



Military Police
Complaints Commission
of Canada

Commission d'examen des plaintes
concernant la police militaire
du Canada

National Defence Act – Part IV
Section 250.53

FINAL REPORT

Following a Public Interest Investigation
Pursuant to Subsection 250.38(1) of the *National Defence Act*
With Respect to an Anonymous Complaint
Concerning the Conduct of Major Francis Bolduc, Captain Richard da Silva,
Sergeant Danny Parent, Sergeant André Mantha
Master Corporal James O'Bready, and Master Corporal Steve Carrier

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Hilary C. McCormack
Chairperson

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I EXECUTIVE SUMMARY

Overview of the Report

This Public Interest Investigation (PII) report is further to a complaint that was received by the Military Police Complaints Commission (MPCC or the “Commission”). In the complaint, it was alleged that military police members had abused Afghan detainees at Kandahar Airfield (KAF) in Afghanistan during a training exercise. It was also alleged in the complaint that the Canadian commander (Comd) at KAF, the commander of Joint Task Force Afghanistan (JTF-Afg), ignored the charges that were submitted to him following an investigation by the Canadian Forces National Investigation Service (CFNIS). After evaluating the available information, the Commission decided that two separate allegations arose from the complaint and that the situation warranted a PII. Following a comprehensive investigation and the analysis of the investigation report, the documentary evidence and other relevant documents, the Commission found that the two allegations were not substantiated. That said, the Commission made several recommendations concerning police best practices.

This report describes the complaint (Chapter II) and then details the PII process (Chapter III). The decision by the CFNIS to examine the investigation and its impact on the Commission’s process is then outlined (Chapter IV). A description of the facts surrounding the events at the heart of this complaint is then necessary (Chapter V) before addressing the allegations. The review of the first allegation, i.e., that the CFNIS conducted an inadequate investigation that did not succeed in collecting sufficient evidence concerning the exercises held at the Detainee Transfer Facility (DTF), begins with an overview of the CFNIS JTF-Afg investigation (Chapter VI). That is followed by a list of the shortcomings identified in the investigation (Chapter VII) and the finding for that allegation (Chapter VIII). A review of the decision not to lay charges (Chapter IX) thus precedes the finding for the second allegation (Chapter X). The final chapter (Chapter XI) summarizes the Commission’s findings and recommendations.

The following paragraphs describe the PII process, the facts that were uncovered during the PII as well as the Commission's findings. That said, the Commission would, from the outset, like to state that the evidence collected during the PII clearly shows that no detainee urinated or defecated during the exercises and that no detainee was abused during the exercises as was alleged in the complaint. In the anonymous complaint, it is also alleged that the guards went into the cells with 9-mm pistols and forced the detainees up against the wall or to the floor and applied arm locks. The evidence collected during the PII does not lead the Commission to conclude that those actions took place during the exercises that were held at the DTF. On the contrary, the evidence shows that the guards were unarmed and had minimal physical contact with the detainee during the exercise on January 19, 2011.

In addition, none of the evidence collected during the PII shows that the Officer Commanding (OC) of the JTF-Afg Military Police Company (JTF-Afg MP Coy) gave the order to terrorize the detainees or that the exercises were aimed at terrorizing the detainees, as was alleged in the complaint. One of the objectives of the exercise was to demonstrate to the detainees that the guards could control the DTF in any given situation. Therefore, a show of force during those exercises was necessary to achieve that objective, which is very different from terrorizing the detainees.

The JTF-Afg MP Coy OC, a major, and his company sergeant-major, a master warrant officer, are the subjects of the CFNIS JTF-Afg investigation. Although the PII report presents a great deal of information on the behaviour of those two individuals, the Commission would like to emphasize that this PII, in accordance with the Commission's mandate, concerns the CFNIS JTF-Afg investigation, not the decisions made, and actions taken by the OC and the sergeant-major of the JTF-Afg MP Coy. The Commission decided not to reveal their names because, although they are the subjects of the CFNIS JTF-Afg investigation, they were not charged with offences under the *Code of Service Discipline*, and they are not the subjects of this PII. They will therefore be identified as Maj X and MWO Y. However, all of the witnesses will be identified by name.

An Anonymous Complaint

On February 12, 2015, the Commission received a typed letter by mail that was written in French. The subject line of the complaint read as follows: [translation] “Detainees assaulted by Canadian military police in AFG from December 2010 to January 2011.” The complaint alleged that the JTF-Afg MP Coy OC, Maj X, gave the order to [translation] “terrorize” detainees with exercises at the KAF detention centre and that those exercises eventually involved them being performed in the cells occupied by the detainees. The complaint alleged that the tension was so high after the previous two months that several detainees defecated and urinated on the spot.

An investigation was reportedly carried out by the CFNIS, and charges were allegedly laid and given to the JTF-Afg commander (Comd), who allegedly ignored them. Another military police (MP) investigation was held in 2012. However, in spite of those investigations, no charge was laid against the JTF-Afg MP Coy OC. In closing, the complaint provided a list of five [translation] “references” but did not specify whether those people were named for being involved in the alleged events, for witnessing the alleged events, or for any other reason.

The Public Interest Investigation (PII) Process

On February 27, 2015, the Commission sent a copy of the complaint to the Canadian Forces Provost Marshal (CFPM) and asked him to confirm certain facts that were alleged in the complaint. On March 11, 2015, the deputy commander (DComd) of the Canadian Forces Military Police Group (CF MP Gp) informed the Commission that an investigation had been carried out by the CFNIS concerning an exercise held at the KAF DTF. The investigation had concluded on April 16, 2011, no charges had been laid, and the matter had been handed over to the Comd of JTF-Afg so that the appropriate measures could be taken. The Commission was also informed that an administrative investigation concerning Maj X was conducted in 2012.

In order to obtain the most information possible to determine how the complaint ought to be handled, the Commission communicated informally with the “references.” Some of them refused to speak with the Commission or could not be reached, while others agreed to provide information and gave the names of other individuals who were aware of the events, and the Commission contacted those people as well. The Commission was thus able to confirm that an

unusual incident had occurred during an exercise held at the DTF. In May 2015, a series of articles appeared in the media concerning the same allegations as those in the complaint.

On September 21, 2015, the interim Chairperson of the Commission, Michel Séguin, extended the one-year time limit for filing the complaint. The interim Chairperson determined that the Commission could receive, process and investigate an anonymous complaint: that there was strong public interest in extending the time limit for filing the complaint, given the allegation that detainees were abused, the lack of charges following the CFNIS investigation, issues involving the MP's independence, and all of the relevant circumstances and factors.

Complaints are normally investigated first by the Office of Professional Standards (PS) of the CFPM, and the complainant can then request that the Commission conduct a review if he or she is dissatisfied with the outcome of the internal investigation. In addition, at any time during the review of a complaint, the *National Defence Act (NDA)* gives the Chairperson the authority to order a Commission investigation if the Chairperson deems it in the public interest. On November 4, 2015, the Chairperson of the Commission, Hilary C. McCormack, decided to hold a PII into the matter given the seriousness of the allegations and the fact that they raised systemic issues related to the MP's independence that might impact the public's trust in the MP, particularly with regard to the allegation that the CFNIS failed to press charges. The Chairperson pointed out that, because of the nature and seriousness of the charges, it was preferable for a transparent and independent public process to take place in order to investigate the complaint. Conducting a PII would enable the Commission to conduct an in-depth investigation into the events and make its findings public so that no doubts remained concerning the events in question or the MP's conduct in the matter. Therefore, the file was not referred to the CFPM for an investigation at first instance by the PS office. On January 14, 2016, the Chairperson of the Commission co-delegated the duty of carrying out the PII and establishing and sending the Interim and Final reports concerning the matter to Commission Member Michel Séguin. The Chairperson and Mr. Séguin therefore jointly led the PII and prepared the Interim Report.

The Commission received the complaint on February 12, 2015 and forwarded a copy of it to the CFPM on February 27, 2015. On November 6, 2015, the Commission sent an initial request to the CFPM for disclosure of the relevant documents. On December 18, 2015, the DComd of the

CF MP Gp notified the Commission that the CFNIS was also reviewing the matter to determine whether additional elements that might necessitate a police investigation had been raised in the anonymous complaint. On January 6, 2016, the Commission still had not received the disclosure documents, and it wrote to the CFPM again to request an update on when it could expect to receive them. The same day, the CFPM informed the Commission that the requested documents would not be disclosed until the CFNIS's review of the 2011 investigation was completed.

The Commission would like to point out that it did not agree with the CFPM's decision to not provide the initial disclosure documents requested until the CFNIS's review of the 2011 investigation was completed. The Commission is of the opinion that the CFPM had no reason not to disclose the documents, as the Commission's examination of those documents would not jeopardize the CFNIS's review. In addition, the CFNIS's finding after its review would have had no impact on the PII unless the CFNIS decided to lay charges against the subjects of the 2011 investigation. The decision not to disclose the requested documents prevented the Commission from evaluating the matter and determining whether or not the complaint was within its area of jurisdiction in a timely manner. Furthermore, it is important to note that the Commission has a legal obligation to deal with all matters before it as expeditiously as possible. The Commission therefore feared that the delay in receiving the initial disclosure documents would not only impede its obligation to act expeditiously but would also negatively impact the subjects of the complaint and the witnesses, as they would have to recall events that had occurred a long time ago.

In the months that followed, the Commission and the CF MP Gp exchanged frequent correspondence and held numerous discussions and meetings to resolve the matter. The Commission wanted to advance the PII and tried to find a way to have the documents disclosed without having to wait for the CFNIS's review of the 2011 investigation to conclude. On June 2, 2016, the *Protocol between the MPCC and the CF MP Gp in respect of the Conduct of Concurrent Public Interest and CFNIS Investigations Regarding Exercises in Afghanistan by Military Police* was signed. On June 8, 2016, the Commission was informed that the CFNIS's review would be concluded soon and that the matter would not be submitted to a military

prosecutor again to consider potential charges; rather, it would be concluded without any charges being laid.

On June 10, 2016, the entire investigation report from the 2011 investigation was disclosed to the Commission, including recordings of the interviews that were conducted and a video recording of part of the exercise that was held on January 19, 2011, which was the main event that was under investigation by the CFNIS. On July 21, 2016, the Commission wrote to the CFPM to request that additional documents be disclosed. In total, the Commission received over 3,000 pages of documents and numerous audio and video recordings as part of the initial disclosure phase. The disclosure process went on continuously until 2020, although most of the documents were disclosed during the period from June 2016 to October 2018. A large number of the documents were not under the control of the CFPM; they belonged to Canadian Joint Operations Command (CJOC). Several documents were classified as secret and stored following the CF repatriation from Afghanistan. Although CJOC was amenable to the Commission's requests, the disclosure process was weighed down by those factors, which are inherent to any matter involving incidents that occurred in a theatre of operations.

The conduct of the military police who were involved in holding the exercise at the DTF could not be investigated by the Commission, as it was not one of the issues for which the Commission has jurisdiction to receive complaints. Subsection 250.18(1) of the *National Defence Act* provides that the only complaints that can be made about Military Police conduct are complaints about the performance of policing duties or functions listed in regulations made by the Governor in Council. The *Complaints about the Conduct of Members of the Military Police Regulations* define what policing duties or functions can be complained about and provide a list of those duties or functions. The *Regulations* also provide exceptions to the list. The Federal Court of Canada concluded in 2009 that “the detention of insurgents in Afghanistan” is not a function that falls within the Commission's jurisdiction to investigate because it relates to military operations that result from established military custom or practice and is therefore part of the functions excluded by the *Regulations*. However, the Commission concluded that the duties and functions performed by the members of CFNIS JTF-Afg who investigated the events in 2011 and the decisions concerning the laying of charges were policing duties and functions

that were not excluded from the Commission's jurisdiction. The Commission also decided that it should investigate the events that led to the CFNIS JTF-Afg investigation in order to examine not only the information obtained by CFNIS JTF-Afg during the investigation, but also the information that was available concerning the events.

The Commission therefore identified the following allegations:

Allegation #1: The CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010-2011;

Allegation #2: The CFNIS made an inappropriate decision in deciding not to lay charges following its investigation.

The Commission identified six individuals who were the subjects of the complaint:

LCol (Retired) Francis Bolduc, the CFNIS deputy commanding officer (DCO) at the time that the investigation was concluded in 2011; Capt (Retired) Richard da Silva, the CFNIS detachment commander in Afghanistan at the time of the investigation; and the members of the CFNIS detachment in Afghanistan who participated in the investigation in 2011, that is to say, WO Danny Parent, Sgt (Retired) James O'Bready, Sgt (Retired) André Mantha and Sgt Steve Carrier. LCol Bolduc was a major in 2011, and he was a lieutenant-colonel when he was identified as a subject of the complaint. WO Parent was a sergeant at the time of the events, and he was a warrant officer when he was identified as a subject of the complaint.

MCpl O'Bready and MCpl Carrier were master corporals at the time of the events, and they were sergeants when they were identified as subjects. In this report, the Commission generally refers to the ranks of the named individuals at the time of the events that it is discussing, in order to make it easier to understand how events unfolded and the reporting relationships at the time.

After reviewing the disclosure documents, the Commission investigators began the interview phase in July 2017. The interviews continued to be carried out until September 2018, and the investigators traveled across Canada to meet with 74 witnesses. The Commission investigators then interviewed the six people who were the subjects of the complaint, and those interviews were carried out between October and December 2018.

The investigators then prepared a lengthy investigation report, which was submitted to the Commission on July 31, 2019. After reading the investigation report, the Commission asked that additional documents be prepared and annexed to the investigation report in order to complete the description of the evidence collected with timelines, witness statements and lists of relevant elements identified. Those documents were submitted in September and October 2019.

After it reviewed the investigation report, the annexes and the documents relevant to the case, the Commission started preparing this Interim Report. It should be noted that the Commission conducted additional interviews, both in person and by telephone, with three witnesses and three people who were the subjects of the complaint, as well as two Security and Military Police Information System (SAMPIS) experts between March and September 2020 to clarify some of the information that was received during the PII. The Commission also submitted a number of disclosure requests to the CF MP Gp while preparing this Interim Report. The Commission notes, when possible, the CF MP Gp provided the information and documents that it requested.

The Commission noted that some of the documents that it requested from the CF MP Gp and CJOC could not be located, despite a thorough inspection being carried out by Commission personnel of the boxes and folders containing the documents that were repatriated from the mission in Afghanistan. The Commission had to draw its conclusions in the absence of those documents. For that reason, it was not always possible for the Commission to draw definitive conclusions about the entire factual framework surrounding the exercises that were carried out at the DTF in 2010 and 2011. Nevertheless, after conducting an in-depth investigation of the events, the Commission was able to obtain enough evidence to enable it to reach the necessary conclusions concerning the complaint and formulate the appropriate recommendations.

Recommendation #1:

The Commission recommends that the CFPM, in concert with the Canadian Joint Operations Command, develop a better system for the repatriation of military police files, as well as their storage, following the end of an overseas operation. (Accepted by the CFPM)

This matter presented the Commission with special challenges. As the identity of the complainant was not known, it was not possible for the Commission to adopt the usual practices during both the initial steps of the process and the conduct of the PII. In the present case, the Commission had to interpret the content of the one-page complaint without being able to communicate with the complainant. It was unable to obtain clarifications concerning the alleged facts and the specific elements concerning which the complainant wished to formulate a complaint. Nevertheless, because of the specific facts in this matter, the Commission was able to obtain factual clarifications by contacting the “references” named in the complaint and obtaining information directly from the CFPM. That information proved to be sufficient to proceed with the steps required to deal with the complaint, but there is no guarantee that the same will be true in other cases.

The Commission faced challenges when deciding on the scope of the PII and its jurisdiction to investigate the various allegations made in the complaint. Therefore, even though the complainant’s original intent seemed to be, above all, to submit a complaint regarding the decision to lead the exercise(s) at the DTF, the Commission had to conclude that, based on applicable legislation and jurisprudence, this allegation did not fall under its jurisdiction. The PII would have to focus on another aspect of the complaint: the fact that no charges had been brought following the CFNIS investigation. The Commission was unable to verify whether investigating the conduct of those who led the investigation still reflected the complainant’s original intent. Since it was necessary in the public interest to investigate the allegations of a lack of charges following the 2011 investigation, the Commission was able to determine that its investigation should proceed with a scope that matched its jurisdiction.

More generally, the Commission could not assess the complainant’s credibility. The Commission could not conduct an interview with the complainant to verify the truthfulness of his/her allegations and the source of his/her information. It was therefore impossible to verify, before the start of the PII, whether the alleged facts could have been exaggerated or inaccurately described. Those aspects became particularly concerning once the Commission realized that the description of the DTF exercises in the complaint did not correspond with the events that actually took place,

more so since the testimonies gathered during the PII confirmed that there were numerous conflicts between the individuals involved at the time of the events.

The Commission was able to ensure that it uncovered and reported the facts accurately by conducting interviews with a large number of witnesses. The Commission was thus able to ensure that the information on which it would base its findings was corroborated and substantiated by numerous sources. The cooperation of the vast majority of people involved in the deployment in question was of great assistance to the Commission in that task.

Although the *NDA* allows the Commission to accept an anonymous complaint, as it states that a complaint may be made by “any person,” it is not appropriate to accept such complaints in every case. Anonymous complaints must therefore be handled with caution. Here, the Commission kept in mind the challenges created by the complainant’s anonymity and made sure to take the necessary steps throughout its investigation to address the potential issues that could arise from the situation.

Summary of Facts – The Exercise of January 19, 2011

The JTF-Afg MP Coy was made up of MP members from the Regular and Reserve Force as well as other soldiers. They were mainly from units in Quebec, and the majority of them were posted to 5 MP Regiment. Most of the members of the JTF-Afg MP Coy arrived at KAF, in Afghanistan, in November 2010. The deployment was approximately eight months long. The Coy OC, Maj X, was an MP officer who reported directly to the JTF-Afg Comd, BGen Milner.

The JTF-Afg MP Coy was made up of a headquarters (HQ) and three platoons (Pls). The General Support (GS) Pl was responsible for the DTF. Lt Busset commanded that Pl. The Afghan detainees were transferred to the DTF while waiting to be released or handed over to the Afghan authorities. The JTF-Afg MP Coy was not responsible for decisions concerning the capture, release or transfer of the detainees; those decisions were made exclusively by the Comd of JTF-Afg and his personnel. Nevertheless, the JTF-Afg MP Coy was responsible for their detention.

Before arriving in the theatre of operations, the training that the members of the GS PI received was first and foremost focused on how to serve as guards at the DTF, including the transport, handling and treatment of the detainees. During the deployment in November 2010, certain last-minute personnel changes were required that resulted in the MP members being deployed as DTF guards, even though they had originally been assigned to other duties. They therefore did not receive the same training as their colleagues who had been assigned from the start to serve as DTF guards. Those individuals therefore had to read the directives before being partnered for a week with another guard who was well acquainted with how the DTF worked. The immediate supervisor of the individual concerned would decide whether or not he/she was ready to work at the DTF. There was also ongoing training provided in the field to make up for the fact that some of the guards had not received pre-deployment training and therefore had not practised the cell extraction exercises.

