therefore not misleading for the task force to state that it was relying on the May 18 legal opinion to reach a decision about whether to lay criminal charges. For example, the statement by Insp Grabb at the press conference referring to reliance on the legal opinion was not misleading:

> *And what we were able to determine based on our external legal opinion and our own analysis of the facts is that although it can be established beyond a reasonable doubt that certain substances were in fact placed in coffee intended to be consumed by Stopford, there's insufficient evidence at this time to refer this matter to a provincial prosecution service somewhere in Canada for possible charges.*

As well, the task force consulted extensively with the external counsel when preparing material for the May 30, 2000, press conference. Given his independence as a legal adviser, it hardly seems likely that CFNIS task force members would have involved him so fully in developing the materials for the press conference if they were attempting to "massage" the information he was giving them. The readiness of BGen Samson to provide information to the SRG after the CDS announced its creation also strongly suggests that there was no intention by the CFNIS to mislead.

(ii) Verbal Advice Provided to CFNIS Task Force

Part of the basis for the SRG characterizing the public statements of the CFNIS task force as misleading flows from the SRG's analysis only of the written legal advice that the task force had received in four legal opinions. The SRG did not take into account the frequent verbal advice that the external counsel gave to the task force and that task force members considered to be legal advice.

Statements by those interviewed by the MPCC and documents provided to it showed that not all the legal advice provided to the task force came from written legal opinions. The external counsel was consulted for verbal advice, sometimes daily or more often, and on many occasions the task force investigators considered his verbal responses to be legal

advice. During preparation for the May 30, 2000, task force press conference on the Stopford case, Mr. Marshall was consulted extensively. It was therefore entirely reasonable for task force members to state at the May 30 press conference that they had received external legal advice.

(iii) The SRG Report

- Timeframe

Much of the difference of opinion between the SRG and BGen Samson about the issue of “misleading” appeared to flow from the SRG’s cursory examination of the task force investigation. BGen Sharpe indicated to the MPCC that he could have asked for more time – perhaps 30 days – but that if this matter wasn’t dealt with quickly it was a pointless exercise. “Fourteen days was very important.” Later, he stated that, “the time line was driving us.”

In fact, when speaking to the media at the June 20, 2000, press conference held to unveil the SRG report, BGen Sharpe was asked if the two-week timeframe given to the SRG was a constraint. He replied:

> *Quite honestly this is the sort of thing that you either do very quickly in two weeks or you do it over many years I suppose. In the interest of getting the air cleared on both the leadership issue and the charges or the potential criminal charges here we felt that speed was of the essence. Had we required more than two weeks I am absolutely positive had I asked for another week, another two weeks we would have the time given to us ... but I felt 14 days was sufficient. If we were going to go longer than, if we wanted to start calling people and start seeking explanations from different individuals here it would have stretched itself on to a much longer process and quite frankly we concluded very quickly that the issue of leadership, which was a significant question here was not a serious question.*

- Liaison between CFPM and SRG

BGen Sharpe told the MPCC that he had asked for all relevant legal opinions [used by the CFNIS], not merely written legal opinions. Indeed, the report of the SRG refers to requesting all relevant opinions.

Despite this request, BGen Sharpe concluded during the work of the SRG that some information appeared to be missing. He told the MPCC:

> *But at the end when we submitted our report, I stressed that and I made sure everyone understood that – that meant, the conclusion that we drew was based on the assumption that we had all relevant information.*
>
> *And – and I – and I stressed that because I still was having difficulty believing that we had seen everything. Otherwise there – there was a disconnect.*
>
> *We did not try to – try to investigate the disconnect because again, I felt in the timeframe, and the timeframe was very important, that we get it in on time; that that would have opened up a – an area that I would not be back – we would not be finished for a long period of time.*
>
> *So that was – that was – we recognized that there appeared to be something missing. But without – without a different mandate, I – I didn't feel we could go – go chasing, what was perhaps missing.*

BGen Samson had asked Capt Lanouette, spokesperson for the CFPM, to act as liaison with the SRG. He was to gather the files associated with the investigation and the transcripts of interviews, then bring them to the office of the CDS.

Capt Lanouette told the MPCC that he had two informal encounters with BGen Sharpe while the SRG was preparing its report. At the first encounter, Capt Lanouette explained that there was more information available and asked BGen Sharpe to contact him if he needed anything else. Capt Lanouette stated further:

[BGen Sharpe] made the statement to the effect that you only have to read six (6) of these transcripts to come to the determination of what happened. He's – he basically commented on the thoroughness of the investigation –
Q: What do you mean?
A: – and he said that he's really impressed by how thorough the investigation was …

Capt Lanouette told the MPCC that at the second encounter (likely the following week) BGen Sharpe introduced him to the members of the SRG, and Capt Lanouette told them to contact him if they needed further information. He indicated to the MPCC that there was no discussion about the need for documentation at the second meeting. "If they would have asked for anything, I would have actioned it; there wasn't [any such request]." BGen Sharpe himself described Capt Lanouette to the MPCC as being "very, very cooperative. He was getting us [the SRG] the stuff – I mean, everything that he could do to help us out … . "

BGen Sharpe told the MPCC that at one point he and Capt Lanouette discussed the legal opinions used by the CFNIS. However, BGen Sharpe told the MPCC that he did not "feel comfortable" saying to Capt Lanouette, "surely there must be more information…. I felt that that was somewhat presumptuous of me to do that."

MPCC counsel asked BGen Sharpe about the impact of the decision of the SRG not to look further:

Q: You've made very harsh comments –
A: Yes.
Q: – on one (1) of the key institutions of – you're – you're a member of the army and my concerns that I've got with that, and it's me personally, and I want to address it –
A: Yeah.
Q: – frankly with you, so that you can throw it back at me.
A: Yeah.
Q: Would it – considering how you could – the misleading accusations – conclusions I should say, knowing now that you felt that there was a grey area, would it not have been better to go back and say, hey guys, Lanouette please come in. I don't understand what you guys have done.
A: Hmm hmm, I – I –
Q: There must be something else.