The DTF complex was made up of two zones: the DTF and the guardhouse of the GS PI as well as the CFNIS JTF-Afg offices (see site map in Annex A). At the time of the exercise on January 19, 2011, the DTF had eight cells—four on each side of a central hallway that gave access to them. Burlap covered the partition walls in order to prevent any visual contact between people inside the different cells. There was a catwalk above the central hallway in order to enable the guards to monitor the detainees while the detainees were in their cells. The desks of the shift supervisor and his 2IC were at the guardhouse entrance, immediately to the right, along the wall. The surveillance camera monitors of the DTF were on the wall facing those desks. The workspace of Lt Busset's platoon was to the left of the main entrance door, along with her office. On the upper right-side, there was a large break room.

Starting in December 2010, the number of detainees at the DTF began to increase significantly. The number of detainees had increased to 49, but the DTF had only been built to hold 32. The length of the detainees' attention had also increased significantly. There were concerns that there could be an uprising and other problems at the DTF on account of the large number of detainees.

Standard Operating Procedure (SOP) 500, entitled "Detainee Operations," contained the policies and procedures concerning the detention of any individual during the Canadian deployment in Afghanistan. Annex G of the SOP focused on "Emergency Procedures." In December 2010,

Annex G was amended to include the procedures to follow in the event of a riot at the DTF. The GS Pl Comd allegedly distributed that new SOP approximately two weeks before the exercise on January 19, 2011, but she did not check to make sure that her subordinates had read it. They testified that they had not received it before the exercise on January 19, 2011.

Maj X decided to conduct an exercise with two objectives: to recall personnel to the DTF and to verify how familiar the troops were with the new SOP in order to ensure that they were ready for any eventuality. He wanted the exercise to be held shortly before the shift change. He therefore chose January 19, 2011 at 0400 hours because the shift change took place at 0530 hours. Only his operations officer, Capt Touchette, his master warrant officer, MWO Y, and himself were aware that an exercise would be held. There was therefore minimal planning.

At around 0400 hours on January 19, 2011, Maj X and MWO Y went directly onto the catwalk and met the two English-speaking guards who were there. Capt Touchette was at the JTF-Afg MP Coy headquarters to answer any potential phone calls concerning the exercise and make sure to prevent any requests for assistance from outside the DTF. A guard was informed that a situation was degenerating in cells 6, 7 and 8 of the DTF to such an extent that he no longer had positive control over the situation. Consequently, he had to start the procedures, ie, notify his shift supervisor, Sgt Degrasse, of the situation so that he could recall the troops. Maj X then went to Sgt Degrasse's desk to verify whether the shift supervisor knew the SOP. MWO Y remained on the catwalk to ensure that the guards did not disturb the detainees during the exercise. Although Maj X stated that he asked the guard to start the conversation with Sgt Degrasse by saying [translation] "exercise, exercise, exercise," the evidence seems to suggest that the guard had understood that it was an exercise and that he was to call Sgt Degrasse following his conversation with MWO Y.

Maj X arrived at the guardhouse at the same time as Sgt Degrasse was receiving the call from the guard, who informed him of the exercise by telling him that there was an "uprising situation." Not understanding what "uprising situation" meant, Sgt Degrasse looked at the surveillance camera monitors in the eight cells of the DTF and saw that all of the detainees were asleep. Sgt Degrasse testified that he did not really have any type of discussion with Maj X and that Maj X

had hung back a bit after arriving at the guardhouse. Sgt Degrasse then informed Maj X that he was going up on the catwalk to see what was happening.

When he arrived on the catwalk, Sgt Degrasse said that he had asked MWO Y what was happening. MWO Y motioned for him to go and see the guard who was at the far end of the catwalk. The guard told him, a bit hesitantly, that, according to the information that he had received from MWO Y, there was [translation] “an exercise” and [translation] “some type of riot” underway in cells 6, 7 and 8. Sgt Degrasse then contacted his 2IC, MCpl Gasparro, from the telephone on the catwalk and told him that there was an exercise concerning a riot underway in cells 6, 7 and 8. MCpl Gasparro told him that he would send some shift members onto the catwalk. MWO Y, who was beside him at the time, asked him what procedure he would follow in response to this type of situation. He stated that he told him that he would conduct a recall and possibly enter the cells, given the situation. MWO Y allegedly told him to conduct a recall and review his SOPs. Sgt Degrasse left the catwalk and headed for the guardhouse.

At the time of the call, MCpl Gasparro was sitting at Sgt Degrasse’s desk, and Maj X went up next to him while taking notes. MCpl Gasparro informed Cpl Dauphinais of the exercise and told him to gather together the other guards who were in the break room and join Sgt Degrasse in the DTF. MCpl Gasparro then started the troop recall procedures by calling Lt Busset. Cpl Dauphinais and the five other guards quickly left the break room in the direction of the DTF. The evidence shows that everyone except for Cpl Dauphinais thought that it was a real situation throughout the entire exercise.

Sgt Degrasse met the guards as they were coming through the door leading to the DTF. After they entered and went over to the service weapons locker, Sgt Degrasse, noticing that MCpl Gasparro was not there, went back to see the guards who had already entered under the catwalk into the hallway leading to the DTF cells. Sgt Degrasse stated that he had given cell numbers, but had asked the guards to wait until he came back. Some of the guards remembered passing by Sgt Degrasse and hearing someone tell them to wait.

Once their weapons were stored, the guards entered by the first door leading to the cells. It was there that the six guards got the equipment that was needed to deal with the riot situation and

then proceeded through the door leading to the hallway under the catwalk where the cells were located. The guards entered the hallway leading to the cells still not having a precise idea of the nature of the operation to carry out and were seeking instructions or directives from their colleagues on the catwalk. They first stopped in front of cell 2, which was located at the entrance of the cell hallway. Sgt Degrasse allegedly saw them there and informed them that they were not at the right place and told them to go to cells 7 and 8 before he left for the guardhouse. Three guards apparently heard a guard on the catwalk tell them that it was cell 7.

The guards gathered in front of cell 7 and decided as a group to enter and extract the detainee. The guards entered in diamond formation, with one guard in front holding a shield flanked by two guards, and a fourth guard following behind them. A fifth guard stood further back, holding the restraint equipment. One guard ordered the detainee to stand, and he complied. The detainee then put on his sandals in order to move towards the guards. He was seized and escorted outside the cell, where the guards placed him in handcuffs, glasses and earmuffs. A camera recorded everything that was going on in the cell. The footage of the detainee's extraction does not show the guards using any excessive force during the extraction.

Everything seemed calm in the DTF, and most of the guards indicated that one of them had asked the detainee if he wanted to go to the bathroom, as it would soon be time for the morning routine. The detainee apparently refused the guards' offer, and they simply placed him back in his cell. He returned peacefully to his bunk and went underneath the covers. He did not seem perturbed, nor did he show signs of physical abuse. According to the timestamp on the video, the operation lasted less than two minutes. Once the detainee was placed back in his cell, the guards decided to begin the morning toilet routine.

MWO Y stated that he heard a noise from the cells and was told that it was part of the normal toilet routine. He allegedly called the guards, but his testimony during the CFNIS JTF-Afg investigation on his role and actions during the exercise is far from clear and precise. None of the guards who participated in extracting the detainee testified that they heard MWO Y address the group or one of them in particular at the time of the extraction. He stated that he learned much later that the guards had extracted a detainee from his cell, a long time after the exercise was over. According to MWO Y, his task was to remain on the catwalk and observe what the guards

were doing there, not prevent the guards from entering the detention area. In addition, he added that situations arose that could not have been foreseen, such as a shift sergeant taking the initiative to proceed with a cell extraction.

MWO Y left the catwalk to go to the guardhouse, and he met Cpl Dauphinais at the bottom of the stairs. Cpl Dauphinais described MWO Y as angry during the encounter, as he told him that the guards had not followed the SOP and that they should not have entered the cell. The CFNIS JTF-Afg investigator asked MWO Y if he remembered that meeting. MWO Y first said that he had no recollection of it. However, when the CFNIS JTF-Afg investigator reminded him of the things that he had allegedly said, specifically a profanity, MWO Y stated that he did not know whether he had used that word, and then said that the SOPs had not been followed. He went on to say that he could not remember exactly what he had said.

Throughout the exercise, Maj X wrote in his notebook. Those notes concerned the actions taken by Sgt Degrasse, the extraction and other key events. He wrote the exact time of the extraction in his notebook and noted down: “Extraction complete of trouble maker.” He testified that he was informed of the extraction by Sgt Degrasse and that he believed that it was fictitious. Sgt Degrasse testified that he never spoke of an extraction to Maj X.

Back at the guardhouse, Sgt Degrasse observed MCpl Gasparro making phone calls. MCpl Gasparro succeeded in calling Lt Busset, having also tried to reach two other people unsuccessfully. He informed her that it was a recall and riot exercise. He then left the guardhouse to go to the DTF. Maj X also spoke with Lt Busset and told her that it was an exercise within the company and not to contact anyone outside of it.

Sgt Degrasse sat down at his computer and began searching for the SOP on the riot scenario that he was dealing with in this exercise, ie, SOP 500, but he could not find it in the computer system or locate the paper version in the guardhouse. He could not find any document with the directives concerning a riot. According to Sgt Degrasse, Maj X had given no directives during the exercise, except for when Sgt Degrasse asked him questions.

When she arrived at the DTF complex, Lt Busset gave orders for the members of her shift to report to the most senior member on the catwalk to conduct [translation] “a show of force” as set

out in the SOP. She then went to Sgt Degrasse's office. Sgt Degrasse informed her of the situation, and Maj X also joined the conversation. A discussion then followed concerning the definition of a disturbance and a riot and the response according to the new SOP. As she was getting ready to go to the catwalk, Maj X announced the end of the exercise. Maj X then asked her to gather together the members of her personnel who were on the catwalk and give a debriefing in the break room.

Lt Busset led a debriefing mainly with members of Shift B, and the members of Shift A who were seeing to the morning toilet routine arrived in the middle of it. One corporal said that they went into the cell, and Lt Busset questioned him about it. She asked a sergeant to substantiate the statement, and then she had to end the debriefing, as Maj X wanted to begin his debriefing with the shift supervisors and the people in charge of the DTF. Maj X stated that the major points that he raised during the second debriefing were that the troops were not familiar with the new SOP or the procedures for conducting a cell extraction. According to him, the exercise was [translation] "a big failure."

Summary of Facts – The CFNIS JTF-Afg Investigation and the Decision not to Lay Charges

Investigations of a sensitive nature or concerning serious crimes were conducted by the members of the CFNIS detachment (CFNIS JTF-Afg) in the theatre. That detachment was not under Maj X's authority, but reported to the CO of the CFNIS, who was based in Ottawa, and the CO reported directly to the CFPM. Capt da Silva commanded CFNIS JTF-Afg and was assisted by Sgt Parent; three other investigators, Sgt Mantha and MCpls O'Bready and Carrier, were part of CFNIS JTF-Afg.

On January 29, 2011, LCol Strickland, the assistant chief of staff of JTF-Afg, asked Capt da Silva to meet with him. LCol Strickland informed Capt da Silva of the exercise and of the fact that the detainee had been extracted from his cell. Capt da Silva told LCol Strickland that it was a situation that needed to be investigated by the CFNIS.

Capt da Silva stated that he called Maj Bolduc, who at the time was the DCO of the CFNIS, to inform him and ask him to send a team of independent investigators to KAF so that they could investigate the incident, given how close his personnel members were with those of the JTF-Afg

MP Coy. Maj Bolduc allegedly told him that he would not send a team of investigators to KAF because Capt da Silva's team was capable of conducting the investigation in a professional manner. Maj Bolduc, for his part, said that he did not receive any such request. When asked whether he had considered sending another team of investigators to KAF, given how close the members of CFNIS JTF-Afg and the JTF-Afg MP Coy were, Maj Bolduc replied that he did not remember considering it and that, even if he had, he thought that he would not have been in a position to deploy the additional resources.

Capt da Silva therefore needed to assign an investigator to the case. Sgt Parent was scheduled to take his deployment leave on February 7, 2011, Sgt Mantha was in Canada until the beginning of February, and MCpl Carrier had not completed his investigator training. MCpl O'Bready was in Canada and arriving back in the early hours of January 30, 2011. Capt da Silva decided that MCpl O'Bready would be responsible for the investigation.

Capt da Silva met with MCpl O'Bready on January 30, 2011, to inform him of the complaint received from LCol Strickland. MCpl O'Bready then met with three witnesses in the afternoon of January 30, 2011, and then with five more witnesses on January 31, 2011. He drafted an investigation plan, which was reviewed by Capt da Silva. He met with witnesses on February 1, 2, 3, 8, 16, 20, 21 and 24, 2011. He interviewed Maj X as a person involved on February 3, 2011, and MWO Y on February 6, 2011. MCpl O'Bready submitted, between February 18 and 24 2011, three written requests for assistance to CFNIS Central Region (CR) and CFNIS Western Region (WR) so that they could conduct interviews with persons involved or expert witnesses as part of the investigation. On February 24, 2011, Capt Touchette informed Capt da Silva that other exercises had been conducted at the DTF. On February 24, 2011, MCpl O'Bready met a second time with Lt Busset and Capt Touchette about those exercises.

On February 25, 2011, MCpl O'Bready notified Maj X that he was a suspect, and Maj X once again agreed to meet with MCpl O'Bready for a cautioned interview. On March 2, 2011, MCpl O'Bready met with Maj X a third time at Maj X's request, as he wanted to provide him with more details concerning his statement of February 25, 2011. MCpl O'Bready also notified MWO Y on February 25, 2011, that he was a suspect. MWO Y stated that he was not willing to meet with MCpl O'Bready again.

Aside from the statements from witnesses and from Maj X and MWO Y, the investigation report, General Occurrence (GO) 2011-2411, contains documents and other evidence, such as audio and video recordings of the formal interviews, investigators' notebooks, an excerpt from Maj X's notebook during the January 19, 2011 exercise, a task statement from Maj X, a briefing note prepared by Maj X concerning the January 19, 2011 exercise, and certain versions of MP technical directives concerning Op Athena.

MCpl O'Bready would later prepare a "précis des faits" (Crown brief) that was sent to a Regional Military Prosecutor (RMP), in Ottawa, by Capt da Silva on March 7, 2011. At the request of Capt da Silva, Maj Bolduc printed it and gave it to the RMP. Two Records of Disciplinary Proceedings (RDPs) were in this "précis des faits" (Crown brief). The RDPs of Maj X and of MWO Y each contained two proposed charges; namely, one charge against each individual under section 124 of the *NDA* and one charge against each individual under section 129 of the *NDA*.

The RMP produced pre-charge legal advice on April 8, 2011. After reading the legal opinion, Maj Bolduc decided not to lay charges against Maj X and MWO Y. A CFNIS SOP stated that any file in which the subject is an MP member must be reviewed by the CO CFNIS. Therefore, while this SOP does not clearly specify it, it is the CO CFNIS who had the authority to lay charges against MP members. Maj Bolduc, as DCO CFNIS, had been delegated this authority for all Francophone files.

Maj Bolduc informed Capt da Silva of his decision. Capt da Silva disagreed and had an animated discussion about it with Maj Bolduc. Despite this, Capt da Silva prepared the covering letter for the Military Police Investigation Report (MPIR), which was signed by Maj Bolduc on behalf of CO CFNIS, LCol Delaney. This letter and the MPIR for GO 2011-2411 were submitted to Col Giguère, DComd JTF-Afg, on April 19, 2011.

The covering letter is an important document because it informed the Comd JTF-Afg of CFNIS's final decision in this file. It reveals that the CFNIS JTF-Afg investigation showed that Maj X had [translation] "hastily prepared an exercise and that control measures during the exercise were defective." It states that MWO Y had [translation] "decided to adopt a definitely passive role

during the exercise.” Therefore, the [translation] “consequence of their conduct” was that one detainee had been extracted from his cell. The letter concludes this description of the file by stating that the situation had [translation] “gotten out of control in a sensitive location under the supervision of two senior MP members.” Having thus described the actions and omissions of the two subjects of the investigation, this letter states that, [translation] “the conduct of [M]aj [X] and [M]WO [Y] appears to be more a case of professional misconduct than criminal behaviour.”

Comd JTF-Afg met with Maj X and informed him that no charges would be laid against him. Maj X and MWO Y were not subject to disciplinary or administrative actions following this incident. However, there were consequences from this incident for Maj X. Commanding troops is a significant privilege within the CAF. The evidence shows that Maj X did not command troops after his deployment to KAF. He was apparently removed from the merit list, and his promotion to the rank of lieutenant colonel was delayed by at least four years; this represents a significant financial and reputational consequence.

The Commission’s Findings of Fact and Recommendations

MCpl O’Bready arrived at KAF around 0300 hours on January 30, 2011. He reportedly prepared an investigation plan that same day before meeting with three witnesses from 1513 hours to 1740 hours. On January 31, 2011, he interviewed five witnesses. It appears that he was in a hurry to meet with as many witnesses as possible during the first two days of his investigation before developing a detailed investigation plan. Despite this urgency, MCpl O’Bready did not meet with the complainant, LCol Strickland. Furthermore, he did not meet with the detainee, who was the alleged victim, at the very beginning of his investigation. He should have met with these two individuals at the very beginning of his investigation to ensure that he planned it properly.

MCpl O’Bready did not establish a timeline of events in order to then plan the order of his witnesses and the main subjects that were to be explored. He could have easily accomplished this following his first interview with Sgt Degrasse. He definitely should have done it when he obtained the timeline from the notes of Maj X and the time stamps indicated on the video recording of the extraction.

The list of tasks from the investigation plan is short; the last task that was completed is dated February 2, 2011. No additional tasks were subsequently added. Some of the tasks accomplished are not recorded. Several other tasks could have been considered during the investigation and were not included in the investigation plan. The investigation plan found in the GO 2011-2411 file had several deficiencies. The investigation plan did not develop as new information came to light. The plan should have included any new witness, any new investigative activity and any change made to the direction of the investigation. MCpl O'Bready had additional meetings with four of the eight initial witnesses. However, he should have had additional meetings with some other witnesses, given the information he had gathered during the investigation.

The interviews were all conducted by MCpl O'Bready, and they are deficient in numerous respects. MCpl O'Bready should have dedicated much more time to interview preparation. MCpl O'Bready did not meet with a number of individuals who either played a role in the events of January 19, 2011, or could have had information on this matter. In many cases, MCpl O'Bready asked one question and, after a very short answer, did not pursue the line of questioning. He failed to follow up, and some relevant questions were simply not asked. There does not seem to have been analysis of previous interviews done by MCpl O'Bready before meeting with Maj X, MWO Y or the key witnesses in the investigation.

MCpl O'Bready conducted 23 interviews. The bulk of the interviews (17) were conducted in less than 45 minutes, and 14 of these 17 interviews took 30 minutes or less. The interviews with five of the six guards who participated in the detainee extraction lasted from 17 to 30 minutes. The interviews with the guards who were on the catwalk lasted less than 20 minutes. The duration of an interview is the result of the topics discussed and the way in which these topics are discussed. These interviews are short given the sequence of decisions and events that MCpl O'Bready had to clarify and the complex nature of the charge of negligence.

Planning to meet every person who could possibly offer information regarding the incident under investigation and two hours of preparation for each planned hour of interview time are generally recognized as being best practices in this field. Of course, there are several other components to preparing interview plans. CF MP Order 2-340.2 (*Investigation Plans*) directs the reader to CF MP Order 2-353 for any questions regarding interviews, interrogations and preparing interview

plans. However, this order has not yet been published. Therefore, it appears that it did not exist in 2011 and that there are still no CFPM directives on the preparation of interview plans.

This investigation and MCpl O'Bready would have greatly benefited from assistance and close supervision being dedicated to him throughout the investigation. Sgt Parent, although he was absent for a good portion of the investigation, did not support or supervise him adequately when he was present at KAF. Sgt Mantha and MCpl Carrier provided only occasional support when asked. Sgt Mantha offered him only minimal administrative support; he did not give him advice or suggestions that could have helped MCpl O'Bready through the various steps of this investigation.

Capt da Silva was ultimately responsible for this investigation. He was right to ask that other investigators be responsible for this file. While he stated that he had asked Maj Bolduc to send a team of investigators from Canada, he did not vigorously try to convince him. Capt da Silva should have persevered in trying to convince him and submitted his request in writing. At the very least, he should have supported and supervised his investigators.

Recommendation #2:

The Commission recommends that the CFPM publish a policy on the preparation of interview plans based on police best practices. (Accepted by the CFPM)

One deficiency in this file is the lack of documentary evidence. The DTF logs, the detainee's journal, SOP 500, and the personal notes of the persons involved are not part of GO 2011-2411. Furthermore, no plan of the DTF and no photos of the DTF were part of GO 2011-2411. It would have been very easy for MCpl O'Bready to obtain official plans of the DTF. He could also have easily asked the guards on the catwalk to draw diagrams and indicate where MWO Y was during the incident or ask Sgt Degrasse to draw a plan of his office and indicate the location of Maj X. He also could have taken photos of the DTF. These plans, photos and videos would have helped when the file was being assessed by the RMP or any other person.

A review of the investigators' notebooks in GO 2011-2411 shows that they took very few notes in their notebooks. Sgt Parent took notes on pages that are not in GO 2011-2411. They did not take notes during the meetings between investigators or during conversations with the

prosecutor. These investigators did not seem to know or care about the directives on note taking. Despite the fact that he was responsible for ensuring that the notebooks complied with the standards, Sgt Parent did not comply with the CFNIS SOPs and the Military Police Policies and Technical Procedures (MPPTP). Sgt Mantha described a very concerning practice; namely, the directives of certain officers prohibiting notes of conversations with the prosecutors. This clearly is contrary to the official directives of the CF MP Gp.

This lack of detailed notes was an obstacle to properly conducting this PII. Given the long period of time between the incident and the PII, complete and accurate notes would have helped the witnesses remember their actions and the events. The Commission wishes to emphasize that it has often recommended during previous investigations that the CFPM ensure that military police members take complete and detailed notes of every important decision or administrative activity or investigation as set out in CF MP Orders 2-301, 2-301.1, 2-340 and 2-340.1. This is not yet the case, despite these recommendations and the favourable responses to these recommendations from the CFPM. This duty to take complete and accurate notes was also confirmed by the Supreme Court of Canada in *Wood v Schaeffer* when the Court stated that, "... police officers do have a duty to prepare accurate, detailed, and comprehensive notes..."

Despite the existing policies, the Commission's files indicate that many military police members are not familiar with them or do not comply with them. This is a serious problem that has persisted for many years. The CFPM must develop strategies, programs and policies that will ensure that MPs become fully aware of the importance of proper note-taking according to the policies, as well as the value of this practice. A continuous training program on note-taking is required throughout the career of an MP and not just within specific courses taught at the Canadian Forces Military Police Academy (CFMPA).

Control measures are also necessary to ensure compliance with the policies. Verification of notebooks and a quality control program by supervisors who are responsible for the notebooks of their subordinates according to existing policies would greatly help to ensure compliance with these policies. Furthermore, the annual performance review of Military Police members, investigators, supervisors and officers holding leadership positions at all levels of the CF MP Gp

should include evaluating their note-taking and their supervision of note-taking according to CF MP policies and orders.

Recommendation #3:

The Commission recommends that the CFPM develop policies and programs for the continuous training of military police members on note-taking techniques and develop strategies to implement these policies and programs. (Accepted by the CFPM)

Recommendation #4:

The Commission recommends that the CFPM include a component on note-taking in the annual performance review of Military Police members, investigators, supervisors and officers holding leadership positions at all levels of the CF MP Gp. (Not accepted by the CFPM)

The witness statement summaries included in the “*précis des faits*” (Crown brief) did not include all of the important elements that were present in the interviews conducted by MCpl O’Bready. The video recordings of the interviews were not sent to the RMP. Therefore, the RMP did not view these video recordings when assessing the evidence at the time of conducting his review of the situation and the charges proposed by MCpl O’Bready. There is no evidence in the file that indicates that the absence of audio/video recordings in the package sent to the RMP had any effect on the preparation of the legal opinion.

Any investigator must ensure that he or she presents the best possible file to the RMP. The “*précis des faits*” (Crown brief) and the prosecutor summary should include a section that presents the essential elements for each charge, as well as the supporting evidence. Furthermore, all investigation plans should include such a section; that way, the investigator would know what evidence they need to obtain in order to lay the charge. At the end of their investigation, the investigator would simply have to put this information into the “*précis des faits*” (Crown brief) or the prosecutor summary. The essential elements of service offences can be found in a document prepared by the Office of the Judge Advocate General (JAG).

Recommendation #5:

The Commission recommends that the CFPM amend the CF MP Orders, by inserting in the directive that any “précis des faits” (Crown brief) or prosecutor summary should include a section that sets out the essential elements of each charge, as well as the supporting evidence. (Not accepted by the CFPM)

Recommendation #6:

The Commission recommends that the CFPM ensure that CFNIS investigators regularly consult the reference document on the essential elements of service offences prepared by the lawyers of the Office of the Judge Advocate General (JAG). (Accepted by the CFPM)

Capt da Silva and the CFNIS JTF-Afg were aware of the detainee extraction well before January 29, 2011. Capt da Silva did not act before receiving the formal complaint from LCol Strickland. Capt da Silva should have shown much more initiative and conducted an investigation as soon as he was made aware of the situation. This lack of action on the part of Capt da Silva is one of the causes of the 10-day delay before the investigation was initiated. He could have assigned this investigation to his most experienced investigator, Sgt Parent, if he had reacted on January 19, 2011. Sgt Parent was at KAF until February 6, 2011, and he could have taken charge of this investigation.

After his situational assessment, Capt da Silva had little choice in the selection of his lead investigator. MCpl O’Bready had only four years of experience in the CFNIS and had not received advanced training in investigations. He arrived from Canada, as he had to travel there to attend his brother’s funeral after the latter’s unexpected death. However, given the 10-day delay, the deployment leave of other detachment members and the lack of external investigators, Capt da Silva’s only option was to assign this investigation to MCpl O’Bready.

MCpl O’Bready described a working environment in which he worked primarily by himself. The work was not done in teams; there was no case manager, file manager, lead investigator or person responsible for the evidence. He was alone in carrying out all the tasks in his file. The assistance provided by the other investigators was not up to standard, and there was a total absence of teamwork. He was not adequately supervised during the investigation. In short, MCpl O’Bready was left to his own devices during this investigation and there was no investigation team. A file manager should have been assigned to the investigation in order to

adequately support MCpl O’Bready. A file manager would have analyzed the information gathered from the witnesses and would have established links between this information in order to better prepare the investigators for their interviews. Daily team meetings would have greatly assisted MCpl O’Bready in planning and conducting this investigation.

The Major Case Management model is a methodology that focuses on accountability and uses a multidisciplinary approach to conduct investigations into offences that meet the criteria for major cases. This model establishes a centralized coordination, organization and investigation standard covering all fields, standardized training and shared case management technology. This investigation management model is the result of recommendations from the 1996 Campbell Report. Most Canadian police services use this system.

The Major Case Management system is intended to create a permanent record of the timeline of the investigation that includes the direction, speed, progress and decision-making process throughout the investigation. The minutes of investigation team meetings have a specific category in the Major Case Management system that records the details on who was responsible for specific decisions or recommendations, as well as the reasons that led to them. Thus, this system makes it possible to follow the investigation as it develops and observe the results of each of the decisions and actions in the investigation. The Major Case Management system software provides investigators with the tools required to organize, manage, retrieve and analyze the sometimes large volumes of data collected in the investigation.

This system and software program improve and greatly facilitate disclosure in criminal proceedings or in the context of other investigations or monitoring reviews. Through this system and its disclosure mechanisms, the investigators are able to better describe and explain the reasons that led to the decisions and actions that influenced the conduct of the investigation.

The CFNIS had no SOP for Major Case Management in 2011. The MPPTP also made no mention of it. The CF MP Orders came out in 2012. A review of the table of contents of CF MP Orders shows that investigation management is the subject of CF MP Order 2-500. This order refers the reader to CF MP Order 2-530 for more information on major case management policies and procedures. CF MP Order 2-530 is entitled “*Major Case Management—Principles*”

and CF MP Order 2-540 is entitled “*SAMPIS Major Case Management Subsystem.*” However, these orders have not yet been published.

The Major Case Management model must be used [translation] “in the case of major joint investigations with other law enforcement agencies” or when “a complex investigation task force is deemed necessary.” CF MP Order 2-500, the source of the above quotations, should be amended to correctly set out the threshold and context for the use of the Major Case Management model.

This investigation should have been managed as a major case. This model’s methodology would definitely have avoided many of the deficiencies identified in this PII. At the beginning of the investigation, the CFNIS investigators should have assessed the situation to decide whether they should use the Major Case Management model. The person in charge of the investigation should also indicate in the file the reasons why they decided not to use this model in the investigation. The Commission had recommended in 2006 (MPCC 2006-033 and MPCC 2006-037) that CF MP Gp policies be amended to include the principles of the Major Case Management model.

Recommendation #7:

The Commission recommends that the CFPM develop and publish a policy that clearly identifies the situations and offences that must be managed as major cases and ensure that MPs receive training on this subject throughout their careers. (Accepted by the CFPM)

This investigation should not have been conducted by CFNIS JTF-Afg. Close ties had been established between them and the members of JTF-Afg MP Coy during their pre-deployment training, and they worked side-by-side at KAF. Capt da Silva seemed to have emphasized this during his conversations with Maj Bolduc, but the latter does not remember this conversation.

There was a personal conflict between Capt da Silva and Maj X. Capt da Silva therefore did not invest himself in the investigation as he should have. The CFNIS had a specific SOP on conflicts of interest. This SOP specified that a conflict of interest occurs when an MP member “has a personal, professional or financial reason to provide other than an objective view as it pertains to a situation he or she is responsible to investigate.” An MP member must not participate in an investigation or supervise it when they have a direct or indirect personal interest

in the complainant, victim or accused, or if they have a personal interest in the outcome of the investigation. An MP member who believed they were in a conflict-of-interest situation had to advise their supervisor. This supervisor then had to take the appropriate actions, some of which are mentioned in the SOP.

There was a potential conflict of interest between MCpl O'Bready and the subjects of the investigation. MCpl O'Bready was clearly uneasy regarding the subjects of the investigation. He had previously worked under MWO Y and he could possibly look forward to working under Maj X in the future. He also seems to have been influenced by the difference in rank between himself and these two individuals.

Maj Bolduc was well aware of the personal conflict between Maj X and Capt da Silva, but he did not intervene. He did not seriously consider this question. If he had done so, he surely would have come to the conclusion that it was necessary to send an independent investigator or team of investigators to KAF. Capt da Silva did not try to identify the conflicts of interest associated with assigning the investigation to MCpl O'Bready.

Their approaches to this highly sensitive situation are surprising. They demonstrate the need for a training program in the CFNIS on identifying conflicts of interest and on CAF, CF MP Gp and CFNIS policies on conflicts of interest.

The subjects of the CFNIS JTF-Afg investigation were a major and a master warrant officer in the Military Police. A master corporal in the Military Police with only four years of experience as an investigator was responsible for this investigation. It is unsurprising that MCpl O'Bready was very uncomfortable in his role. He was given a task, and, like a good soldier, he tried to carry it out. Despite what MCpl O'Bready said, his behaviour during the interviews and his testimony show that he felt tremendous pressure and that he was not independent. MCpl O'Bready was not the ideal choice to carry out this task, but he was the only one available on the ground on January 29, 2011, to conduct this investigation from start to finish.

Capt da Silva was responsible for ensuring that the investigator could carry out the task. Having decided to assign MCpl O'Bready to this investigation, Capt da Silva should have ensured that MCpl O'Bready was adequately supported and supervised. This investigation would therefore

have benefited from being managed using the Major Case Management model. If he could not find the right person within his detachment, he then should have obtained external support.

Recommendation #8:

The Commission recommends that the CFPM develop a training program on identifying conflicts of interest and on CAF and CF MP Gp policies on conflicts of interest. (Not accepted by the CFPM)

Many Canadian police services ask other police services to conduct an investigation when the subject of investigation is one their members. These policies exist to prevent any real or perceived conflict of interest. Many factors need to be considered in developing this type of policy, such as the suspect's rank and position, the offence and its context. Such an approach demonstrates to the public that this police service wants to ensure that each of its investigations is impartial and transparent, and that it will be perceived as such.

Maj Bolduc's testimony demonstrates that there was no directive or even institutional culture regarding an investigation into another Military Police member. There were no investigators identified who could have been assigned to a sensitive investigation such as this one. An independent investigator with the required rank, experience and qualifications could have travelled to KAF and conducted this investigation with the support of CFNIS JTF-Afg members. Such an investigator or team of investigators should be available to travel anywhere in Canada or around the world to investigate independently when the CFNIS detachment that would normally be responsible could not conduct the investigation because of conflicts of interest or any other legitimate reason.

Recommendation #9:

The Commission recommends that the CFPM develop and distribute a policy that takes into account situations requiring the deployment of an independent investigator or team of investigators to provide support during investigations when there is a conflict of interest or as otherwise needed. (Not accepted by the CFPM)

Furthermore, in some files, given the rank or position of the subject of the investigation or the nature of the incident, it would be preferable that an investigation be conducted by another police service. This type of investigation would ensure a level of independence and impartiality that

would greatly increase CAF members' and Canadians' confidence in the results of such an investigation and in the resulting decisions.

Recommendation #10:

The Commission recommends that the CFPM develop a policy regarding investigations in which Military Police members are the subjects. This policy would clearly state which investigations would be referred to another police service. (Not accepted by the CFPM)

This file is marked by a lack of communication between the investigators and the RMP. This lack of communication seems to have had a negative effect on this investigation. The Commission was very limited in its observations, since not all of these communications were disclosed to it, given solicitor-client privilege.

Recommendation #11:

The Commission recommends that the CFPM develop a directive that its investigators maintain close and well-documented communications with the regional military prosecutors, thereby ensuring that the investigation is well-planned, supported and executed. (Accepted by the CFPM)

Many documents provided to the Commission by the CFPM are redacted. Normally, this redaction is based on a claim of solicitor-client privilege. The Commission reviews the work of Military Police members and not the work of the lawyers who advise them. That being said, in many cases, these military police members make decisions based on the advice of lawyers. Having access to this information is essential to properly understand the reasoning of Military Police members. The absence of this information is an impediment to a fair and complete review of a complaint.

As mentioned in many Commission annual reports, there are circumstances where information protected by solicitor-client privilege would allow the Commission to resolve complaints in a more fair and transparent manner. The Commission notes that Parliament seems to have come to this conclusion with respect to the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police (RCMP) in 2013 when it amended the *Royal Canadian Mounted Police Act* to allow the Civilian Review and Complaints Commission for the RCMP to have access to protected information. Any information protected by solicitor-client privilege is included in the definition of protected information found in this act. Similarly, the Commission

could more easily obtain information relevant to carrying out the mandate conferred upon it by the law, and provide independent supervision of Military Police operations while maintaining rigorous control over any protected information as defined by the enabling legislation.

The Commission is of the opinion that certain documents that resulted from the 2016 CFNIS review of the 2011 CFNIS JTF-Afg investigation were incorrectly redacted. On February 9, 2016, LCol Bolduc prepared a memo addressed to Maj Leblanc at the end of a report that had been submitted to him by Maj Leblanc. This memo was redacted based on a claim of solicitor-client privilege in the copy of the report submitted to the Commission following requests for disclosure. It is therefore impossible to read the directives of LCol Bolduc, a military police member, to his subordinate, another military police member. LCol Bolduc stated that he had written a memo to Maj Leblanc and that he believed that he had told him to continue his work. Maj Leblanc stated that he had received the task to submit a new “*précis des faits*” (Crown brief) that contained the missing elements required for a complete pre-charge screening. Given this testimony, the Commission does not believe that the redaction of LCol Bolduc’s note based on a claim of solicitor-client privilege is reasonable.

Recommendation #12:

The Commission recommends that the Department of National Defence take steps to have the *National Defence Act* amended to include provisions regarding information similar to those found in Part VI (Civilian Review and Complaints Commission for the Royal Canadian Mounted Police) of the *Royal Canadian Mounted Police Act*.

The following proposed charges were prepared against Maj X:

[translation]

“NDA 124 DETAILS: In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, as Coy OC, did not ensure that he adequately planned a personnel recall exercise, as he had the duty to do.

NDA 129 DETAILS: In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by directly observing them in order to intervene in the event that things got out of control.”

The following proposed charges were prepared against MWO Y:

[translation]

“NDA 124 DETAILS: In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, when he was performing duties as the controller of a personnel recall exercise, failed to apply the directives of the Coy OC and let the guards enter a detainee’s cell.

NDA 129 DETAILS: In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by directly observing them in order to intervene in the event that things got out of control.”