A: – yeah, I understand exactly what you're saying.

The – the – the probl – not the problem, the situation was that there were four (4) members of – of the review group, and we all – we basically brought an equal authority to the table as we sat there.

The language was very strong, and – and I did debate, quite frankly, changing that. I discussed it with – with Al and Bill and Ed, as – as a group. The consensus was that that was the language we should use. If we felt that that was the case, that was the language we should use.

Did that cause me some concern? Yes it did, primarily because I know and respect many members of the NIS, in fact the – the working relationship with people like Lieutenant-Colonel Dixon was absolutely outstanding. I still consider him a very – very professional and very dedicated guy. I mean, there's no reason I wouldn't.

Q: Yeah, but knowing that you had concern –

A: But –

Q: – about the grey areas –

A: – well, you see, you've got to understand the grey area. The grey area was self-inflicted, if I can be candid about it.

We asked for all the information.

Q: Yeah.

A: We did not have the mandate or the time to pursue it and create it. We had to – to investigate it in other words, we did not have the time or the staff or – or to – to go out and generate that information.

What we did is open and made sure that invitation was clearly understood within the NIS and anyone else that was affected, that we – we were looking at all relevant information.

In other words, help us out here and give us –

Q: Yeah.

A: – how you came to your conclusion –

Q: And just following –

A: – and that door was open right up until the very last minute –

Q: – right, but along that line when you sat down with Captain Lanouette and you had the full legal opinions, did you ask him is there anything else?

A: Not in – not in that – not that precisely, no. I did introduce Captain Lanouette to the other members –

Q: You did.

A: – of the review group –

Q: Okay –

A: – as well.

Q: – but there was two (2) meetings with Captain Lanouette?

A: Oh there were several, he was –

Q: Several?

A: – yeah, he kept coming and giving us information. He was doing a heck of a good job of – of finding things and giving us stuff. And – and sort of expanding on the stuff he gave us.

He came in, oh gosh, it would be probably half a dozen times he came to my office with more information and stuff.

I did not say we'd – we're – we're having trouble with this. And we would like you to go back and just double check –

Q: No, but –

A: – and make sure we've got everything.

Q: – maybe not we're having trouble, but say, listen this is your file of legal opinions, this is it –

A: Yeah –

Q: – there's nothing else?

A: – no this is how we walked – that's exactly how we walked through it. So I said let's – let's go back to the beginning here.

You – you first went to the Justice Department, that was in January, sort of? Yes. And you got that information and that led you here? Yes. And that led you there? Yes. And then you ended up here? Yes. And that's – that's how we walked him through it.

Q: So you would have expected him to say, yes, but there's more –

A: Yes.

Q: – General.

A: – yes, sir.

Q: And he did not –

A: Yes.

BGen Sharpe told the MPCC that he felt it was inappropriate to start asking what other opinions there might be. He stated that Capt Lanouette commented at one point that the opinions the CFNIS were getting from legal staff indicated that there was no "viability or logic" in pursuing the case. BGen Sharpe stated that Capt Lanouette did not offer to give this additional information to him after mentioning it:

> *But he did not offer to kind of share that – I'm not sure how he could have offered to share that if it was verbal. But there was no coming forth with that – volunteering that information and we felt – and I felt, actually, that it would have been inappropriate then to start saying, well tell me the – tell me what other opinions, what other lawyers, who did you talk to, who else gave you this information; because I felt at that stage I'm starting – I would be starting to try and clear, if you like, the NIS and I felt very much like a – like I had to stand back from this with – with Dr. Ratushny, with Dr. English and Dr. Bentley.*

BGen Samson told the MPCC:

> *If he [BGen Sharpe] wanted more information, we were available, we wanted to give it to him, he had everything we could give him in accordance with the mandate ….*

Neither the CFPM, BGen Samson, nor any member of the task force was invited to discuss this issue of the apparently missing information with the SRG. BGen Sharpe told the MPCC that he did speak to another "general officer" who suggested that BGen Sharpe should have spoken to BGen Samson because she might have more information. BGen Sharpe replied that he hadn't spoken to her and didn't think he could, from a "credibility perspective."

Yet, as mentioned before, BGen Sharpe did write to ex-WO Stopford inviting his input (the letter arrived too late for ex-WO Stopford to respond). He also showed part of the report to other generals not involved in the CFNIS. He stated that he did this to show them where the SRG "was going" so that if there was more information available it might come forward.

(iv) Lack of Knowledge by the CFPM about the Scope of the SRG Mandate

BGen Sharpe also told the MPCC that his interpretation of the terms of reference of the SRG was "probably not" known by anyone in the CFNIS. BGen Samson and task force members did not expect at the outset of the SRG review that the SRG would be re-examining the CFNIS investigation. Rather, they thought that the SRG would follow the terms of reference set out by the CDS and determine what administrative action might be taken against those involved in the coffee tampering, given that criminal charges were not an option at that time.

In fact, BGen Samson told the MPCC that she had been unaware that the mandate of the SRG included a review of the process by which the decision was made not to lay charges in this case. She said that, had she known, she would have spoken with the Chairperson

of the MPCC because “no one else, as far as I’m concerned, has the legal right to go through and to evaluate, if indeed we’ve done a bad job or a good job, other than [the MPCC].” If it were decided nonetheless that the SRG would carry on with this line of inquiry, she would have ensured that the “notes” would have been made available to the SRG – that everything that was supplied to the MPCC would have been made available to the SRG. However, she stated, the SRG never asked for the notes.

The strong criticisms by the SRG of the CFNIS for “misleading” would probably not have arisen had the SRG asked for further information about what was obviously a key issue in its report. If the members of the SRG felt that information was missing, they could have asked Capt Lanouette, designated by the CFPM to act as liaison with the SRG. Capt Lanouette had demonstrated a clear willingness during the work of the SRG to provide any information that the SRG requested.

(b) “Inaccurate or Inadequate”

The information presented at the May 30 CFNIS press conference was not flawless. Insp Grabb told the MPCC that some information provided at the press conference could have been made more clear. He stated:

> *I’m just–all I was, was a cop trying to explain to the average citizen, something that is really hard to explain, when you know all the facts.*

However, the Chairperson concludes that these inaccuracies were not of any consequence, nor is there any indication that they were intentional.

(i) Legal Test for Laying Charges

The May 30, 2000 CFNIS press conference presentation could have been more clear in its description of the legal test that must be met before CFNIS investigators lay charges. Insp Grabb stated at the press conference that charges were not laid for the following reason:

> *And what we were able to determine based on our external legal opinion and our own analysis of the facts is that although it can be established beyond a reasonable doubt that certain substances were in fact placed in coffee intended to be consumed by Stopford, there's insufficient evidence at this time to refer this matter to a provincial prosecution service somewhere in Canada for possible charges.*

The May 30 PowerPoint Presentation stated:

> *There is insufficient evidence to establish **beyond a reasonable doubt** that the substances in question were actually ingested by Ex-Warrant Officer Matt Stopford.* [Emphasis in original]
>
> ...
>
> *Although we can prove **beyond a reasonable doubt** who put substances in coffee intended to be consumed by Ex-Warrant Officer Matt Stopford, we cannot prove **beyond a reasonable doubt** which one of them actually delivered, or attempted to deliver, to him what could clearly be considered as a "noxious thing."* [Emphasis in original]

BGen Samson's memorandum of May 25, 2000, accompanying the CFNIS report, used the same wording:

> *Further, criminal charges of Administering a Noxious Substance (Section 245 of the Criminal Code of Canada) and Assault (section 267 of the Code) can not be pursued as it has not been proven beyond a reasonable doubt that ex-WO STOPFORD actually ingested the coffee into which the substances were inserted.*

These statements do not precisely reflect the standard of proof required to lay charges.

An explanatory note setting out the test for laying charges appears in Chapter 107 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), entitled "Preparation, Laying and Referral of Charges." The note found at the end of article 107.02 states:

> *There must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A "reasonable belief" is a belief which would lead any ordinary prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged.*

The same test is set out in a JAG policy entitled "Charge Screening Policy," as well as in the CFNIS Standard Operating Procedure (SOP) 238.

The MPCC understands that the task force was attempting to explain complex legal issues to a lay audience, and that this may have been responsible for the somewhat imprecise wording. (In fact, Insp Grabb did at one point in the press conference of May 30, 2000, refer more accurately to the test for deciding whether to lay charges.) However, the May 18 legal opinion by the external counsel, on which the task force investigators based their decision not to lay charges, did correctly refer to the requirement of "reasonable belief."

(ii) Failure to Mention Involvement of a Military Lawyer

At the May 30, 2000, CFNIS press conference, reliance on "external independent legal counsel" was discussed. Insp Grabb also stated there that the task force had discussed the case with a Crown attorney in Ontario, but only at the beginning of the investigation and only in terms of "brainstorming" the case.

The MPCC was initially concerned by the failure to mention the involvement of a military lawyer. Nowhere during the press conference did Insp Grabb or Capt Lanouette mention the involvement of the then Deputy Director of Military Prosecutions, Cdr Price, in advising on the case, specifically the preparation of a March 10, 2000, legal opinion on mutiny.

Cdr Price told the MPCC that he had not been informed of the details of the ongoing task force investigation relating to ex-WO Stopford until he was asked to provide a legal opinion on the mutiny issue. As he stated, he was "kept out of the loop." He told the MPCC that he was generally aware that there were frequent meetings between the task force and the external counsel, but he was not involved in them or invited to them. Cdr Price said that he viewed the external counsel as the main legal adviser to the task force. Cdr Price also told the MPCC that he thought it appropriate that his [Cdr Price's] involvement with the task force not be mentioned at the May 30, 2000 press conference, since Mr. Marshall was the main legal adviser.

BGen Samson told the MPCC that lack of mention of the involvement of military lawyers was not done purposely to mislead anybody. "I mean, that's not our aim." She agreed, however, that in retrospect, mentioning the involvement of military lawyers in advising the task force might have been appropriate. Later, she stated:

> *There certainly wasn't any intent on my part or the people that I work with to try and mislead the Canadian public because we didn't tell them, oh, by the way, we went the – we didn't tell you, we also got advice from a Military lawyer.*

From the interviews the MPCC conducted with BGen Samson and Insp Grabb, it became apparent that the failure to mention the involvement of a military lawyer flowed from a misunderstanding within the CFNIS. Nonetheless, the involvement of the military lawyer should have been mentioned.

(iii) Analysis by the SRG Regarding the Authority to Lay Charges

The MPCC feels it necessary to address the SRG's analysis concerning the authority to lay charges.

The conclusion to the SRG report stated:

> ***[T]he obvious course of action to us, in all of the circumstances****, is simply to refer the results of the NIS investigation to the local Crown Attorney so that the appropriate prosecutorial authority may exercise the appropriate discretion as to whether or not criminal charges should be laid. This is a responsibility for which the provincial attorneys general are constitutionally accountable to the public. The referral should occur forthwith.* [Emphasis added by MPCC]

This conclusion would indicate that the SRG somewhat misunderstood the charging process and the responsibility of the military police.

CFNIS investigators have the power to conduct investigations relating to any military or criminal offence, including serious and "sensitive" offences. Since November 30, 1997, they also have the power to lay charges in such cases.

Section 2 of the *National Defence Act* defines "service offence" as an offence under the *National Defence Act*, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.[15]

Guidelines governing the CFNIS require military police to consult military prosecutors throughout their investigations in order to receive the benefit of legal advice at all stages of the investigation.

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[15] The test for laying charges has previously been discussed under the heading "Legal Test for Laying Charges."

QR&O Chapter 107, entitled "Preparation, Laying and Referral of Charges," requires CFNIS investigators, before laying charges, to obtain legal advice concerning the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge. If there is disagreement about whether a charge should be laid, the issue is referred to a commanding officer or superior commander within the CFNIS and to the prosecution service. If the disagreement persists, the CFNIS investigator may nonetheless lay the disputed charge.