Maj Bolduc, having received the Regional Military Prosecutor’s legal opinion and having reviewed the “*précis des faits*” (Crown brief), decided not to lay charges. Maj Bolduc strongly emphasized the need to prove a marked departure from the standard of care. The standard of care applicable to the charge of negligent performance of a military duty or task is that of the conduct expected of a reasonable person of the rank and in the circumstances of the accused at the time and place the alleged offence occurred. Maj Bolduc also stated that he believed that the evidence and the opinions of three majors were required to prove an allegation of criminal negligence. His understanding of the test to demonstrate the marked departure is incorrect, as this test does not require the evidence of [translation] “three majors”. Maj Wight and Sgt Larson were excellent witnesses to meet the standard in this file. Maj Wight had commanded the JTF-Afg MP Coy during the deployment prior to that of Maj X and had transferred responsibilities to the latter. Sgt Larson represented the Commanding Officer of the Canadian Forces Service Prison and Detention Barracks (CFSPDB), as an expert in the field of guarding detainees. Maj Bolduc therefore did not use the correct test to assess the marked departure and did not consider all the relevant evidence; namely, the testimony of Maj Wight, which was in the “*précis des faits*” (Crown brief). That being said, it is true that a charge of criminal negligence is difficult to prove, given that it must be shown beyond a reasonable doubt that the degree of diligence that the accused exercised constitutes a marked departure and not simply a departure from the standard of care that a reasonable person would follow in the same situation.

Maj Bolduc strongly emphasized the fact that the detainee had not been abused. Any file with a “detainee” component would be added to the table and the report he was required to prepare on this subject. Maj Bolduc stated that any file questioning the treatment of a detainee was very sensitive in Canada, given the MPCC investigations and public hearings and other investigations

on this subject. The detainee had not suffered any abuse, but that did not therefore mean that there was no breach of the *Code of Service Discipline*. Maj Bolduc believed that Maj X had failed in his duty during the planning of the exercise and that MWO Y had not properly supervised the exercise. Of course, these behaviours do not necessarily represent failings meriting charges under the *Code of Service Discipline*.

Since it was no longer a detainee abuse file, Maj Bolduc therefore decided that it was instead a performance deficiency case that could be submitted to Maj X's chain of command and not a disciplinary case. This was his decision to make and was well within the bounds of his discretion. That said, his relief, that the detainee had not been abused, led him to underestimate the severity of the incident. Maj Bolduc gave little weight to the particular context of this situation; namely, that a minor detainee had been extracted from his cell by a tactical team during an exercise. The Commission's role is not to assess the evidence in order to decide what decision it would have made in the circumstances, but to determine whether Maj Bolduc's decision constitutes a reasonable exercise of his discretion to lay or not lay a charge.

The covering letter dated April 18, 2011, informed the Comd JTF-Afg that, [translation] "in the interests of military justice" the CFNIS JTF-Afg had decided not to lay charges. It then informed the Comd that CFNIS JTF-Afg was using its discretion to thereby [translation] "give the chain of command the opportunity to weigh in on the interest of acting in this file." It is not the CFNIS' jurisdiction to determine whether it is in the interests of military justice to lay charges, since this question is instead the responsibility of the military prosecutors; but, according to the law, the decision to lay charges does fall to the CFNIS and not the military prosecutors.

The message from Capt da Silva's letter was ambiguous. Annex B of CFNIS SOP 225 in force in 2011 specified that the covering letter of the MPIR had to state that the file was submitted to the Comd of the subject of the MPIR so that the latter could decide whether administrative or disciplinary actions were appropriate. The letter prepared by Capt da Silva did not say that the file was submitted to BGen Milner so that he could decide whether administrative or disciplinary actions were appropriate. The text of this letter did not faithfully comply with the directives and the template covering letter found in CFNIS SOP 225.

Recommendation #13:

The Commission recommends that the CFNIS send cover letters that clearly and fully explain the decisions made further to an investigation, as well as the options available to the commander of the subject of the investigation, and that these letters comply with CFNIS SOPs. (Not accepted by the CFPM)

Findings Regarding the Allegations

This investigation included a significant number of deficiencies. These deficiencies or errors show a lack of rigour by the investigators and, on some occasions, lack of competence or experience. These can be divided into two categories: minor and major deficiencies. The following deficiencies are considered to be the most major: the selection and lack of supervision of the lead investigator and the lack of adequate support for the lead investigator. The other deficiencies, namely, the lack of investigation planning, selection of witnesses, interview planning and conflicts of interest, are deficiencies with respect to best practices in the field of police investigations.

None of the deficiencies or errors had an impact on the final result of the investigation and the conclusion that there was sufficient evidence to lay charges, as recommended by the investigators, but they show that the investigators did not always use best practices during this investigation.

The details of the first proposed charge (*NDA*, section 124) for Maj X allege that he failed in planning the exercise and not during the execution of his plan. Therefore, *actus reus* for this charge is in fact the planning of an exercise and not the execution of this plan. This is what the second charge in Maj X's RDP seems to want to accomplish. The current evidence on file does not create a reasonable belief that there was a marked departure between Maj X's planning of the exercise and the standard of care of a reasonable person as shown by the evidence found in GO 2011-2411. However, given the evidence on file, a charge of not having adequately monitored a personnel recall exercise to ensure that no guards enter a cell could have been laid against Maj X.

The details of the first proposed charge (*NDA*, section 124) against MWO Y allege that he failed to apply the directives of his company commander and that he let the guards enter a detainee's cell. The evidence on file suggests that MWO Y committed this offence. He knew that he had

been assigned a task of being the controller during the exercise. The evidence shows that his conduct could constitute a marked departure from the conduct of a reasonable person placed in the same circumstances.

In the proposed charges, Maj X and MWO Y are accused of having engaged in conduct to the prejudice of good order and discipline. It is alleged in these proposed charges that they failed to adequately supervise the guards in order to intervene in case things got out of control. This out-of-control situation was in fact the extraction of the detainee. The evidence on file leads to a reasonable belief that Maj X and MWO Y committed this offence. The evidence shows that not intervening to prevent an extraction during the exercise was a significant departure from the proper operation of the DTF. This evidence leads to the conclusion that there was prejudice to good order and discipline, because it clearly establishes that it was a natural consequence of the omissions of Maj X and MWO Y.

While Maj Bolduc had enough evidence to lead a person to reasonably believe that these proposed offences had been committed, it was up to him to exercise his discretion to determine whether or not to lay charges against Maj X and MWO Y.

The majority of the omissions identified by the Commission represent failures to observe CFPM directives or police best practices. The Commission finds that, despite these deficiencies, this investigation collected sufficient evidence to support the proposed charges, which could have been laid. The evidence on file suggests that one could reasonably believe that Maj X and MWO Y had committed these offences. The Commission noted these omissions because its mandate is to promote excellence in the Military Police. The Commission can therefore note omissions and recommend improvements in relation to an allegation, while also finding that an allegation is unsubstantiated.

It is important to note that the standard of care required of police officers as part of any Commission review is not perfection. The Commission bases its work on the relevant case law, and more particularly on *Hill v Hamilton-Wentworth Regional Police Services Board* to determine the standard of care required of the subjects of the review.

The principles in *Hill* are also used to assess the conduct of the subjects of a conduct complaint. Therefore, it is expected that a peace officer will act as a reasonable investigator in the circumstances. The relevant circumstances may include urgency and insufficient information. Peace officers are entitled to exercise their investigative discretion as they see fit, provided that they stay within the bounds of reasonableness and that their intentions are honest, non-arbitrary and not motivated by favouritism or any other dishonest motivation. The expected standard of care is not perfection, or even the optimum, judged from the vantage of hindsight. Any professional may make minor errors or errors in judgment which cause unfortunate outcomes, but which are not “unreasonable mistakes” that breach the expected standard. It must always be remembered that any review is done with the benefit of hindsight and that one or more omissions does not necessarily represent misconduct.

After reviewing the investigation as a whole, taking into consideration all of the circumstances and applying the standard of care as defined in *Hill*, the Commission is satisfied that the investigators conducted their investigation in a reasonable manner. The errors and omissions identified are not “unreasonable mistakes” that breach the expected standard of care.

Finding #1:

The Commission finds that Allegation #1, that the CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010-2011, is UNSUBSTANTIATED. (Accepted by the CFPM)

Maj Bolduc placed a great deal of importance on his discretionary authority. The directives regarding this discretionary authority can be found in Annex H (February 2008) – Military Police Discretionary – in Chapter 2 of MPPTP. This annex gave him guidelines and a wide latitude in exercising his discretionary authority to lay charges or to refer the file to BGen Milner. As indicated in part 9.6 of this report, BGen Milner could have then decided whether administrative or disciplinary actions were appropriate.

This annex states that “MP must consider issues such as fairness, justice, accountability, consistency and wider CF interests and expectations” when they decide whether to lay a charge.

It also specifies that the MP's decisions should not "display arbitrary and inexplicable differences in the way that different people are treated by the MP."

This annex seems to offer a great deal of latitude regarding the offences at the core of this file. It also states that "the priority of the offence and the screening criteria must be carefully considered prior to referring matters back to unit level for disposal."

It was therefore not unreasonable for Maj Bolduc to conclude that the high threshold that a marked departure represents from the expected standard of care had not been met and that, consequently, the charge of negligent performance of a military duty would be difficult to prove beyond a reasonable doubt. It was within his discretion to consider that the conduct could be addressed more adequately as a performance deficiency rather than criminal conduct, and therefore to decide not to lay charges.

The Commission finds that the CFNIS officer's decision not to lay charges was reasonable given all of the factors and that it was also a reasonable exercise of his discretionary authority whether or not to lay a charge.

Finding #2:

The Commission finds that Allegation #2, that the CFNIS made an inappropriate decision in deciding not to lay charges, is UNSUBSTANTIATED. (Accepted by the CFPM)

Findings regarding the 2016 CFNIS Review of the Investigation

In 2016, when he was the Comd CFNIS, LCol Bolduc asked one of his subordinates to review the 2011 CFNIS JTF-Afg investigation. LCol Bolduc had played an important role during this investigation in 2011, because he had decided not to lay charges. The Commission wishes to note that this represents at the very least a perceived conflict of interest. Maj Leblanc received the mandate to review GO 2011-2411 during a meeting with LCol Bolduc on November 24, 2015. Maj Leblanc submitted his report to LCol Bolduc on February 9, 2016. That same day, he was ordered by LCol Bolduc to continue his work and submit a new "précis des faits" (Crown brief) that would contain the missing elements required to then obtain a pre-screening for the complete charge, if required.

Maj Leblanc stated in his file summary, dated June 8, 2016, that MWO Y had not performed up to the expected level as a supervisor. He compared his performance during the event of January 19, 2011 to a sentry sleeping at his post, a minor infraction, in his opinion, which given the time elapsed since the incident was not worth pursuing further. Maj Leblanc drafted the final remarks on June 10, 2016. He stated that there was a combination of errors during the exercise on January 19, 2011; namely, poor operational planning, poor decision-making and poor communication. However, he believed that these errors did not merit criminal or disciplinary charges.

A review of Maj Leblanc's reports demonstrates that no new facts had been reported regarding the 2011 investigation before LCol Bolduc requested a review in November 2015. LCol Bolduc could have requested this review at any time after February 2015. The initial review and the investigation review in 2011 by Maj Leblanc took nearly seven months. Thus, Maj Leblanc would certainly have completed his task before November 6, 2015 if LCol Bolduc had ordered this review in February rather than late November. This decision therefore slowed the Commission's work by at least nine months.

Maj Leblanc did not conduct a criminal investigation. Maj Leblanc conducted a review of the work carried out by the CFNIS JTF-Afg investigators. It was not a Professional Standards Bureau investigation. On January 6, 2016, the CFPM decided that it would not provide the disclosure requested on November 6, 2015 while the CFNIS review of the investigation was still ongoing.

The Commission is of the opinion that the disclosure of the requested documents would have had no impact on Maj Leblanc's review of the investigation. At that stage, the Commission was only conducting a review of documents and not an interview process. These two activities could have taken place at the same time without either obstructing the work of the other. Furthermore, this decision is very surprising given the experience during a prior PII (MPCC 2007-003, complaint submitted by Dr. Attaran) during which the Commission and the CFNIS had reached an agreement allowing the Commission to have access to the documents and evidence required for its PII. A good coordination and cooperation effort had therefore contributed to each entity being able to fulfil its mandate. Unfortunately, this was not the case in this file.

Canadian Forces Provost Marshal's Notice of Action

The Canadian Forces Provost Marshal (CFPM) issued an 8-page Notice of Action in response to the Commission's Interim Report. The Interim Report was sent to the CFPM on February 26, 2021. The Notice of Action was received on June 25, 2021. The CFPM accepted all of the Commission's findings and, of the thirteen recommendations made by the Commission, six were accepted, six were not accepted, and the CFPM deferred responding to one of the recommendations, recommendation #12, to the Minister of National Defence (MND).

The MPCC's full response to the CFPM's Notice of Action is provided within the report, see paragraphs 433, 451, 452-454, 522-525, 588, 639-640, 643-644, 646, 682 and 719.

In its Notice of Action, the CFPM deferred responding to recommendation #12 to the MND. It should be noted that at the time of the issuance of the Final Report, the Commission had not obtained a response from the MND with respect to recommendation #12. Once the Minister's response is obtained, the Commission will review and publish it verbatim in its Final Report, along with the Commission's comments.

II COMPLAINT

1. On February 12, 2015, the Military Police Complaints Commission (MPCC or the “Commission”) received an anonymous complaint by mail. The complaint was a one-page typed letter written in French. The letter was dated January 9, 2015, and the envelope was postmarked February 10, 2015. The letter had been sent from the Sheraton Gateway Hotel at Pearson International Airport in Toronto, Ontario. It was addressed to the MPCC and [translation] “To whom it may concern.” The subject line indicated that it was a complaint and read as follows: [translation] “Detainees assaulted by Canadian military police in AFG from December 2010 to January 2011.”

2. In the complaint, it was alleged that the officer commanding (OC) the TF 3-10¹ Military Police Company, Maj X, [translation] “gave the order to ‘terrorize’ detainees through sustained and continuous exercises at the KAF² detention centre.” It was also alleged that those exercises involved making dynamic entries into cells neighbouring those occupied by the detainees and eventually culminated in making dynamic entries into the cells occupied by the detainees.

3. In the complaint, it was alleged that military police members would enter detainees’ cells in the middle of the night armed with sticks and batons, sometimes even carrying 9 mm pistols, and would force the detainees up against the wall or to the floor and apply an arm lock. The complaint states that the tension was so high after the previous two months that several detainees defecated and urinated on the spot.

4. The complaint states that an investigation was then carried out by the CFNIS under the orders of Capt Richard da Silva. Nearly thirty (30) military police members were questioned [translation] “in order to bring serious charges against Maj [X].” It is alleged that the charges were given to BGen Milner, who allegedly ignored them. BGen Milner was the Comd of JTF-Afg at the time.

¹ “TF” refers to Joint Task Force Afghanistan (JTF-Afg).

² The acronym “KAF” stands for Kandahar Airfield, which is located in Afghanistan.

5. It was also stated in the complaint that in 2012, LCol Sylvie Beaudry was tasked with investigating those events, but that [translation] “Maj [X] still hasn’t been subject to a court martial or charges.” The complaint also stated that [translation] “everything was filmed, including all of the testimony related to the event” and that the cells were always under video surveillance.

6. In closing, the complaint provided a list of five [translation] “references,” i.e. WO Degrasse, MWO Y, Capt Busset, Capt Mario Tremblay and Capt Touchette. The letter did not specify whether those people were named for being involved in the alleged events, for witnessing the alleged events, or for any other reason.

7. The following chapters will describe the PII process, the facts uncovered during the PII and the Commission’s findings. That said, the Commission wishes to state immediately that the evidence gathered during the PII clearly reveals that no detainee urinated or defecated during the exercises and that no detainee was abused during the exercises as was alleged in the complaint. The anonymous complaint also alleges that the guards entered the cells with 9 mm pistols and forced the detainees up against the wall or to the floor and applied arm locks. The evidence collected in the course of the PII does not lead the Commission to find that these actions occurred during the exercises that took place at the DTF. On the contrary, this evidence shows that the guards were unarmed and had minimal physical interaction with the detainee during the exercise on January 19, 2011.

8. Furthermore, there was no evidence gathered during the PII that shows that Maj X reportedly ordered the detainees to be terrorized or that the purpose of the exercises was to terrorize the detainees. One of the purposes of the exercises was to show the detainees that the guards could control the DTF in any situation. Therefore, a show of force during these exercises was necessary to fulfil the purpose, and this was much different from trying to terrorize the detainees.

III PUBLIC INTEREST INVESTIGATION PROCESS

3.1 Actions and Decisions of the Commission after Receiving the Complaint

9. When the Commission received the complaint on February 12, 2015, it could not contact the complainant to obtain more information about the facts, given that the complaint was made anonymously.

10. On February 27, 2015, the Commission notified the CFPM of the complaint, as set out in subparagraph 250.21(2)c(i) of the *NDA*.³ At the same time, the Commission sent a copy of the complaint to the CFPM requesting confirmation of some of the facts that were alleged in the complaint, specifically regarding the police investigations concerning the alleged events.

11. On March 11, 2015, the Deputy Commander (DComd) of the CF MP Gp informed the Commission that an investigation had indeed been carried out by the CFNIS concerning an exercise conducted at the DTF in Kandahar under the orders of Maj X in January 2011.⁴ The investigation had concluded on April 16, 2011; no charges had been laid and the matter had been handed over to BGen Milner, Comd JTF-Afg, so that the appropriate measures could be taken. The Commission was also informed that an administrative investigation of Maj X had been conducted by LCol Beaudry in 2012.

12. The information confirmed some of the underlying facts alleged in the complaint. However, the available factual elements remained limited. In order to obtain as much information as possible to determine how the complaint should be dealt with, the Commission decided to contact the references named by the complainant. During the spring and summer of 2015, the Commission took the necessary steps to informally talk to the individuals concerned. Some of them refused to speak with the Commission or could not be reached, while others agreed to provide information and even gave the names of other individuals who were aware of the events, and the Commission contacted those people as well.

³ *National Defence Act*, RSC 1985, c N-5 (“*NDA*”).

⁴ Investigation GO 2011-2411; hereinafter, the “2011 investigation.”

13. Following those informal discussions, the Commission was able to confirm that an unusual incident had occurred during an exercise held at the DTF and that the military police who were working there and at the headquarters (HQ) of the JTF-Afg MP Coy had heard about the events and the investigations that followed, particularly the investigation in 2011. In addition, the Commission was able to ascertain that there was a range of perceptions about the events and that a number of the CAF and MP members who were aware of the events had the impression that some of the decisions—i.e. to open an investigation right from the start, or to conclude the investigation without laying charges—had been made or ordered by “Ottawa.” Although the individuals who were questioned could not necessarily specify which office or individual in Ottawa might have been involved, a number of them seemed to believe or suggest that there had been inappropriate interference. That perception seemed to be reflected in the wording of the complaint itself, which emphasized the fact that there had been no court martial despite the investigations that were carried out, implying that charges should have been laid and that the matter should have been made public at the same time.