The JAG policy concerning the preliminary review of charges makes it clear that the CFNIS has authority over the conduct of investigations, and the prosecutor has the authority over the conduct of the prosecution after charges have been laid.

The SRG report recommended that the results of the CFNIS investigation be referred to the local Crown Attorney "so that the appropriate prosecutorial authority may exercise the appropriate discretion as to whether or not criminal charges should be laid." The MPCC has been advised that there is no policy in Ontario obliging the police to consult with prosecutors before laying charges. Although the police may consult with the Provincial Crown Attorney, the decision to lay charges rests with the police.

(iv) Criticism by SRG of Apparent Failure by CFNIS to Consider Criminal Charge for "Attempt"

The SRG concluded that the task force had not considered criminal charges for attempting to administer a noxious substance. However, the SRG was not aware that verbal discussions took place about the possibility of an attempt charge. In her memorandum of June 20, 2000, to the VCDS, responding to the SRG report, BGen Samson stated:

> *Contrary to the Report of the SRG, the CFNIS did in fact seek legal advice, and did give consideration to a charge of attempting to commit a criminal offence, as per the provisions of Section 24(1) of the Criminal Code of Canada. The legal*

advice on this issue, that was articulated verbally in detail to the Task Force Commander, was that only the actions of the soldier who placed four drops of Visine in Ex-WO Stopford's coffee could possibly be considered as an attempt, as defined by Section 24(1). The legal advice was that no evidence existed to prove such an attempt in relation to any other living suspect.

Both Insp Grabb and Mr. Marshall told the MPCC that they had discussed the issue of charging for attempt. Their testimony confirms the statement to that effect by BGen Samson.

Issue 2 – Information Provided to Ex-WO Stopford

Did the CFNIS provide misleading information to ex-WO Matthew Stopford with respect to the "confessions" collected during the conduct of the CFNIS investigation?

(a) Background

On June 29, 2000, ex-WO Stopford and Mr. Art Hanger held a press conference where ex-WO Stopford stated that the "poisoning scenario" did not take place and was a misleading fictitious story designed for an unknown purpose by different departments of the government. He continued:

Once the investigation was cleared up and they did an eighth-month investigation which cost over a million dollars, the NIS stated with Russ [Grabb], the CDS and the Minister of National Defence that it was a black and white case, they had written . . . confessions, but they couldn't prosecute anybody because of statute of limitations and because they didn't have enough evidence at the time. I still express my disbelief. The NIS, the CDS and NDHQ have all stated they had six confessions and up to 12 individuals in my platoon were involved in the poisoning allegations. After speaking with General Sharpe candidly this weekend a few times, I have been informed that there was only one written confession of one soldier and that's the only information he has ever seen concerning the poisoning allegations in my platoon itself.

... on May 31st, 2000[16]*, Inspector Bruce Burton of the National Investigation Service, Sensitive Investigations Unit, met with me at my house. He informed me that they had written confessions from six soldiers who confessed to having attempted to poison me while on tour in Croatia by placing noxious substances in my coffee. These substances included battery acid, anti-freeze, engine coolant, naphtha, bootblackener and Visine. These comments were confirmed by General Baril, Inspector Russ Grabb and Minister Art Eggleton at a news conference which was given May the 31st, 2000, approximately 30 minutes after my meeting with Inspector Burton.*

It was also stated that as many as a dozen troops have been involved in the conspiracy to place substances in my coffee. It was also stated that there was evidence that the military police and the chain of command knew of the alleged poisoning in 1993 and no action was taken. I was not informed of these allegations until... in 1993 and was unaware of any such allegations until receipt of a letter by General Samson in June of 1999. I am informed by General Sharpe that the facts are subsequently [substantially] different than those related to me by Inspector Burton and the NIS and those related to the public on May 31st, 2000. I'm informed by General Sharpe that there is a single confession of a single incident involving drops of Visine in my coffee. This was apparently done as a practical joke. I'm informed by General Sharpe that there was a single individual as opposed to 12 and that there is a single written confession rather than the six confessions previously stated to the media. In fact, [if the facts] as related to me by General Sharpe are accurate, then the allegations made by the NIS and NDHQ are inaccurate in material ways. These inaccuracies have had the effect of devastating my reputation and life as a competent and caring non-commissioned officer operating in wartime conditions.

Ex-WO Stopford's affidavit to the MPCC made the following specific points:

3. On May 31, 2000 Inspector Bruce Burton of the National Investigation Service (Sensitive Investigations Unit) met with me at my house. He informed me that they had ***written confessions from six soldiers*** *who confessed to having attempted to poison me while on tour in Croatia by placing noxious substances in my coffee. These substances included battery acid, anti-freeze, engine coolant, naphtha, boot blackener and visine....* [Emphasis added by MPCC]

4. These comments were confirmed by General Baril, Inspector Russ [Grabb] and Minister Art Eggleton in a news conference which was given May 31, 2000 approximately 30 minutes after my meeting with Inspector Burton.

[16] Ex-WO Stopford's statements at the press conference and in his affidavit erred slightly on some of the dates. The CFNIS press conference was in fact held on May 30, 2000, and WO Burton visited him on the same day. The Minister held a press conference on May 30, and the CDS held a press conference on June 1. BGen Samson wrote to ex-WO Stopford in August 1999, not June 1999. However, these minor variations have no bearing on the issues raised by ex-WO Stopford.

5. It was also stated that ***as many as a dozen troops have been involved*** *in a conspiracy to place substances in my coffee....* [Emphasis added by MPCC]

…

8. I am informed by General Sharpe that the facts are substantially different [than] those related to me by Inspector Burton and to the public on May 31, 2000.