14. In May 2015, while the Commission was starting to gather that information, a series of articles appeared in the media concerning the same allegations as those in the complaint. The articles made reference to the same concern regarding the lack of charges, stating that such charges [translation] “would have resulted in a court martial—a process that takes place in public.”⁵ The articles also contained additional allegations that were not included in the complaint sent to the Commission, specifically concerning the purpose of the exercises, which was allegedly related to an attempt to extract information from the detainees.

15. Having collected that information, the Commission had to determine whether the complaint could be processed and, if so, which procedure would be used. On September 21, 2015, the interim Chairperson of the Commission, Michel Séguin, rendered a decision to

⁵ See Bellavance, Joël-Denis, “Afghanistan: Terreur dans une prison canadienne,” *La Presse*, 4 May 2015 [in French].

extend the time limit for filing the complaint.⁶ In that decision, the interim Chairperson determined that the Commission could receive, process and investigate an anonymous complaint.

16. Section 250.2 of the *NDA* states that a complaint concerning the MP must be filed within one year of the events giving rise to it, unless the Chairperson of the Commission, at the request of the complainant, decides to extend the time. In his decision of September 21, 2015, the interim Chairperson also found that the request for a time-limit extension could be made implicitly, and that the complaint contained such a request. The interim Chairperson considered the date when the 2011 investigation ended, in April 2011, as being when the events that gave rise to the complaint occurred, specifically the complaint concerning the failure to lay charges. Over three years had elapsed between then and the time when the complaint was filed with the Commission. However, the interim Chairperson determined that there was strong public interest in extending the time limit for filing the complaint, given the allegation that detainees were abused, the lack of charges following the CFNIS investigation, issues involving the MP's independence, and all of the relevant circumstances and factors. The Commission therefore received the complaint.

17. Complaints are normally investigated first by the Office of Professional Standards (PS) of the CFPM, and the complainant can then request that the Commission conduct a review if he or she is dissatisfied with the outcome of the PS investigation. In addition, at any time during the review of a complaint, the *NDA* gives the Chairperson the authority to order a Commission investigation if the Chairperson deems it in the public interest.⁷ On November 4, 2015, the Chairperson of the Commission, Hilary C. McCormack, decided to hold a PII into the matter.⁸

18. In her decision to hold a PII, the Chairperson of the Commission noted the seriousness of the allegations and the fact that they raise systemic issues related to the MP's independence that might impact the public's trust in the MP, particularly with regard to the allegation that the CFNIS failed to press charges and instead handed the decision over to the JTF-Afg Comd to

⁶ *Decision Letter* [granting an extension] (21 September 2015), MPCC 2015-005, online: MPCC <<https://www.mpcc-cppm.gc.ca/enquetes-audiences-dinteret-public-interest-investigations-hearings/anonyme-anonyme/2015-005a-eng.aspx>>.

⁷ *NDA*, ss 250.38(1) and 250.38(5).

⁸ *Decision to conduct a Public Interest Investigation* (4 November 2015), MPCC 2015-005, online: MPCC <<https://www.mpcc-cppm.gc.ca/enquetes-audiences-dinteret-public-interest-investigations-hearings/anonyme-anonyme/2015-005f-eng.aspx>>.

determine the appropriate measures to take. The Chairperson pointed out that, because of the nature and seriousness of the charges, it was preferable for a transparent and independent public process to take place in order to investigate the events, especially considering the perception, which was apparently held by a number of the people deployed at the time of the event, that there had been no charges or other repercussions in order to avoid drawing attention to the incident, and that the CFNIS's decisions may have been dictated by "Ottawa."

19. The Chairperson concluded that conducting a PII would enable the Commission to conduct an in-depth investigation into the events and make its findings public so that no doubts remained concerning the events in question or the MP's conduct in the matter. Therefore, the file was not entrusted to the CFPM for an investigation at first instance by the PS of fice.

20. On January 14, 2016, the Chairperson of the Commission co-delegated the duty of carrying out the PII and drafting and sending the Interim and Final reports concerning the matter to Michel Séguin, a Commission member.⁹ From that time forward, the Chairperson and Mr. Séguin jointly led the PII and prepared the Interim Report.

3.2 Initial Disclosure of the Documentary Evidence and Determination of the Scope of the PII

21. On November 6, 2015, two days after the Chairperson had rendered her decision to conduct a PII into the matter, the Commission sent an initial request to the CFPM for disclosure of the relevant documents. The Commission specifically asked to receive a copy of the 2011 investigation file and all the documents related to the investigation conducted by the CFNIS or of any other related investigation; a copy of any audio or video recording of the exercises that were investigated by the CFNIS; and a copy of the report that was produced following the investigation that was conducted in 2012 by LCol Beaudry.

22. On February 12, 2015, the Commission received the complaint and forwarded a copy of the complaint to the CFPM on February 27, 2015. On December 18, 2015, the DComd of the CF MP Gp notified the Commission that CF MP Gp personnel had started to prepare the documents for disclosure, but that the CFNIS was also reviewing the matter to determine whether additional

⁹ *NDA*, s 250.11(3).

elements that might necessitate a police investigation had been raised in the anonymous complaint sent to the Commission in February 2015. Specifically, he said that one of the aspects to be reviewed was related to the fact that the anonymous complaint of 2015 referred to several exercises, and the CFNIS wanted to verify whether the 2011 investigation concerned several exercises or only one.

23. On January 6, 2016, the Commission still had not received the documents that it had requested in November 2015, and it wrote to the CFPM again to request an update on when it could expect to receive the documents. The same day, the CFPM wrote to the Commission to confirm receipt of the initial disclosure request dated November 6, 2015 and to inform the Commission that the requested documents would not be disclosed until the CFNIS's review of the 2011 investigation was concluded. In the letter, the CFPM noted that, as indicated to the Commission on December 18, 2015, the CFNIS was considering the new information provided in the anonymous complaint and was reviewing and evaluating the earlier investigation by the CFNIS to determine whether or not all of the necessary steps had been taken in the 2011 investigation. In closing, the CFPM said that the Commission would be kept informed of the progress made in the CFNIS's review.

24. The Commission wishes to emphasize that it did not agree with the decision of the CFPM to not provide the initially requested disclosure until the CFNIS review of the 2011 investigation had been completed. The Commission is of the opinion that the CFPM had no reason not to provide this disclosure since the review of these documents by the Commission did not risk compromising the CFNIS review. Furthermore, the CFNIS finding following its review would have had no impact on the PII, unless it decided to lay charges against the subjects of the 2011 investigation. Therefore, the decision not to provide the requested disclosure prevented the Commission from assessing the file and determining whether the complaint was within its jurisdiction in a timely manner. It should also be noted that the Commission has a legal duty to deal with all matters before it expeditiously.¹⁰ Thus, the Commission was concerned that the delay in receiving the initial disclosure not only interferes with the Commission's duty to act expeditiously, but may also have a negative impact on the persons who were the subjects of the

¹⁰ *NDA*, s 250.14.

complaint and the witnesses, because they would have to try to remember events that occurred long ago.

25. In the months that followed, the Commission and the CF MP Gp exchanged frequent correspondence and held numerous discussions and meetings to resolve this issue.¹¹ The initial review of the 2011 CFNIS JTF-Afg investigation led to the decision of the CFPM to examine the 2011 investigation more closely to determine whether there was other evidence and whether charges could be laid. The Commission wanted to advance the PII and tried to find a way to have the documents disclosed without having to wait for the CFNIS review of the 2011 investigation to conclude. The CF MP Gp was concerned that a PII that was conducted at the same time as the review could negatively impact the review.

26. After numerous discussions, the Commission and the CF MP Gp leadership agreed on a protocol for sharing information that would govern information exchanges and the simultaneous conduct of the two investigations. On June 2, 2016, the *Protocol between the MPCC and the CF MP Gp in respect of the Conduct of Concurrent Public Interest and CFNIS Investigations Regarding Exercises in Afghanistan by Military Police* was signed. On June 8, 2016, the Commission was informed that the CFNIS's new investigation would wrap up soon and that the matter would not be submitted to a military prosecutor again in order to consider potential charges; rather, it would be concluded without any charges being laid. GO 2011-2411, which contained information regarding the 2015 and 2016 reviews that the Commission later received,¹² indicates that the investigation was officially concluded on June 10, 2016.¹³

27. On June 8, 2016, the Commission received a copy of the report that was produced after the summary investigation led by LCol Beaudry in 2012, as well as a copy of the mandate that was originally given to LCol Beaudry when the investigation was convened. On June 10, 2016, the entire investigation report from the 2011 investigation was disclosed to the Commission, including recordings of the interviews that were conducted and a video recording of part of the

¹¹ The details of those exchanges are discussed in part 3.4.1, below.

¹² Supplementary disclosure of the GO 2011-2411 file, Document 065, 19 July 2016 (received at the MPCC on 26 August 2016), (hereinafter "Document 065").

¹³ Document 065 at 242.

exercise that was held on January 19, 2011, which was the main event that was under investigation by the CFNIS.

28. On July 21, 2016, the Commission wrote to the CFPM to request that additional documents be disclosed. The Commission specifically requested a copy of SOP 500 from the JTF-Afg MP Coy at the time of the events, which is the SOP that it wanted to evaluate at the time of the exercise of January 19, 2011. The Commission also requested all of the internal and external correspondence generated by the CFNIS in the matter, including the notes concerning changes made to the investigation file.

29. On August 26, 2016, the Commission received a copy of the investigation file that had been assembled following the review that was initiated in 2015 and the reopening of the investigation in 2016, including the recordings of the interviews carried out as part of the 2016 investigation.¹⁴ On September 16, 2016, the Commission wrote to the CFPM to request the disclosure of a copy of the reports concerning the physical evidence obtained during the 2016 investigation. Those reports were sent to the Commission on September 21, 2016.

30. After initially informing the Commission that SOP 500 could not be located and had not been found during the CFNIS's recent investigation, the DComd of the CF MP Gp notified the Commission in September 2016 that a copy had just been found. On September 28, 2016, SOP 500 was sent to the Commission, along with the notes concerning the 2011 investigation and emails related to the 2015-2016 investigation. Additional emails related to the CFNIS's 2015-2016 investigation were disclosed to the Commission on October 14, 2016.

31. On October 3, 2016, the Commission wrote to the CFPM to request the disclosure of certain documents obtained as part of the investigation and the CFNIS's 2015-2016 review that were listed in the investigation file. Those documents were sent to the Commission on October 18, 2016.

32. In total, the Commission received over 3,000 pages of documents and many hours of audio and video recordings as part of the initial disclosure phase. After examining the

¹⁴ *Supra* note 12.

documentation that was gathered, on February 27, 2017,¹⁵ the Commission rendered a decision identifying the allegations of the complaint that the Commission had the jurisdiction to investigate under the applicable legislation and jurisprudence. Having determined which allegations would be investigated during the PII, the Commission also identified the individuals who were the subjects of the complaint.

33. In the decision rendered on February 27, 2017, the Commission explained that the conduct of the military police who were involved in holding the exercise(s) at the DTF could not be investigated by the Commission, as it was not one of the issues for which the Commission has jurisdiction to receive complaints. Under the applicable legislation and regulations, and pursuant to an earlier Federal Court of Canada ruling, the capture, detention and transfer of “insurgents in Afghanistan”¹⁶ are not functions that fall within the Commission’s jurisdiction, as they relate to military operations that result from established military customs or practices. Therefore, the Commission is unable to make findings or recommendations on the allegations concerning the conduct of the military police who allegedly ordered the exercise(s) to be held or the conduct of the military police who participated in the exercise(s) at the DTF.

34. However, the Commission found that the functions performed by the CFNIS members involved in the conduct of the 2011 investigation and the decisions concerning the laying of charges are policing duties and functions that are not excluded from the Commission’s jurisdiction. In fact, the Commission regularly considers such issues, and they are the focus of its mandate. The Commission noted that it would be necessary to conduct an investigation into the events that gave rise to the CFNIS investigation in order to review not only the information obtained by the CFNIS during its investigation but also the information that was available about the events. The Commission could shed light on those issues and formulate the necessary findings and recommendations concerning the allegations under investigation.

¹⁵ *Determination of Scope of Public Interest Investigation and MPCC Jurisdiction* (27 February 2017), MPCC 2015-005 (Anonymous), online: MPCC <<https://www.mpcc-cppm.gc.ca/enquetes-audiences-dinteret-public-interest-investigations-hearings/anonymous-anonyme/anonym-2015-005-decision-2017-03-02-eng.aspx>>.

¹⁶ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 918.

35. The Commission also found that the complaint concerning the summary investigation conducted by LCol Beaudry in 2012 did not fall within its jurisdiction under the *Regulations* excluding functions relating to the administration of matters that may be the subject of a complaint before the Commission. After examining the mandate given to LCol Beaudry and the summary investigation report that she prepared, the Commission found that it was an administrative investigation of the alleged leadership deficiencies of the JTF-Afg MP Coy.

36. The Commission therefore identified the following allegations:

Allegation #1: The CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010–2011;

Allegation #2: The CFNIS made an inappropriate decision in deciding not to lay charges following its investigation.

37. After determining which issues fell under its jurisdiction, the Commission had to identify the individuals who were the subjects of the complaint. The Commission had to limit itself to drawing conclusions about the conduct of the CFNIS members involved in carrying out the investigation and the decision not to lay charges. The Commission identified six individuals who were the subjects of the complaint: LCol (Retired) Francis Bolduc,¹⁷ the CFNIS DCO in Ottawa at the time that the investigation was concluded in 2011, Capt (Retired) Richard da Silva, the CFNIS detachment commander in Afghanistan at the time of the investigation, and the members of the CFNIS detachment in Afghanistan who participated in the investigation in 2011, that is to say, WO Danny Parent,¹⁸ who acted as supervisor, Sgt (Retired) James O’Bready,¹⁹ the lead investigator who conducted the investigation, as well as Sgt (Retired) André Mantha and Sgt Steve Carrier,²⁰ who participated in the investigation.

38. As the Commission stated in its decision concerning the scope of the PII, identifying someone as a subject of the complaint did not mean that the Commission had reason to believe

¹⁷ He held the rank of major at the time of the events and was a lieutenant colonel when he was identified as a subject of the complaint. Note that, in this report, the Commission generally refers to the ranks of the named individuals at the time of the events that it is discussing, in order to make it easier to understand how events unfolded and the reporting relationships at the time.

¹⁸ Sergeant at the time of the events.

¹⁹ Master Corporal at the time of the events.

²⁰ Master Corporal at the time of the events.

that a subject of the complaint had participated in inappropriate conduct or that their work was deficient. The people identified as being subjects of the complaint were simply the ones whose conduct was impugned in the complaint, as the complaint concerned events in which they had participated. The Commission had to investigate and formulate findings and recommendations concerning the conduct of each individual who was a subject of the complaint. Having determined the scope of its jurisdiction and identified the allegations to be investigated and the individuals who were the subjects of the complaint, the Commission started to conduct the PII.

3.3 The Complainant's Anonymity and PII Challenges

39. From the outset, this case presented special challenges for the Commission. As the identity of the complainant was not known, even to the Commission, it was impossible for the Commission to follow its customary practices, both in the initial steps of the process and during the investigation.

40. Normally, the Commission regularly consults the complainant(s) regarding the allegations they are making. Since the complaint process set out in Part IV of the *NDA* is intended to be a process accessible to the general public, it is to be expected that certain complainants will not always provide all the information the Commission needs to process a complaint upon first contact with the Commission. Thus, the Commission may contact complainants to clarify their intentions regarding their respective complaints. An exchange of information regarding the complaint review process and the Commission's mandate may sometimes help complainants clarify the allegations they wish to make. In certain cases, simply informing complainants of the limits of the Commission's jurisdiction may, for example, help with the wording of the complaint or indicate to the individual that the Commission does not have jurisdiction to accept the complaint.

41. In this case, the Commission had to interpret the contents of the one-page complaint without being able to communicate with the complainant. The Commission therefore had to rely solely on the text of the letter of complaint to interpret the allegations therein. It was unable to obtain clarifications from the complainant regarding the alleged facts and the specific aspects about which the complainant wished to make a complaint. On the other hand, given the unusual facts of this matter, the Commission was able to obtain factual details by contacting the

[translation] “references” named in the complaint and by obtaining information directly from the CFPM concerning the 2011 investigation and LCol Beaudry’s investigation. That information was sufficient to continue with the necessary steps to process the complaint; however, there is no guarantee that the same would happen with another case.

42. Similarly, the Commission was unable to contact the complainant to inform him/her that more than a year had passed since the events and to verify whether he/she would like to request an extension for filing the complaint. The Commission had to rely on the implicit request for an extension in the complaint, as explained in the interim Chairperson’s decision. Nevertheless, even on the basis of that request, the Commission could not obtain information from the complainant regarding the reasons he/she had waited so long to file the complaint. The Commission had no means of discovering, for example, when the complainant had been informed of the events and whether he/she had been prevented from filing the complaint earlier for reasons beyond his/her control.

43. In this case, the Commission made a decision concerning the extension without that information, given the seriousness of the allegations and the fact that public interest was an argument in favour of an extension, regardless of the reasons that may have explained the delay in filing the complaint. Nevertheless, in other cases, not being able to obtain more information from the complainant might prove to be a serious obstacle, even preventing the Commission from making a decision based on the relevant facts.

44. The Commission also faced some challenges when deciding on the scope of the PII and its jurisdiction to investigate the various allegations in the complaint. Even though the complainant’s original intent seemed to be, in particular, to make a complaint regarding the decision to conduct the exercise(s) at the DTF, the Commission had to conclude that based on applicable legislation and jurisprudence, that allegation did not fall under its jurisdiction. The PII would have to focus on another aspect of the complaint: the fact that no charges had been brought following the 2011 CFNIS investigation. As a result, the subjects of the complaint would have to be those involved in the investigation into the exercise(s) at the DTF, rather than those involved in planning or carrying out the exercise(s). In light of the anonymous nature of the

complaint, the Commission was unable to verify whether investigating the conduct of those leading the investigation still reflected the complainant's original intent.

45. Once again, in light of the special facts of this matter, as well as the nature of the allegations, the Commission was able to resolve the issue without consulting the complainant. Since it was necessary in the public interest to investigate the allegations of a lack of charges following the 2011 CFNIS investigation, including the allegation that charges were allegedly referred to the Comd JTF-Afg, the Commission was able to determine that its investigation should proceed with a scope that matched its jurisdiction. Furthermore, the Commission also pointed out to the subjects of the complaint that identifying them was not an indication of their involvement in improper or wrongful conduct.