9. I am informed by General Sharpe that there is ***a single confession of a single incident*** *involving drops of visine in my coffee. This was apparently done as a practical joke.* [Emphasis added by MPCC]

10. I am informed by General Sharpe that there was ***a single individual as opposed to twelve and that there is a single written confession rather than six confessions.*** [Emphasis added by MPCC]

(b) May 30, 2000 CFNIS Press Conference PowerPoint Presentation

The PowerPoint presentation made at the CFNIS press conference of May 30, 2000, did not refer to “confessions.” At slide 29, the PowerPoint presentation stated:

Although the findings of this case flow from the voluntary statements of the very soldiers who were actually involved in this affair, the passage of time has precluded many witnesses from being able to recall precise details of important events.... Although some Roto 2 soldiers made incriminating and admissible statements to fellow soldiers and to police, the overall investigation was greatly hampered by an absence of candor and cooperation on the part of those believed to be involved.

However, during the May 30 press conference, Insp Grabb did refer to “confessions” and also spoke of the number of soldiers involved:

The evidence in this case supports the following conclusions. Firstly, during Roto 4 [sic], ***a number of identified soldiers did in fact place substances*** *such as naphtha, anti-freeze, anti-irritant eye drops like Visine, and boot blackener in coffee intended to be consumed by Matt Stopford. And I stress the word intended to be consumed.* [Emphasis added by MPCC]

> *How do we know this?* ***Many of the people who were involved, many of the soldiers about which I'm speaking, confessed not only to fellow soldiers but to police during our criminal investigation.*** *The alleged motive for these acts was to temporarily render him unable to carry out his position of command. The evidence also supports the conclusion that a number of other substances including battery acid was also contemplated. The evidence supports the conclusion that no permanent harm was intended. And the identified soldiers also contemplated placing similar substances in the coffee of other leaders in their company. Again, how do we know this?* ***The people directly involved made incriminating statements not only to their fellow soldiers who in turn gave us witness statements but in some cases some of these individuals confessed to having placed the substances in coffee intended to be consumed by Matt Stopford.*** [Emphasis added by MPCC]
>
> *... Now, were it not for the fact that in 1993, a three-year statutory limitation period applied to this particular conduct, to this particular offence under section 129 [of the National Defence Act], make no mistake,* ***the NIS would have laid charges against a number of people, approximately six soldiers***. [Emphasis added by MPCC]

In response to a question from a journalist, Insp Grabb stated:

> ***I'd also like to clarify that I said approximately six soldiers. In fact, we did 12 cautioned interviews of soldiers who were under investigation. Twelve soldiers were – on 12 occasions read their rights. We're estimating that approximately six were directly involved in committing the section 129 offence that we allege.*** [Emphasis added by MPCC]

During an interview with CBC Newsworld on May 31, 2000, Insp Grabb stated:

> *[W]hat we were able to determine is that* ***approximately six soldiers, there may have been more, but approximately six on more than one occasion did in fact place various substances in coffee intended by them to be consumed by Matt Stopford****, and in fact, they contemplated doing similar acts to other leaders in that company.... Where we had some difficulties was proving beyond a reasonable doubt, which one of those half a dozen soldiers actually delivered to Matt Stopford what the courts would consider a noxious thing....* [Emphasis added by MPCC]

Insp Grabb said that media reports stating that he had spoken of six "confessions" were erroneous. He told the MPCC, "I never said that."

The MPCC also examined the transcript of a May 30, 2000 media scrum with the Minister of National Defence, and the transcript of a June 1 press conference where the CDS announced the formation of the SRG. Neither the Minister of National Defence nor the CDS made any reference to the number of individuals who may have been involved in the coffee tampering.

(c) May 30, 2000 Visit to Ex-WO Stopford by a CFNIS Investigator

A CFNIS investigator who had not been involved in the Stopford investigation met with ex-WO Stopford at the latter's home on May 30, 2000. The investigator provided ex-WO Stopford with a copy of the briefing materials for the May 30 CFNIS press conference. It is possible that the investigator's verbal explanation may have mentioned five or six people "confessing" to allegations of coffee tampering, and this explanation might have mistakenly referred to "written" confessions.

It is unfortunate that the CFNIS decided to send an investigator who had little knowledge of the case to inform ex-WO Stopford of the conclusions reached by the CFNIS. This is not a criticism of that investigator, who had merely been assigned to meet with ex-WO Stopford because they were acquaintances. However, had an investigator more familiar with the case been sent to explain the results, at least some of the apparent confusion relating to the number of confessions might not have occurred.

(d) Communications Between Ex-WO Stopford and BGen Sharpe

Ex-WO Stopford told the MPCC that BGen Sharpe had told him on the telephone at about the time the SRG report became public that he (Sharpe) had seen one confession about Visine by one of the soldiers. BGen Sharpe had said that this incident occurred during the third week in the tour and that it was designed as a practical joke. Later, ex-WO Stopford told the MPCC that BGen Sharpe had said there was only one person who had put anything in the coffee, possibly two.

In a statement released on June 29, 2000, BGen Sharpe stated that he had spoken to ex-WO Stopford on several occasions. "In my conversations with Matt, we discussed a wide range of issues during which I indicated to him that there was at least one, but less than 12 persons involved in the alleged coffee tampering."

BGen Sharpe explained to the MPCC that he told ex-WO Stopford that there was at least one confession. BGen Sharpe said that he wasn't sure of the actual number of confessions, but that there was at least one.

(e) Varying Definitions of "Confession"

Just as dictionary definitions vary, it would seem that ex-WO Stopford and Insp Grabb may have had a different understanding of the term "confession." Insp. Grabb seemed to understand "confession" to include a statement to a third party, not merely a statement to a police officer or person in authority. Yet it is also quite reasonable to consider a confession to be a statement by a suspect only to a person in authority. Ex-WO Stopford, for example, appeared to consider statements to a third party to be hearsay, and understood the notion of confession to be something different. As well, the explanation given to ex-WO Stopford by the investigator who briefed him on May 30, 2000, may have referred to five or six people "confessing" to allegations of coffee tampering, and this explanation might have mistakenly referred to "written" confessions. In any event, such an error, if it occurred, was not made with any intent to mislead.

Issue 3 – Knowledge by the Military Police and the Chain of Command in Croatia of Coffee Tampering Allegations

When did the military police and the chain of command become aware of the allegations that ex-WO Stopford was poisoned in Croatia in 1993?

The purpose of examining the last issue was to assess if the CFNIS investigation and comments made at the media briefing of May 30, 2000, reflected whether the military police and the chain of command knew about the coffee tampering allegations and, if they did, when they knew.

Ex-WO Stopford raised the possibility that the military police and the chain of command in Croatia were aware of the coffee tampering allegations, but did nothing about it.

At the May 30, 2000 CFNIS press conference, Insp Grabb stated that there was some indication that "the medical and tactical chain of command at the time [in Croatia] were made aware of what [the allegations of poisoning] was going on … and we in fact have a statement from one commissioned officer who tells us that he was aware of this in theatre at the time, in 1993, that he was made aware." According to Insp Grabb, that officer also claimed to have passed this information up the chain to his superior. Later, Insp Grabb stated that the commissioned officer indicated that he had provided this information to his "boss up the command – the command structure that was there in Croatia at the time, locally." Insp Grabb said that he did not know whether the information was passed on from the chain of command in Croatia to officers in Ottawa. The CFNIS became aware of this information during the course of their investigation into the - *protected* - Stopford matter.

Upon reviewing the CFNIS investigation report and all pertinent documents in its possession and after interviewing 11 individuals, the Chairperson concludes that the comments made at the CFNIS press conference on May 30, 2000 adequately reflected whether and when the military police and chain of command were made aware of the coffee tampering allegations.

The facts as related by Insp Grabb at the May 30 press conference are somewhat, although not substantially, at variance with the task force investigation report dated May 24, 2000. Insp Grabb appears to have erred about the rank of the individual (a non-commissioned member and not an officer) who may have brought the allegations of coffee tampering to the chain of command. The MPCC finds no indication that this was in any way deliberate. The main point – that there was some evidence to suggest that the chain of command in Croatia was aware of the poisoning allegations – was reported by Insp Grabb.

In reviewing the CFNIS report, the MPCC took note of the fact that interviews of certain members of the chain of command, conducted during the initial investigation, were not tape recorded, whereas interviews with non-commissioned members were recorded on tape. This way of proceeding may give the impression of offering preferential treatment to senior officers.

A further review of the evidence identified certain avenues of investigation that, in the MPCC's opinion, the CFNIS could have pursued more fully. Accordingly, the MPCC asked the CFPM to look further into the possible knowledge, by the military police and the chain of command in Croatia, of the coffee tampering allegations. The additional information provided by the CFNIS in response to that request does not enable the MPCC to draw any further conclusions at this time about possible knowledge by the military police and the chain of command in Croatia.

V: Chairperson's Findings Subsequent to the Investigation

The MPCC examined the documents that were made available to the SRG. It also reviewed further documents, some prepared in response to the SRG report, and heard 11 individuals *viva voce*. The persons interviewed, including the military police members whose conduct could be the subject of the complaints, all agreed to give their versions of the events under oath, and cooperated fully with the MPCC. They were also given the opportunity to explain their understanding of the events. The MPCC therefore bases its conclusions on a more extensive body of information than that reviewed by the SRG. This has permitted the MPCC to have a fuller understanding of the CFNIS investigation and has also led the MPCC to substantially different conclusions than those reached by the SRG.

It should be noted that the central focus of the SRG's criticism of the CFNIS lay in the SRG's interpretation of the written legal opinions given to the CFNIS. The SRG could not find support in these written opinions for the decision reached by the CFNIS in May 2000 not to proceed with criminal charges at that time. Yet much of a legal opinion rendered by the external counsel on May 18, 2000 consisted of an examination of the evidence that could be used to support a charge of mutiny. The CFNIS task force relied on the analysis of the evidence contained in that opinion to help it decide whether to lay criminal charges, not merely mutiny charges. In light of all the information gathered by the MPCC, which consists of more than those written legal opinions, it was entirely reasonable for task force members to state at the May 30, 2000 CFNIS press conference that they had received external legal advice relating to the laying of criminal charges.

The SRG did not take into account the frequent verbal advice that the external counsel gave the task force. In particular, because it had not asked for or sought additional information, the SRG was apparently not aware that verbal discussions took place about the possibility of laying charges for attempt under the *Criminal Code*.

The strong criticisms by the SRG of the CFNIS for "misleading" would probably not have arisen had the SRG asked for further information about what was obviously a key issue in its report. If the members of the SRG felt that information was missing, they could have asked Capt Lanouette, designated by the CFPM to act as liaison with the SRG. Capt Lanouette had demonstrated a clear willingness during the work of the SRG to provide any information that the SRG requested.

The mandate given to the SRG by the CDS was to address questions of leadership and the possible administrative measures to be taken with respect to the CF members implicated in the coffee tampering. The CDS had explained the scope of the SRG's mandate at a press conference held June 1, 2000. It was apparent from this explanation that the SRG would not be examining whether or not charges could be laid. This had already been addressed by the CFNIS investigators. The SRG extended its mandate on its own initiative to include a review of the process by which the CFNIS decided not to lay charges. The SRG did not inform BGen Samson, the CFNIS task force or other concerned individuals, including the CDS, about this extension of the mandate. Nor would BGen Samson have any reason to think that the SRG mandate would extend to assessing the process by which the CFNIS decided not to lay charges and the conduct of CFNIS members.

It would not have been improper for the members of the SRG to speak with the Provost Marshal. BGen Sharpe did write to ex-WO Stopford inviting his input (the letter arrived too late for ex-WO Stopford to respond). The fact that BGen Sharpe also consulted officers not directly or indirectly concerned or involved with this matter, instead of BGen Samson, in the hope that somehow the concerns of the SRG would filter back to her through them, surprised the MPCC.