46. Another challenge arising from the anonymous nature of the complaint became clearer as the investigation proceeded. Normally, when the Commission knows the identity of the complainant, it can verify the complainant's motivations, intent, good faith and credibility. Thus, if the Commission discovers or suspects that a complaint was filed for ulterior motives—such as past conflict with the subjects of the complaint or with others whose conduct is questioned—the Commission can take steps during its investigation to check the facts and analyze in depth the motivations of the complainant and the witnesses.

47. In this case, these kinds of concerns took on particular importance as the evidence revealed that a significant number of interpersonal conflicts arose during the deployment at issue. The summary investigation conducted by LCol Beaudry revealed that it had been difficult to find the necessary personnel for that rotation given the need to recruit Francophone personnel. As a result, the OC JTF-Afg MP Coy had to contend with the fact that there were open and ongoing personality conflicts among the company's officers.²¹ That report concluded that the OC JTF-Afg MP Coy's failure to take strong action from the outset to put an end to the personality conflicts led to the rapid development of an unhealthy environment within the JTF-Afg MP Coy, resulting in situations where more experienced officers tried to influence more junior officers or

²¹ Summary Investigation Report, Document 016, 29 November 2012 (received at the MPCC on 8 June 2016) at 5-6.

members, while others were apparently selective in the level of effort applied to their duties. All of that affected everyone's ability to form a team.²²

48. In such an environment, it becomes particularly important to ensure that the complaint is not motivated by prior conflict or animosities, so that the Commission does not become a tool for the pursuit of objectives unrelated to its mandate, such as the settling of accounts from conflicts in the workplace or through other circumstances. As the Commission did not know the complainant's identity, it could not ascertain whether such motivations were the reason for filing the complaint.

49. More generally, because of the complainant's anonymity, the Commission could not assess the complainant's credibility. The Commission could not conduct an interview with the complainant to verify the truthfulness of his/her allegations and the source of his/her information. Neither could the Commission question other witnesses about the complainant's reputation, his/her access to important information or his/her possible involvement in the conflicts that were apparently rampant within the JTF-Afg MP Coy. It was therefore impossible to ascertain, before the start of the PII, whether the alleged facts could have been exaggerated or inaccurately described. Those aspects became particularly concerning once the Commission realized that the description of the DTF exercises in the complaint did not correspond with the events that actually took place, especially since the testimonies gathered during the PII confirmed that there were numerous conflicts between the individuals involved at the time of the events.²³

50. Therefore, the complainant's anonymity posed a challenge, not only during the initial stages, but throughout the PII. In this case, the Commission was able to ensure that it uncovered and reported the facts accurately by conducting interviews with a large number of witnesses. The Commission was thus able to ensure that the information on which it would base its conclusions was corroborated and verified by numerous sources. The cooperation of the vast majority of people involved in the deployment concerned was of great assistance to the Commission in that task.

²² *Ibid* at 14-15.

²³ See chapter IV below.

51. In summary, it should be noted that although the *NDA* allows the Commission to accept an anonymous complaint, as it states that a complaint may be made by “any person,”²⁴ it is not appropriate to accept such complaints in every case. The Commission will have to evaluate each complaint it receives on a case-by-case basis, in accordance with each specific circumstance. The challenges of this current case demonstrate the risks that may arise when handling anonymous complaints. In this case, the Commission was able to overcome those challenges by obtaining information from numerous other sources at the different stages of the process. However, that may not necessarily be possible in all cases. Anonymous complaints must therefore be handled with caution. Here, the Commission kept in mind the challenges created by the complainant’s anonymity and made sure to take the necessary steps throughout its investigation to address the potential issues that could arise from the situation.

3.4 Investigation Process

52. To carry out the investigation phase of its PII, the Commission retained the services of two investigators, Michel Hamel and Sylvain Berthiaume, both of whom had many years of experience as police officers within police departments; i.e. the Toronto Police Service and the RCMP, respectively. In order to prepare an investigation plan for the PII, the investigators conducted a detailed analysis of the documents that were disclosed to the Commission.

53. On May 16, 2017, the investigation plan was submitted to the Commission to be reviewed. The investigation plan had a file history, including a preliminary analysis by the investigators of the allegations to investigate and the documents that were examined. In addition, the investigation plan listed potential witnesses and identified additional documents that the MP needed to be asked to disclose, because the documents were not among the others received during the initial disclosure phase in 2016.

54. After examining the investigation plan, the Commission approved the list of suggested witnesses on May 24, 2017. The Commission also felt that it was necessary to obtain further

²⁴ *NDA*, s 250.18. The complainant’s anonymity greatly complicates the task of assessing this person’s credibility and the accuracy of the complaint, since the Commission could not question the complainant to clarify certain aspects of the complaint. This is even more important in this file, since the Commission’s investigation revealed that several allegations in the complaint were false.

documentary evidence. Therefore, an additional document disclosure request was sent to the CFPM on May 24, 2017. This section recounts the history of the documentary disclosure that was received and the interview phase, which began in July 2017.

3.4.1 Documentary Disclosure

55. The review of the documents that were disclosed during the initial disclosure phase in 2016 enabled the Commission and its investigators to make a list of the documents that might contain evidence relevant to this PII. The Commission undertook the necessary steps to identify and locate the documents in question.

56. To that end, on May 24, 2017, the Commission wrote two letters to the CFPM. In one letter (hereinafter “the first letter”), the Commission asked the CFPM to disclose additional documents that were relevant to its PII. In another letter (hereinafter “the second letter”), the Commission asked for the help and cooperation of the CF MP Gp in obtaining access to the many files that had been repatriated after the mission in Afghanistan, in order to identify the documents concerning the events that were the focus of the PII.

57. In the first letter, the Commission first asked the CFPM to confirm that all of the notes made by the members of the CFNIS who were involved in the conduct, supervision and oversight of the 2011 investigation had been located and added to the investigation file or otherwise provided to the Commission. Specifically, the Commission asked that the CFPM disclose the notes taken by Capt da Silva, Maj Bolduc and Maj Casswell²⁵ or that it confirm that no notes were taken by the individuals concerned. The Commission also requested the disclosure of a number of other documents related to the investigation conducted by the CFNIS in 2011, including those prepared between January 29, 2011, June 30, 2011 for the CFNIS CO, the CFPM or his staff, the Department of National Defence (DND) officials, the Minister of National Defence, or any other person.

58. The Commission also asked that the CFPM disclose additional documents concerning the events that the CFNIS had investigated, including the events concerning the DTF and the SOPs

²⁵ In March 2011, Maj Casswell was temporarily deployed in Afghanistan to serve as the acting commander of the CFNIS detachment while Capt da Silva was on mission leave.

of the JTF-Afg MP Coy. With regard to the DTF, the Commission asked to receive a copy of any diagram or map showing the layout of the DTF in December 2010 and January 2011. The Commission also asked to obtain the names, including the current postings or the last known contact information, of the personnel from the JTF-Afg MP Coy general support platoon who worked in any capacity at the DTF during the period concerned. The Commission also requested the name or names and the contact information of the interpreters who assisted JTF-Afg MP Coy personnel during the period concerned and who participated in the interviews that were conducted with the detainee who was involved in the exercise on January 19, 2011.

59. As for the JTF-Afg MP Coy SOPs, the Commission asked to receive a copy of SOP 500 dated November 2010 or earlier and August 2011 or later. The Commission also asked to receive a copy of any SOP from the JTF-Afg MP Coy concerning the operations carried out at the DTF that was in effect between December 2010 and January 2011, including any other policy or order in effect concerning the promulgation, circulation, and retention of JTF-Afg MP Coy SOPs.

60. In its second letter, the Commission asked the MP to allow it to inspect the files and the audio and video recordings related to the operations conducted at the DTF by the JTF-Afg MP Coy for the period from December 2010 to January 2011, including any electronic communications concerning the exercises conducted at the DTF for that same period. The purpose was to locate any relevant evidence concerning the exercises or to confirm that no documents concerning those exercises existed. The Commission also asked the MP to allow it to inspect other documents concerning the JTF-Afg MP Coy SOPs, including any electronic communications on the topic and any SOPs related to the promulgation and retention of the SOPs.

61. In order to successfully complete its PII, the Commission had to act as diligently and independently as possible. To that end, the Commission asked for access to the premises and to the boxes that might contain relevant documents concerning the DTF and the JTF-Afg MP Coy SOPs for the period from December 1, 2010 to February 1, 2011. The Commission stated in its letter that it was willing to send investigators and other members of its personnel with the required level of security clearance to the premises in order to go through the boxes and conduct the necessary research.

62. In an effort to move forward with the planning phase of its PII, the Commission once again wrote to the CF MP Gp on June 2, 2017 to obtain the list of JTF-Afg MP Coy personnel members for the period concerned as soon as possible, including their current postings and last known contact information, as it had requested in its first letter of May 24, 2017. A document containing the names of JTF-Afg MP Coy personnel for the period concerned was sent to the Commission on June 5, 2017.

63. On June 8, 2017, the Commission and members of the CF MP Gp chain of command had a meeting about the Commission's disclosure requests in order to discuss the documents that were sought and the next steps to be taken to comply with those requests.

64. After that meeting, on June 21, 2017, the Commission received a letter from the DComd CF MP Gp in which the DComd replied to the requests contained in the Commission's first letter dated May 24, 2017.

65. With respect to the notes generated by the CFNIS, the DComd CF MP Gp said that the CF MP Gp did not have any additional notes, apart from those provided to the Commission during the initial disclosure of documents on June 10, 2016. Regarding Maj Casswell's notes, the DComd stated that the Maj Casswell had confirmed that he had not taken any notes. He added that Maj Casswell's limited participation in the 2011 CFNIS investigation is reflected in the investigation-related emails, which were provided to the Commission during the initial disclosure of documents in June 2016. Regarding the other 2011 investigation documents, including those prepared between January 29, 2011 and June 30, 2011, the DComd said that a search had been conducted, but that no documents had been found.

66. With respect to the DTF plan or map, the DComd stated that the CF MP Gp did not possess that type of document. He consequently specifically stated that he needed more time to conduct the appropriate inquiries with Canadian Joint Operations Command (CJOC) to confirm whether such documents existed and, if so, from whom they could be requested. With respect to the name(s) of the interpreters, he said that he needed more time to review the request, adding that that information might pose a significant security risk for the individuals concerned.

67. Lastly, with respect to the SOPs, the DComd said that the CF MP Gp was not able to locate certain SOPs, including those requested by the Commission, despite the efforts made by the CFNIS when the investigation was reopened in 2016. Nevertheless, he appended to his letter six documents related to the JTF-Afg MP Coy SOPs²⁶ for the Commission's review. Those documents have been added to the file for this PII.

68. On July 13, 2017, the Commission received a letter from the CFPM, in reply to the Commission's second letter of May 24, 2017. The CFPM said that the documents requested by the Commission were neither in the custody nor under the control of the CF MP Gp. Consequently, the CFPM stated that he did not have the necessary authority to grant the Commission access to those documents. The CFPM did agree to cooperate with the Commission to ensure that it could gain access to the relevant documents. To that end, the CFPM provided the name of a person responsible for the mission closure in Afghanistan who, according to the CFPM, would be able to provide the Commission with information about the repatriation of documents to Canada at the end of the mission: LCol Murphy, Chief of Staff, Defence Security Operations / Director General, Defence Security. The CFPM also said that, once the information was obtained, he would be prepared to make a request to the organization controlling the documents so that the Commission could inspect them.

69. On August 1, 2017, the Commission investigators interviewed LCol Murphy. During that meeting, the Commission obtained relevant information and was given the names of other people to talk to in order to track the documents for the period concerned that had been repatriated to Canada at the end of the Afghanistan mission and locate them.

70. Between August and November 2017, Commission investigators conducted interviews with seven other individuals: officers in charge of managing all materiel repatriated to Canada from Afghanistan for the relevant period and the CJOC personnel responsible for storing, retaining and archiving the files concerned. Through these interviews, the Commission was able

²⁶ Documents 101-106 (received at the Commission on 21 June 2017) are the table of contents of JTF MP Coy SOPs from the transition mission (roto 11) (document 101); the terms of reference for four positions associated with DTF operations from roto 11 (SOPs 012, 016, 017 and 033) (documents 102 to 105); and Annex B of SOP 600 regarding detainee treatment by the Tactical Aircraft Security Officer (TASO) team (document 106).

to determine that the files concerned had been sent to the CJOC offices in the National Capital Region (NCR).

71. Therefore, on November 9, 2017, the Commission sent a letter to the CFPM to request MP cooperation in accessing the files held by CJOC that might contain documents relevant to its PII. Specifically, the Commission asked for the CFPM's cooperation to submit a formal request to the organization controlling the documents, CJOC, for the purposes of search and inspection. Requested documents included the following: access logs for the DTF and DTF catwalk for December 2010 and January 2011; detainee logs and files for December 2010 and January 2011; all audio or video recordings made at the DTF in December 2010 and January 2011; the SOPs for the JTF-Afg MP Coy concerning operation of the DTF valid during December 2010 and January 2011, including the versions of SOP 500 in effect for previous and subsequent rotations; notes of the members of the JTF-Afg MP Coy who worked at the DTF or at JTF-Afg MP Coy HQ, including the notes of Lt Busset, General Support (GS) Platoon OC; as well as the emails, meeting minutes and notes taken during meetings concerning the exercises conducted at the DTF and the JTF-Afg MP Coy SOPs.

72. In addition to the inspection of the above-mentioned files, the Commission requested authorization to inspect the contents of six specific boxes, kept at the CJOC offices, potentially containing documents relevant to its PII. Those boxes had been inspected by the CFNIS as part of its 2016 investigation, and the CFNIS had kept copies of certain documents therein, as well as a list of the documents that should be there. Based on that information, the Commission had reason to believe that the boxes could contain documents relevant to its PII that had not been copied by the CFNIS.

73. On December 7, 2017, the Commission wrote to the DComd CF MP Gp in reply to its letter of June 20, 2017, specifically to request an update regarding its request concerning the interpreter. On January 22, 2018, the Commission informed the CF MP Gp that it would take steps on its own to identify and locate the interpreter concerned. Commission investigators later found relevant information to identify the interpreter in the documents inspected at the CJOC offices. The interpreter then agreed to be interviewed by the Commission as part of the PII. In his/her interactions with the Commission, the interpreter, who provided valuable assistance to the

PII through his/her voluntary participation in the process, asked that his/her name not be mentioned in the report for security reasons. The Commission reviewed that request and confirmed that there indeed could be risks to the safety of the interpreter and his/her family if his/her name were revealed in the report. The Commission therefore agreed to protect the interpreter's anonymity. For that reason, the interpreter's name is not mentioned in this report.

74. On December 21, 2017, the CFPM, in reply to the Commission's requests, sent a letter to the Comd CJOC to officially request access to the relevant files on the Commission's behalf. On February 13, 2018, the Comd CJOC replied to the CFPM and provided the contact information of a resource person—the CJOC HQ information management officer—to coordinate Commission access to the documents. Next, the Commission engaged in continued discussions with the resource person and CJOC personnel to identify the files concerned and plan the Commission's inspection of the documents.

75. On March 1, 2018, the Commission started inspecting the documents concerned at the CJOC offices. The Commission examined the contents of hundreds of boxes and noted that the files were not always grouped by date or subject. It was therefore often necessary to open each of the boxes to ensure that the relevant files were found. In the course of its inspection, the Commission found lists of boxes with identification numbers. Thanks to the identification numbers and additional communication with CJOC and DND personnel, the Commission was able to determine that a number of boxes potentially containing documents relevant to the PII were located in Winnipeg, while some other boxes were at another NCR warehouse. Steps were therefore taken to transfer them to the CJOC offices to enable their review by Commission personnel.

76. While awaiting those files, Commission personnel inspected the boxes already at the CJOC offices. Commission investigators and personnel thus spent a number of days at the CJOC offices in March 2018 to examine the contents of the boxes found there. That initial inspection yielded some relevant documents.

77. On April 9, 2018, the Commission wrote to the CFPM for the disclosure of documents identified during the inspection of the CJOC files. The CF MP Gp informed the Commission that

it would be better to address the request directly to CJOC, adding that the CFPM would be prepared to intervene if there were a problem. The Commission therefore submitted its request to the Comd CJOC on April 13, 2018. The Commission received the requested documents on May 10, 2018. In light of the security classification of the documents concerned, CJOC specified that the documents would have to remain classified, and the Commission would have to handle them accordingly; it was understood that the Commission would request authorization from CJOC once it had identified precisely which pieces of information it would need to publish as part of its report.

78. Following that initial inspection of the paper documents, the Commission entered into discussions with CJOC personnel to try to obtain access to the electronic files, namely the emails of the various individuals deployed during the mission who were involved in the events under investigation. After numerous conversations and internal checks by the CJOC resource person, the Commission was informed that it was not possible to access the data, as CJOC did not have the equipment necessary to read the information contained on the servers. In addition, even if the compatible equipment were available, there was no guarantee that the servers would still be readable or would contain the files relevant to the Commission's PII. Given that there were no documents confirming the servers' contents, it was not possible to verify whether the servers stored at CJOC contained the electronic files for the relevant period or whether they included the emails or other documents that could have been useful to the PII. The Commission therefore had to restrict its search to the physical files repatriated from Afghanistan.

79. During the summer of 2018, the remaining boxes of documents were transferred from Winnipeg to Ottawa, and the document inspection process began anew on August 23, 2018. Commission investigators and personnel once again spent a number of days at the CJOC offices inspecting the boxes of documents, finishing in September 2018. On September 13, 2018, the Commission requested the disclosure of additional documents from CJOC regarding operations conducted at the DTF and detainee-related procedures identified during the inspection. CJOC sent copies of the relevant documents to the Commission on October 22, 2018. As for the documents transferred in May 2018, it was agreed that they would remain classified and would

be handled accordingly by the Commission, which would seek CJOC authorization before publishing the necessary information in its report.

80. On October 21, 2019, the Commission wrote to the Comd CJOC. The Commission provided a detailed list of the precise information taken from the CJOC documents that it would have to use in its report and asked the Comd CJOC to confirm that publication of that information would not present a security risk. In his letter of November 6, 2019, the Comd CJOC authorized the publication of the specific information listed by the Commission in its letter.

81. It is worth noting that, on October 21, 2019, the Commission also wrote to the CF MP Gp to request that the security classification of one of the documents in the CFNIS files be removed; the document was essential, and the Commission would have to be able to discuss its existence, wording and contents in this report. It was later determined that the document concerned was a document from CJOC. Therefore, on April 21, 2020, the Commission again wrote to the Comd CJOC for authorization to refer to this document. This authorization was granted by the Comd CJOC in his letter of April 30, 2020.

82. Lastly, on August 10, 2020, the Commission wrote to the Comd CJOC for authorization to include a plan of the DTF at KAF in its report. The Commission explained that the plan in question had been prepared by one of the witnesses interviewed by the Commission in the context of this PII. This witness was a member JTF-Afg Coy. In his letter of August 13, 2020, the Comd COJC authorized the publication of this document.