If the SRG had doubts or questions about the correctness of the process by which the CFNIS decided not to lay charges or about the conduct of CFNIS members, it should have referred these matters to the MPCC and lodged a formal complaint. One of the mandates of the MPCC, pursuant to Part IV of the NDA, is precisely that – to examine

any complaint about military police conduct in the performance of policing duties or functions prescribed by regulation. It is important to note that the "laying of a charge" is specifically mentioned as a policing duty or function in the regulations made pursuant to section 250.18 of the NDA.[17]

Much of the difference of opinion between the SRG and BGen Samson about whether any "misleading" occurred appeared to arise because of the cursory examination by the SRG of the process used by the CFNIS task force which led to a decision not to lay charges. The SRG, driven by its two-week deadline, condemned BGen Samson and the CFNIS before they were given an opportunity to explain fully their rationale for not proceeding with criminal charges. It is unfortunate that, because of the cursory examination by the SRG, the reputations of BGen Samson and the CFNIS were unfairly discredited.

On another issue, at the May 30, 2000, CFNIS press conference, reliance on "external independent legal counsel" was discussed. The MPCC was initially concerned by the failure to mention the involvement of a military lawyer in the preparation of a legal opinion on mutiny. From the interviews conducted by the MPCC, it became apparent that the failure to mention the involvement of a military lawyer flowed from a misunderstanding within the CFNIS. Nonetheless, the involvement of the military lawyer should have been mentioned.

As for the information provided to ex-WO Stopford with respect to the "confessions" collected during the conduct of the CFNIS investigation, there may have been confusion arising from the explanation given to ex-Warrant Officer Stopford. Just as dictionary definitions vary, it would seem that ex-WO Stopford and Insp Grabb may have had a different understanding of the term "confession." Insp. Grabb seemed to understand "confession" to include a statement to a third party, not merely a statement to a police officer or person in authority. Yet it is also quite reasonable to consider a confession to be a statement by a suspect to a person in authority only. Ex-WO Stopford, for example,

[17] *Complaints About the Conduct of Members of Military Police Regulations*, P.C. 1999-2065.

appeared to consider statements to a third party to be hearsay, and understood the notion of confession to be something different. As well, the explanation given to ex-WO Stopford by the investigator who briefed him on May 30, 2000, may have referred to five or six people "confessing" to allegations of coffee tampering, and this explanation might have mistakenly referred to "written" confessions. In any event, such an error, if it occurred, was not made with any intent to mislead.

It is unfortunate that the CFNIS decided to send an investigator who had little knowledge of the case to inform ex-WO Stopford of the conclusions reached by the CFNIS. This is not a criticism of that investigator, who had merely been assigned to meet with ex-WO Stopford because they were acquaintances. However, had an investigator more familiar with the case been sent to explain the results, at least some of the apparent confusion relating to the number of confessions might not have occurred.

Concerning the knowledge of the military police and the chain of command about the coffee tampering allegations, the facts provided by Insp Grabb at the May 30 press conference are somewhat, although not substantially, at variance with the task force investigation report dated May 24, 2000. Insp Grabb appears to have erred about the rank of the individual (a non commissioned member and not an officer) who may have brought the allegations of coffee tampering to the chain of command. The MPCC finds no indication that this was in any way deliberate. The main point – that there was some evidence to suggest that the chain of command in Croatia was aware of the poisoning allegations – was reported by Insp Grabb.

In reviewing the CFNIS report, the MPCC took note of the fact that interviews of certain members of the chain of command, conducted during the initial investigation, were not tape recorded, whereas interviews with non-commissioned members were recorded on tape. This way of proceeding may give the impression of offering preferential treatment to senior officers.

A further review of the evidence identified certain avenues of investigation that, in the MPCC's opinion, the CFNIS could have pursued more fully. Accordingly, the MPCC asked the CFPM to look further into the possible knowledge, by the military police and the chain of command in Croatia, of the coffee tampering allegations. The additional information provided by the CFNIS in response to that request does not enable the MPCC to draw any further conclusions at this time about possible knowledge by the military police and the chain of command in Croatia.

VI: Chairperson's Findings Having Considered the Notice of Action from the CDS

On November 30, 2000 the Chairperson of the MPCC, in accordance with section 250.39 of the NDA, forwarded to the Minister, the CDS and the Judge Advocate General (JAG) her interim report in writing setting out the Chairperson's findings with respect to both complaints. Although section 250.39 includes the CFPM as a recipient of this report, it was decided that, given her involvement as a subject of the complaint, she would not receive a copy. Sending the interim report to the CFPM in these circumstances would be contrary to the spirit of the Act.

Subsection 250.49(2) and section 250.51 of the NDA require the CDS to review the interim report in light of its findings and recommendations and to notify in writing both the Minister and the Chairperson of any action that has been or will be taken with respect to the complaints.

On December 14, 2000, the Chairperson of the MPCC received from the CDS his notice of action dated December 12, 2000. This notice was considered by the Chairperson prior to the preparation of this final report.

In his notice of action dated December 12, 2000, the CDS, though comforted by the conclusion that there was no misconduct by the CFPM or the CFNIS members and reassured by the finding that neither he nor the Canadian public had been misled, was nevertheless cognizant of the need to address several issues raised.

The CDS stated, in part:

> …
>
> *In particular, I note that your interim report states that the Special Review Group extended its mandate on its own initiative. Coincidentally, the administrative orders, which provide direction on how boards of inquiry and summary investigations are to be conducted, are now in the process of being rewritten. A military administrative law reference manual is also being developed to provide additional guidance in this area and that manual should be completed in the spring 2001 timeframe. Action will now be taken to ensure that these important source documents include direction on investigative procedures and reporting requirements and explain the responsibilities that need to be documented in the mandate (terms of reference) of a review team.*

The Chairperson is pleased that the CDS has decided to take these measures and welcomes the proposed direction and explanations to be documented in the terms of reference for a study or review team.

The CDS goes on to state:

> …
>
> *The interim MPCC report also makes findings and comments that directly pertain to policing functions and policies. In this regard, I can advise you that I intend to ask the CFPM, through the Vice Chief of the Defence Staff, to examine the MPCC report in detail, once it has been made final, in order that the full extent of any necessary amendments to CFNIS or military police practices and procedures may be determined. You will be informed of any specific measures that will be adopted to correct CFNIS or military police practices and procedures once this process of analysis has been completed.*

The Chairperson looks forward to being informed of the specific measures to be adopted following the examination of this report by the CFPM. Among the items of interest will

be the measures taken in relation to the briefing of persons affected by a military police investigation and the introduction of consistent procedures for the recording of interviews by the military police (regardless of the rank of the person being interviewed).