3.4.2 Interview Phase and Subsequent Steps

83. Beginning in June 2017 and throughout the interview phase, the Commission continued to correspond with the CF MP Gp to obtain information on the individuals identified as potential witnesses for this PII, including current assignments or, if the individuals had been released or had retired, their last known addresses in order to locate them. The Commission notes that, insofar as possible, the CF MP Gp provided the Commission with the requested information. The Commission also took steps itself to locate the witnesses identified for its PII. For example, it was necessary to contact DND pension services on a number of occasions to have Commission letters of introduction sent to retired witnesses.

84. In the end, the Commission was able to locate all the witnesses it sought. The witnesses' participation in interviews with the Commission is purely voluntary, because it is a PII rather than a public interest hearing. In this case, the Commission obtained excellent cooperation from the witnesses, almost all of whom agreed to be interviewed. Of all the individuals identified as witnesses for this PII, only two refused to participate in interviews with Commission investigators; three others stopped responding to Commission communications after initially stating that they were willing to participate in the PII. Therefore, only five witnesses did not cooperate with the Commission on the PII. Although it is always preferable to meet with all identified witnesses, the Commission concluded that not obtaining statements from those five witnesses would not prevent it from drawing conclusions about the events, given that a sufficient number of other witnesses provided the Commission with information regarding those same events.

85. The interview phase began in July 2017. Interviews continued until September 2018. Commission investigators then conducted interviews with the six subjects of the complaint between October and December 2018. An additional witness was interviewed in May 2019 to clarify information received in the course of the PII.

86. It should be noted that the initial list of witnesses identified in the investigation plan was supplemented over the course of the interviews because of information obtained by the Commission, both through documents and during the interviews with previously identified witnesses. Commission investigators travelled across Canada over a number of months to meet with 74 witnesses, including the subjects of the complaint. Some interviews were also conducted by telephone or on Skype. It is also worth noting that one witness emailed his replies to the Commission's interview questions.

87. Commission investigators interviewed the following witnesses:

- The individuals named as references in the anonymous complaint: WO Degrasse, MWO Y, LT Busset, Capt Touchette and Capt Tremblay;
- The MP members who were subjects of the 2011 CFNIS investigation: Maj X and MWO Y;

- The guards involved in the cell extraction during the January 19, 2011 exercise;
- The guards present during the January 19, 2011 exercise;
- Other guards working at the DTF between December 2010 and January 2011;
- JTF-Afg MP Coy HQ personnel;
- JTF-Afg HQ personnel, including the chain of command that could provide information about the measures taken, if any, further to the CFNIS investigation;
- JTF-Afg MP Coy personnel, including the interpreter who assisted the JTF-Afg MP Coy personnel;
- Col (Retired) Grubb, who was the CFPM at the time and visited Kandahar in January 2011 shortly before the January 19, 2011 exercise at the DTF;
- The CFNIS members who had a role in reviewing the CFNIS investigation in 2016;
- The CFNIS Central Region evidence custodian at the time the documents and evidence relating to this investigation were repatriated;
- Individuals able to provide information on the documents sought by the Commission, including certain MP personnel members such as officers responsible for managing all materiel repatriated from Afghanistan for the relevant period and CJOC personnel responsible for the storage, retention and archiving of the Afghanistan mission files.

88. Once the interviews were concluded, Commission investigators examined all the gathered evidence in detail, including documentary evidence and testimonies. They then prepared a lengthy investigation report that was submitted to the Commission for review on July 31, 2019. After reading the investigation report, the Commission asked that additional documents be prepared and annexed to the investigation report to complete the description of the evidence gathered by means of timelines, witness statements and lists of relevant facts identified. Those documents were prepared by the investigators and other Commission personnel members and submitted in September and October 2019.

89. After it reviewed the investigation report, the annexes and the documents relevant to the case, the Commission started preparing this Interim Report. It should be noted that the Commission conducted additional interviews, in person or by telephone, with three witnesses

and three subjects of the complaint, as well as two SAMPIS experts, between March and September 2020, to clarify information received over the course of the PII. The Commission also made several requests for disclosure to the CF MP Gp while preparing this Interim Report. The Commission notes that, insofar as possible, the CF MP Gp provided the requested information and documents to the Commission.

90. It is also worth noting that the Commission found that some documents requested from the MP or CJOC could not be located, despite an extensive inspection by Commission personnel of the boxes and files containing documents repatriated from the mission in Afghanistan. For example, the military police notebooks could not be located, including LT Busset's notebook. However, some military police members said during their interviews with Commission investigators that they had handed them in at the end of the mission. Similarly, without electronic files, it was not possible to verify whether the new SOP 500 had in fact been provided within the JTF-Afg MP Coy prior to the January 19, 2011, exercise or whether electronic communications regarding the exercise or other exercises could have shed more light on the events.

91. The Commission had to draw its conclusions without those documents. It was therefore not always possible for the Commission to arrive at definitive conclusions about the entire factual framework surrounding the exercises conducted at the DTF in 2010 and 2011. It was found that the Commission had access to less information than the CFNIS JTF-Afg did at the time of the events, when the witnesses' memories were fresher, all the witnesses were on site, and the electronic servers and documents were available. Thus, in some cases, if the information had not been sought or retained by the CFNIS JTF-Afg at the time of the events, it could not be located. However, by conducting a thorough investigation into the events, the Commission was able to obtain sufficient evidence to draw the necessary conclusions regarding the complaint and make the appropriate recommendations.

Recommendation #1:

The Commission recommends that the CFPM, in concert with the Canadian Joint Operations Command, develop a better system for the repatriation of military police files, as well as their storage, following the end of an overseas operation. (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted: [translation] “*Since the complaint was received in 2015, nearly all military police (MPs) participating in deployed operations have access to an electronic police database for storing police records, eliminating the need for physical repatriation of those records. Physical evidence related to an MP investigation in a deployed operation is repatriated and stored in accordance with CF MP Orders and continuity of evidence rules, and storage is at an approved MP evidence storage facility. Repatriation and storage of all other records (non-police documents) are handled in accordance with Canadian Joint Operations Command (CJOC) Information Management Directives.*”**

3.5 The Effect of Time on Witnesses’ Memory

92. Any investigation basically relies on witness testimony. In this case, the facts being investigated occurred over a period of time, from January to April 2011. The witnesses were interviewed in 2017 and 2018, that is, six to seven years later. Several witnesses testified that they did not remember the events and actions that are the focus of this investigation. Some witnesses were also dealing with post-traumatic stress syndrome, which caused memory loss. Some witnesses also appeared to have selective memory, and some testimonies seemed coloured by a personal interest. In short, this investigation, like in any case examining a past incident, was significantly influenced by the passage of time and its effect on memory.

IV CFNIS’s DECISION TO CONDUCT A REVIEW OF THE INVESTIGATION

4.1 Review of the Investigation

93. As described in section 3.1 of this report, the Commission informed the CFPM, Col Delaney, on February 27, 2015, that it had received an anonymous complaint, and a copy of that complaint was attached to that letter. On November 6, 2015, the Commission made its first request for disclosure of documents to the CFPM. On January 6, 2016, the CFPM informed the Commission that the requested documents would not be disclosed until the CFNIS’s review of the 2011 investigation was concluded. The CFPM specified that the CFNIS was assessing the new information provided in the anonymous complaint and that the CFNIS had to conduct a review and assessment of the 2011 investigation.

94. LCol Bolduc, CFNIS CO at the time, asked one of his subordinates in 2016 to conduct a review of the CFNIS JTF-Afg's 2011 investigation. LCol Bolduc had played an important role in the 2011 investigation as he had decided not to lay charges. The Commission wishes to note that this is at least a perceived conflict of interest. Maj Leblanc stated that he had received the mandate to review GO 2011-2411 during a meeting with LCol Bolduc, the CFNIS 2IC, and the CFNIS legal advisor, which took place on November 24, 2015. Maj Leblanc stated that he believed this review to be necessary given the allegation that the 2011 investigation had been improperly conducted.²⁷ Maj Leblanc submitted his report to LCol Bolduc on February 9, 2016. That report refers to documents that were reviewed. But, just as important, it states which documents were not reviewed and why. Maj Leblanc notes that this is not a quality assurance review, but a review of the "wave tops." He states that the investigation plan was not very detailed, he points out omissions and he makes some comments. He assesses the testimony of MWO Y and concludes that the latter committed an offence. The report also contains an assessment of Maj X's testimony, but does not definitively conclude that Maj X committed an offence.²⁸

95. The report offers three options: accept the GO as is; submit it to a military prosecutor again for a second pre-charge review; or reopen the investigation to clarify certain points raised during the review, and then submit it to a prosecutor. Maj Leblanc stated that, given the omissions noted in the report, the review team believed that the "précis des faits" (Crown brief) should be redrafted and sent to a military prosecutor for a pre-charge review, taking into account all the facts in the file. He also recommended other actions to locate the missing evidence.²⁹

96. The Commission is of the opinion that some documents from the CFNIS's 2016 review of the CFNIS JTF-Afg's 2011 investigation were improperly redacted. On 9 February 9, 2016, LCol Bolduc wrote a note to Maj Leblanc at the end of the report. This note was redacted based on solicitor-client privilege in the copy of the report submitted to the Commission in response to the disclosure requests. It is therefore impossible to read the directive from LCol Bolduc, a military police member, to his subordinate, another military police member. LCol Bolduc stated

²⁷ Transcript of the Commission's interview with Maj Leblanc, 8 March 2018 at 13.

²⁸ Document 065 at 20-25.

²⁹ Document 065 at 25, para 8.

that he had written a note to Maj Leblanc and he believed that he had told him to continue his work.³⁰ Maj Leblanc stated that he had been tasked with submitting a new “*précis des faits*” (Crown brief) containing the missing elements in order to obtain a complete pre-charge review.³¹ Given these testimonies, the Commission does not believe that the redaction of LCol Bolduc’s note based on solicitor-client privilege is reasonable.

97. In his summary of the file dated June 8, 2016, Maj Leblanc stated that MWO Y’s performance as a supervisor had been lacking. He compared his performance at the time of the event on January 19, 2011 to a sentry sleeping at his post—a minor infraction, in his view, which, given the time that had elapsed since the incident, did not merit further examination.³²

98. Maj Leblanc wrote the concluding remarks on June 10, 2016.³³ In them he stated that there had been a combination of mistakes during the January 19, 2011 exercise, namely, poor operational planning, poor decision-making and poor communication. However, he was of the opinion that these mistakes did not warrant disciplinary or criminal charges.

99. LCol Bolduc stated that Maj Leblanc’s work was completed sooner than he wanted, given the pressure from the Commission which wanted to obtain disclosure of GO File 2011-2411 in order to begin its work. The CF MP Gp 2IC, Col Frei, reportedly asked him to complete his review so that the file could be disclosed to the Commission.³⁴

100. Maj Leblanc did not conduct a criminal investigation; Maj Leblanc conducted a review of the work carried out by CFNIS JTF-Afg investigators. This was not an investigation by the Office of Professional Standards. On January 6, 2016, the CFPM decided not to provide the disclosure requested on 6 November 2015 until the CFNIS’s review of the investigation was concluded.

101. The Commission is of the opinion that the disclosure of the requested documents had no impact on Maj Leblanc’s review of the investigation. At this stage, it was just an examination of

³⁰ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 66-70, 178-182.

³¹ Transcript of the Commission’s interview with Maj Leblanc, 8 March 2018 at 17.

³² Document 065 at 5.

³³ *Ibid* at 242.

³⁴ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 67-70, 184-185.

documents by the Commission, not an interview process. These two activities could have been carried out at the same time without either one interfering with the work of the other. Furthermore, this decision is even more surprising given the experience of a previous PII (MPCC 2007-003, complaint submitted by Dr. Attaran) during which the Commission and the CFNIS had reached an agreement giving the Commission access to the documents and evidence required for its PII.³⁵ A solid coordination and cooperation effort had therefore helped ensure that each party was able to complete its mandate. Unfortunately, that did not happen in this case.

4.2 Impact on the Commission's Process

102. As previously stated, the Commission received the anonymous complaint on February 12, 2015 and the Commission informed the CFPM of the anonymous complaint on February 27, 2015. The decision to conduct a PII was made on November 4, 2015 and an initial request for disclosure was sent to the CFPM two days later. On November 24, 2015, Maj Leblanc was tasked with conducting a review of the investigation.

103. Therefore, the CFPM was aware of the anonymous complaint on February 27, 2015, but the decision to conduct a review of the investigation was not made until nine months later, after the Commission requested disclosure to begin its PII. A review of Maj Leblanc's reports showed that no new facts had been reported relative to the January 19, 2011 investigation before LCol Bolduc requested a review in November 2015. LCol Bolduc could have requested this review in February 2015.

104. The initial review and examination of the 2011 investigation by Maj Leblanc took almost seven months. Maj Leblanc surely would have completed his task before November 6, 2015, had LCol Bolduc ordered the review in February instead of late November. The CFPM's decision not to disclose the documents requested by the Commission until Maj Leblanc completed his review and examination had delayed the Commission's work by at least nine months. The Commission is of the opinion that this decision was not justified.

³⁵ *Chairperson's Final Report Concerning the Afghan Detainee complaint by Dr. Attaran* (24 April 2009), MPCC 2007-003, online: <<https://www.mpcc-cppm.gc.ca/documents/enquetes-audiences-dinteret-public-interest-investigations-hearings/final-reports-rapports-finals/pii-eip-2007-003-fnl-rpt-eng.pdf>>.

V WHAT HAPPENED? – THE FACTS UNCOVERED DURING THE PII

105. Please note that all the times indicated in this report are in KAF local time, unless clearly indicated otherwise.

5.1 The JTF-Afg MP Coy and the Situation at the Detainee Transfer Facility

5.1.1 JTF-Afg MP Coy Responsibilities and Structure

106. The JTF-Afg MP Coy comprised Regular Force and Reserve Force MPs, as well as other military members. They came primarily from units located in Quebec, and most were posted to 5 MP Regiment.³⁶ Some were Reserve Force members. Most JTF-Afg MP Coy members arrived at KAF, Afghanistan, in November 2010. The length of deployment was about eight months.³⁷

107. The Coy CO, Maj X, was an MP officer. Although he was an MP, he reported directly to the JTF-Afg CoC, and his immediate superior was BGen Milner.³⁸ Although there was a direct command relationship between Maj X and the General, Maj X typically communicated with the General through Col Giguère, JTF-Afg 2IC, and through LCol Strickland, JTF-Afg Assistant Chief of Staff.³⁹

108. Maj X also had access to the MP CoC, ultimately reporting to the CFPM. However, the chain was merely “technical,” as there was no command relationship. Therefore, Maj X received his orders from the JTF-Afg CoC, but he was able to seek technical advice and guidance from the CFPM.⁴⁰ However, it should be noted that, on April 1, 2011, after the events in question, the Canadian Forces implemented a new MP command and control structure under the CF MP Gp. This was a major transformation for the MP, because from then on, the CFPM assumed full command of all military police members directly carrying out policing duties or functions.

³⁶ Document 100, “JTF-Afghanistan MP Coy” (received by the MPCC on 5 June 2017) (hereinafter “Document 100”). The JTF-Afg MP Coy had 122 members, 40% of whom were Regular Force MPs, 21% were Reserve Force MPs and 39% were Regular Force and Reserve Force CAF members.

³⁷ *Ibid.*

³⁸ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 13.

³⁹ *Ibid* at 72-73.

⁴⁰ Transcript of the Commission’s interview with Col (Retired) Grubb, 2 February 2018, at 5-10, 43-44; see also Document 020, GO File 2011-2400 at 346-354, 356-363 (hereinafter “Document 020”).

MP units were therefore placed under the command of the CFPM rather than the military chain of command.

109. The JTF-Afg MP Coy served several distinct functions. It consisted of an HQ and three Platoons (Pl). The HQ had a dozen people; nearly half were MPs. Capt Touchette was the Operations Officer; Capt Clerk was the Adjutant, responsible for administration; and Capt Tremblay was the Logistics Officer. MWO Y, the Coy sergeant-major, was charged with the discipline of Non-Commissioned Members.⁴¹

110. Pl #1 provided MPs to the Operational Mentoring and Liaison Team (OMLT). This Pl was commanded by Maj Laprade and had more than 50 members, just under half of whom were Regular Force and Reserve Force MP members.

111. Pl #2, the General Support (GS) Pl, was responsible for the DTF, JTF-Afg police and investigative services, and aircraft security (Tactical Aircraft Security Officers [TASO] team). LT Buset commanded this 42-member Pl, the bulk of whom were posted to the DTF. The Afghan detainees captured during the mission were transferred to the DTF while waiting either to be released or to be handed over to the Afghan authorities. The JTF-Afg MP Coy was not responsible for decisions relating to the capture, release or transfer of detainees; those decisions were made solely by the JTF-Afg Comd and his personnel. However, the JTF-Afg MP Coy was charged with their detention.

112. Pl #3 provided close protection for certain military members and dignitaries. This Pl was commanded by Maj Sommerville and had approximately 35 members, the majority of whom came from the Infantry rather than the MP. It should be noted that the members of this Pl were not involved in the January 19, 2011, exercise.

113. Sensitive investigations or investigations pertaining to serious crimes were conducted by members of the in-theatre CFNIS Detachment (CFNIS JTF-Afg). This five-member Detachment

⁴¹ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 26.

was not under the authority of Maj X. The Detachment Comd reported to the CFNIS CO, based in Ottawa, and the latter reported directly to the CFPM.⁴²

5.1.2 Training of Guards

5.1.2.1 Pre-Deployment Training

114. Before their arrival in theatre, nearly all JTF-Afg MF Coy members received the same training in 2010, which lasted a total of approximately eight months. The training first took place in Valcartier, then was followed by group training called “build-up” in Wainwright, Alberta, which served to confirm the training received and included practical exercises. A full mock-up of the DTF had been reproduced in Wainwright to give the deployed members an opportunity to familiarize themselves with the KAF environment. According to the evidence gathered, this mock-up was not identical to the KAF DTF.⁴³

115. The training of GS Pl members primarily focused on the work of DTF guards, including detainee transport, handling and treatment. A presentation on the *Geneva Convention* relative to the Treatment of Prisoners of War had been given during the pre-deployment training. Several witnesses stated that they had participated in cell extraction exercises in Wainwright. Some appeared to remember the expression “show of force,” including Lt Busset, GS Pl Comd. However, during her interview with the Commission, Lt Busset stated that she did not remember taking part in a show of force exercise in Wainwright.⁴⁴

116. During the November 2010 deployment, some last-minute changes had to be made to personnel assignments, which meant that Military Police members were deployed as DTF guards, when originally they were to be posted to other duties. Therefore, they did not receive the same training as their colleagues who had been assigned to the DTF as guards from the start. This was the case for some of the MPs on duty on January 19, 2011, when the main incident leading to the CFNIS JTF-Afg investigation and this PII occurred. GS Pl Shift A, led by Sgt Degrasse supported by MCpl Gasparro, both MPs, was in operation at the DTF. Eight guards from Shift A were on duty that night at the DTF: two Infantry members, Cpls Roy and

⁴² Document 020 at 346-354, 356-363.