Finally, with reference to the request by the CDS to have the CFNIS investigation report referred to the appropriate provincial prosecutorial authority, the Chairperson is informed in the notice from the CDS that the Office of the Assistant Deputy Attorney General – Criminal Law for Ontario does not disagree with the CFNIS decision not to lay a charge.

Following the investigation by the MPCC, and after having considered the notice of action from the CDS, the Chairperson upholds her interim report conclusions and reiterates them as follows:

Findings Relating to Individuals

- There was no misconduct by BGen Patricia Samson, CFPM, the CFNIS or the military police members whose conduct the MPCC has investigated.

Findings Relating to Specific Issues

Did the Canadian Forces National Investigation Service (CFNIS) provide inaccurate or inadequate and misleading advice to the Chief of the Defence Staff and the Canadian public, among other occasions, during the press conference held on May 30, 2000, with regard to the possibility of laying charges pursuant to the *Criminal Code* and the *National Defence Act*?

- The CFNIS did not mislead, intentionally or otherwise, the CDS or the Canadian public about the nature of the legal advice on which the CFNIS relied in reaching its decision not to proceed with *Criminal Code* and *National Defence Act* charges.

- A review of the evidence did reveal minor inadequacies in the information provided at the CFNIS press conference on May 30, 2000. However, none of these were of any significance in the discussion of whether the CFNIS had provided inaccurate or inadequate and misleading advice with regard to the laying of criminal charges.

Did the CFNIS provide misleading information to ex-WO Matthew Stopford with respect to the "confessions" collected during the conduct of the CFNIS investigation?

The Chairperson concludes as follows about statements relating to confessions:

- that Insp Grabb reported at the May 30, 2000, press conference that:
    - the task force did 12 cautioned interviews of soldiers who were under investigation;
    - "many" of the soldiers who were involved, confessed not only to fellow soldiers but to police during the investigation;
    - approximately six soldiers were directly involved in committing an offence that would have been prosecuted under section 129 of the *National Defence Act* if the three-year limitation period had not expired;
- The PowerPoint presentation at the May 30, 2000, press conference did not mention "confessions", but stated rather that, "some Roto 2 soldiers made incriminating and admissible statements to fellow soldiers and to police;"

- A CFNIS investigator who met with ex-WO Stopford on May 30, 2000, may have said that five or six people confessed to allegations of coffee tampering. However, it is not known whether the investigator mistakenly referred to "written" confessions during the discussion.

- Varying interpretations of what was meant by the word "confession" led to confusion and, perhaps, the perception on the part of ex-WO Stopford that he had been given misleading information. There was no intent on the part of the CFNIS to mislead.

- A CFNIS investigator more familiar with this investigation should have been sent to brief ex-WO Stopford.

When did the military police and the chain of command become aware of the allegations that ex-WO Stopford was poisoned in Croatia in 1993?

- Upon reviewing the CFNIS investigation report and all pertinent documents in its possession and after interviewing 11 individuals, the Chairperson concludes that the comments made at the CFNIS press conference on May 30, 2000 adequately reflected whether and when the military police and chain of command were made aware of the coffee tampering allegations.

Ottawa, January 17, 2001

- ORIGINAL SIGNED BY -

Louise Cobetto
Chairperson

Annex A: Comparison of Statements in May 18 Legal Opinion, May 25 Memorandum of Provost Marshal, and May 30 CFNIS PowerPoint Presentation

May 18 Legal Opinion	CFPM Memorandum – May 25, 2000	May 30, 2000, Press Conference PowerPoint Presentation
– that a group of soldiers during Roto 2 discussed, on a number of occasions, the removal of WO Stopford from his position of command through the placement of various substances, including naphtha, in his coffee;	… that a group of soldiers during Roto 2 discussed, on a number of occasions, the removal of ex-WO STOPFORD from his position of command, through the placement of various substances, including naphtha, in his coffee.	During Roto 2, a number of identified soldiers did, in fact, place substances such as naphtha, anti-freeze, anti-irritant eye drops, and boot blackener, in coffee intended to be consumed by Ex-Warrant Officer Matt Stopford.
– that these discussions, although depicted by many as simply venting, appear to have had a practical and serious thread to them;	These discussions, although depicted by many as simply venting, appeared to have had a practical and serious thread to them.	
– that following this discussion, and likely as a result of this discussion, at least three soldiers placed a substance in the coffee cup of WO Stopford;	Following these discussions, and likely as a result of the discussions, at least three soldiers placed a substance in the coffee cup of ex-WO STOPFORD.	
– that Visine, coolant and naphtha were placed in Stopford's coffee;	These substances included naphtha, Visine and coolant.	"substances such as naphtha, anti-freeze, anti-irritant eye drops, and boot blackener"
– that there was an ongoing awareness of a number of soldiers that a substance was being placed in Stopford's coffee and that the soldiers were looking for a physical effect on Stopford;	It has also been determined that there was an ongoing awareness on the part of a number of soldiers that a substance was being placed in ex-WO STOPFORD's coffee and that these soldiers were looking for a physical effect on ex-WO STOPFORD.	

May 18 Legal Opinion	CFPM Memorandum – May 25, 2000	May 30, 2000, Press Conference PowerPoint Presentation
– that there is no precise way to gauge the exact amounts of or the range of substances which may have been placed in Stopford's coffee, however, it appears most likely that the placement of substances in his coffee was in small amounts and of short duration; and	However, this investigation has been unable to determine the exact amounts of or the range of substances that may have been inserted or if, in fact, ex-WO STOPFORD actually ingested the coffee into which the substances were inserted.	The amount of substances placed in the coffee, and the frequency in which they were administered, cannot be clearly established.