⁴³ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 35, 80.

⁴⁴ Transcript of the Commission’s interview with Maj Busset, 27 November 2017 at 8-9.

Bilodeau-Roy; two Reservist MPs, Cpls Gratton and Young-Jones; one MP assigned temporarily to the DTF from the Close Protection Pl, Cpl Lorette; and three MPs, Cpls Dauphinais, Dandurand and Ferreri.

117. Cpls Dauphinais and Ferreri were originally supposed to be part of the OMLT and tasked with mentoring and teaching Afghan police officers. During his interview with the Commission, Cpl Dauphinais stated that he had learned that he would be assigned to the DTF during the build-up in Wainwright.⁴⁵ He did not remember receiving guard training or practising SOPs concerning the DTF before departing for Afghanistan.⁴⁶ According to Cpl Ferreri, approximately three weeks after he arrived at KAF, he was transferred to the DTF because of the considerable number of detainees at the DTF.⁴⁷ He had not received focused training on the work of guards at the DTF, including detainee transport, handling and treatment, prior to the deployment. Cpl Lorette, who was on duty at the DTF catwalk during the exercise concerned, had received close protection training.⁴⁸ Therefore, these three individuals did not receive the same pre-deployment training for guards at the DTF as the other five guards who were on duty on the night of the exercise, January 19, 2011.

118. Similarly, Sgt Degrasse was originally supposed to be working at the JTF-Aft MP Coy HQ as Operations NCO, and he had received training to that effect. He had been transferred to the DTF in December 2010 and had therefore not received guard training for the DTF.⁴⁹ However, he stated that he had received CF detention training in Edmonton.⁵⁰ Thus, the DTF training he received was in the field.⁵¹

119. MCpl Gasparro stated that the training he had received in Wainwright did not cover guard work at the DTF because he was originally supposed to be assigned to an armoured

⁴⁵ Recording of the Commission's interview with Cpl Dauphinais, 24 August 2017 at 00h:06m:42s, 00h:08m:10s, 01h:23m:19s.

⁴⁶ *Ibid* at 00h:07min:24s.

⁴⁷ Document 152, Answers to the Commission's interview questions received by email from Sgt Ferreri, 26 February 2018 at 2.

⁴⁸ Recording of the Commission's interview with Sgt Lorette, 4 April 2018 at 00h:06m:53s.

⁴⁹ Transcript of the CFNIS JTF-Afg's interview with Sgt Degrasse, 30 January 2011 at 15-16.

⁵⁰ *Ibid* at 16, 52-53.

⁵¹ *Ibid*.

squadron, not to the DTF.⁵² Therefore, he stated that he had not taken part in the training that the other GS PI guards had received in Wainwright.⁵³

5.1.2.2 Training at KAF

120. Cpl Dauphinais stated that once he was informed that he was being assigned to the DTF he was told he would receive DTF guard training when he arrived at KAF.⁵⁴ Cpl Ferreri stated that he had begun his guard duties at the DTF in early December 2010. He considered himself inexperienced in these duties at the time the exercise was carried out on January 19, 2011. When asked if he had received training on his assignment to the DTF he stated that he had participated in training with members of his shift on how to escort a detainee from one location to another.⁵⁵ Once he was assigned to the DTF, Cpl Lorette had received guard training in the field, but he stated that he was always supervised by at least two or three MPs and that he had never been left alone when he was on duty on the catwalk or performing tasks related to his role as a guard at the DTF.⁵⁶

121. Lt Busset stated that she was aware that members of her PI had not received pre-deployment training to work as guards at the DTF. She explained how she had tried to rectify this situation. First, the member was to read the SOP in the first week of being assigned to the DTF. Then, the member would be paired for one week with another guard who knew DTF operations well. The member had to observe the guard and could ask questions about DTF operations and the tasks to be performed. Lt Busset stated that she would then be informed by the member's immediate supervisor whether or not the member was ready to work at the DTF.⁵⁷

122. She also stated that ongoing training had been given in the field to make up for the fact that some guards had not received the pre-deployment training and therefore had not completed the cell extraction exercises. She stated that members of both shifts practised scenarios in the

⁵² Recording of the Commission's interview with MCpl (Retired) Gasparro, 7 November 2017 at 01h:04m:00s.

⁵³ *Ibid* at 01h:04m:27s.

⁵⁴ Recording of the Commission's interview with Cpl Dauphinais, 24 August 2017 at 00h:07m:55s.

⁵⁵ Document 152, Answers to the Commission's interview questions received by email from Sgt Ferreri, 26 February 2018 at 5.

⁵⁶ Recording of the Commission's interview with Sgt Lorette, 4 April 2018 at 00h:06m:18s, 00h:06m:57s, 00h:07:16s.

⁵⁷ Transcript of the CFNIS JTF-Afg's interview with Lt Busset, 1 February 2011 at 53-54.

field. Once a month, each shift had a scenario to practise, such as an emergency procedure or a cell extraction. Lt Busset stated that, in addition to receiving this practical training, each shift received training on DTF procedures including the detainee admission process, detainee handling, use of force and how to escort detainees. Four training sessions were given each month. Lt Busset stated that this ongoing training began in December 2010.⁵⁸

5.1.3 The Detainee Transfer Facility (DTF) Complex

123. As stated, the GS Pl was responsible for the DTF. Lt Busset commanded the Pl and WO Grenier was her 2IC. PO2 Gervais was the NCO in charge of day-to-day operations at the DTF, along with his 2IC, MCpl Côté. The personnel working as guards were divided into two shifts. Shift A was under the command of Sgt Degrasse supported by his 2IC, MCpl Gasparro. Shift B was under the command of Sgt Waugh, and his 2IC was MCpl Perreault. Each shift had 10 to 11 guards who were primarily MPs, and some Infantry soldiers.⁵⁹ Generally speaking, both shifts were assigned to 12-hour work shifts, alternating day and night. The shift change occurred at 0530 hours.⁶⁰ A minimum of two guards were posted to the catwalk during each work shift.⁶¹

124. The DTF complex had two zones: the first consisted of the guardhouse for the GS Pl, as well as CFNIS JTF-Afg offices; and the second housed the DTF. The DTF had already been in operation when the JTF-Afg MP Coy arrived in theatre.

125. A plan of the DTF complex for rotation 10 was obtained as part of this PII and can be found in Annex A of this report.⁶² It is important to note that this plan is not to scale. The paragraphs that follow provide a description of this complex as it was at the time of the events of January 19, 2011.

⁵⁸ *Ibid* at 55-57, 60.

⁵⁹ Of the 42 Pl members, 28 were Regular Force MPs, 10 were Reserve Force MPs and 4 were Regular Force and Reserve Force Infantry members (document 100 [JTF Afghanistan MP Coy] and document 012 [Org Chart for TF MP Coy 3-10]).

⁶⁰ Transcript of the CFNIS JTF-Afg's interview with Maj X, 3 February 2011 at 6; transcript of the Commission's interview with Maj X, 21 August 2017 at 123.

⁶¹ Recording of the Commission's interview with Mr. Gervais, 3 August 2017 at 02h:36m:45s.

⁶² See Annex A, Plan of the DTF Complex (roto 10).

126. The DTF complex had a total of 13 doors. Door 1 was the main entrance to the DTF, giving access to its courtyard.⁶³ To the right in the courtyard, there were four sea containers (SCs) (“Shower,” “Medical,” “ID,” and “Shura”) which were used during the admission process for detainees at the DTF.⁶⁴ To the left, there was a sea container labelled “DTF NCO,”⁶⁵ inside which were the offices of PO2 Gervais and MCpl Côté.⁶⁶ The “Bunker” container served as protection during attacks.⁶⁷ Door 2 led to the exterior of the complex.

127. Door 3 led to the cells.⁶⁸ Beyond that door, to the left were four toilets (“4 x TN”) and, to the right, four refrigerators (“4 x Refrig”) and lockers containing riot gear (“Riot”) for the DTF personnel.⁶⁹

128. The DTF was a large open space, sheltered by a corrugated metal roof. Initially, the DTF contained four cells. Due to the significant increase in the number of detainees at the DTF, four more cells had been added.⁷⁰ On the date of the exercise, January 19, 2011, the DTF contained eight cells: four on each side of a central corridor that gave access to them. The bars were covered with burlap to prevent any visual contact between the cells.⁷¹ There was a small storage corridor separating cells 1 to 4 from cells 5 to 8.⁷²

129. A catwalk overlooked the central corridor, enabling the guards to watch the detainees while they were in their cells.⁷³ The catwalk provided a good field of view: without having to move far, the guards could see into all the cells in the DTF.⁷⁴ An exterior staircase along the bars at the entrance to Door 3 took the guards above Door 3, i.e., onto the catwalk.⁷⁵

⁶³ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part I at 00h:34m:57s.

⁶⁴ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 00h:33m:00s-00h:39m:45s.

⁶⁵ Non-commissioned officer in charge of the DTF.

⁶⁶ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 00h:29m:57s.

⁶⁷ *Ibid* at 00h:30m:54s, 00h:31m:07s.

⁶⁸ *Ibid* at 00h:01m:45s.

⁶⁹ *Ibid* at 00h:27m:30s.

⁷⁰ See part 5.1.4, which discusses the situation in the DTF at the time of the deployment.

⁷¹ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 53.

⁷² The green bar on the floor plan represents the small storage corridor.

⁷³ See part 5.1.3, which discusses the Detainee Transfer Facility.

⁷⁴ Recording of the Commission’s interview with Mr. Gervais, 3 August 2017 at 02h:35m:46s; transcript of the Commission’s interview with Maj X, 21 August 2017 at 96-97.

⁷⁵ The orange bar on the floor plan represents the catwalk.

130. On the other side of the DTF were four toilets (“4 x TN”) and a sea container belonging to the medical personnel (“Medical SC”).⁷⁶ The guards used Door 4 to take the detainees for their daily showers (“Shower”) or to get uniforms for them (“Supply”).⁷⁷ Door 5 was not used during that roto.⁷⁸ Door 6 gave access to the medical centre (“Medical”) for the detainees. It was mostly the non-commissioned officer in charge of the DTF, the doctors and the nurses who used Door 6.⁷⁹

131. The members of Lt Busset’s platoon usually used Door 7 or Door 8 to get to the DTF. Lt Busset stated that Door 7 was a door with a code and a more direct access when her personnel arrived at the DTF from their quarters.⁸⁰ Door 7 was used only by the DTF personnel, the members of the JTF-Afg CFNIS and the medical personnel.⁸¹ After entering through Door 7, the DTF personnel and the members of the JTF-Afg CFNIS would go through Door 9 to get to their offices at the guardhouse or to the “CFNIS SC.” Door 8 was the main entrance to the MP detachment, also called “Guardhouse.”⁸² That door was open to the public, while Door 1 and Door 7 were not.⁸³

132. Door 10 was the entrance to the guardhouse. Door 11 led to a patio, an area where people could relax outdoors.⁸⁴ The members of the JTF-Afg CFNIS would go through Door 12 to get to their offices (“CFNIS”).⁸⁵ There was no door inside the guardhouse leading to the area where the JTF-Afg CFNIS members’ offices were located.⁸⁶

133. “CFNIS SC” was a sea container next to the guardhouse inside of which Capt da Silva’s office and the JTF-Afg CFNIS laboratory were located.⁸⁷ The guards would go through Door 13

⁷⁶ “Medical SC” stands for “Medical Sea Container.”

⁷⁷ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 00h:18m:45s.

⁷⁸ *Ibid* at 00h:04m:55s-00h:05m:26s.

⁷⁹ *Ibid* at 00h:10m:25s.

⁸⁰ *Ibid* at 00h:01m:45s.

⁸¹ *Ibid* at 00h:03m:51s.

⁸² The French term is “poste de garde.” Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part I at 00h:29m:47s.

⁸³ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 00h:01m:45s.

⁸⁴ *Ibid* at 00h:03m:27s.

⁸⁵ *Ibid* at 01h:04m:01s, 01h:05m:18s.

⁸⁶ *Ibid* at 01h:05m:18s.

⁸⁷ *Ibid* at 01h:04m:44s; recording of the Commission’s interview with Mr. Gervais, March 3 2020, Part I at 00h:15m:35s.

to get to the courtyard of the DTF. Note that the black bar between the guardhouse and “CFNIS SC” was a passage between those two buildings that enabled the DTF personnel to get to Door 13.⁸⁸

134. A sketch of the guardhouse was obtained in the course of this PII and is included in Annex B. The desks of the shift supervisor and his assistant were located at the entrance to the guardhouse, immediately to the right along the wall.⁸⁹ In the shift supervisor and his assistant’s work area, there were three desks.⁹⁰ The monitors of the DTF surveillance cameras were mounted on the wall facing the shift supervisor’s and his assistant’s desks⁹¹ so that they could see what was happening in the DTF courtyard and in the eight cells.⁹² There were two monitors that enabled them to see everything that was going on in the DTF courtyard.⁹³ The position of the monitors for the DTF surveillance cameras is marked with a red diamond on the sketch.⁹⁴

135. To the left of the main entrance door was the work area for the members of Lt Busset’s platoon, including her office.⁹⁵ At the far right was a large common room with a television and armchairs.⁹⁶ The guards would rest in that room during their breaks. At the rear of that room was a patio.⁹⁷ Only the offices of Lt Busset and the members of the JTF-Afg CFNIS were closed. The other work spaces and the break room were open.

5.1.4 The Situation at the DTF at the Time of the Deployment

136. Not long after the JTF-Afg MP Coy arrived in theatre, the increases in the number of detainees and the duration of detentions at the DTF raised many concerns and seemed to have contributed to the event leading to the incident on January 19, 2011. In November 2010, the situation at the DTF was stable. However, beginning in December 2010, the number of detainees

⁸⁸ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 01h:05m:02s.

⁸⁹ *Ibid* at 01h:01m:06s, 01h:11m:18s; see also Annex A, Door 10.

⁹⁰ Recording of the Commission’s interview with Maj Busset, 9 September 2020 at 00h:01m:57s, 00h:02m:59s, 00h:03m:18s.

⁹¹ *Ibid* at 00h:05m:08s, 00h:06m:05s.

⁹² Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 01h:11m:55s, 01h:15m:03s.

⁹³ Recording of the Commission’s interview with Maj Busset, 9 September 2020, at 00h:06m:14s.

⁹⁴ See the red diamond on the sketch in Annex B.

⁹⁵ Recording of the Commission’s interview with Maj Busset, 17 June 2020, Part II at 01h:01m:24s.

⁹⁶ *Ibid* at 01h:02m:30s.

⁹⁷ See Annex A, Door 11.

at the DTF began to increase significantly. In January 2011, the number of detainees exceeded the standards previously in effect.⁹⁸ Maj X said that BGen Milner had told him that he would have to double the DTF's capacity, and even more than double it.⁹⁹

137. Lt Busset confirmed that there had been a sudden and unprecedented increase in the number of detainees during the first two months of the tour, which posed all sorts of challenges for the JTF-Afg MP Coy.¹⁰⁰ The number of detainees had risen to 49, while the DTF had been designed to accommodate 32 detainees.¹⁰¹ The DTF was also designed to detain them for short periods before transferring them.¹⁰² However, she said that the duration of detention had lengthened significantly, which worried her C of C and that of JTF-Afg. Maj X also said that within a month of their arrival at KAF in November 2010, the number of detainees had risen from 32 to 49.¹⁰³

138. MWO Y also said that they had had to adapt because of the number of detainees at the DTF, which he said was around 50 to 60.¹⁰⁴ MWO Y said that very soon after the rotation arrived in theatre, the DTF had already reached its full capacity, and more detainees kept arriving. He said that Maj X had told him that the situation was worrying him. In particular, he was afraid of not being able to maintain control in the event of a riot.¹⁰⁵

139. According to Maj X, that increase in the number of detainees was causing concern among the JTF-Afg C of C, which was afraid that the JTF-Afg MP Coy would not be capable of responding if a situation developed at the DTF.¹⁰⁶ LCol Strickland, the Assistant Chief of Staff

⁹⁸ Transcript of the JTF-Afg CFNIS interview with Maj X, 3 February 2011 at 5.

⁹⁹ Transcript of the Commission's interview with Maj X, 21 August 2017 at 73-74.

¹⁰⁰ Transcript of the JTF-Afg CFNIS interview with Lt Busset, 1 February 2011 at 47-48; transcript of the Commission's interview with Maj Busset, 27 November 2017 at 24, 41.

¹⁰¹ Transcript of the JTF-Afg CFNIS interview with Lt Busset, 1 February 2011 at 47-48; transcript of the JTF-Afg CFNIS interview with Lt Busset, 24 February 2011 at 2-3.

¹⁰² Transcript of the JTF-Afg CFNIS interview with Lt Busset, 1 February 2011 at 47-48.

¹⁰³ Transcript of the JTF-Afg CFNIS interview with Maj X, 3 February 2011 at 28.

¹⁰⁴ Transcript of the JTF-Afg CFNIS interview with MWO Y, 6 February 2011 at 5.

¹⁰⁵ The Commission's informal interview with MWO Y, 8 June 2015 (not recorded).

¹⁰⁶ Transcript of the JTF-Afg CFNIS interview under caution with Maj X, 25 February 2011 at 21-22.

for JTF-Afg, confirmed that the operational C of C was concerned about the issues related to the detainees.¹⁰⁷

140. Col Giguère, DComd of JTF-Afg, also said that there had been concerns about a potential uprising or other problems at the DTF because of the high number of detainees.¹⁰⁸ BGen Milner also recalled that there had been discussions concerning the high number of detainees due to the high operational tempo, as well as the concerns raised by the situation, although he stated that he did not think they had reached a point where the JTF-Afg MP Coy could not manage the situation.¹⁰⁹

141. In short, all of those responsible for the DTF were well aware of the significant increase in the number of detainees and were worried about it, as was the JTF-Afg C of C. It is clear that this situation played a significant role in the chain of events that followed, beginning with the decision to review SOP 500.

5.2 Modification of Standard Operating Procedure (SOP) 500 and Transmission of the Information

5.2.1 The Review Process

142. In December 2010, Maj X assigned the officers serving under him the task of amending the existing SOP 500 concerning disturbances to include procedures in the event of a riot at the DTF.¹¹⁰ Maj X told the JTF-Afg CFNIS that in December 2010, Lt Busset and her staff put a great deal of work into revising SOP 500¹¹¹ concerning detention, and that Capt Touchette was involved in preparing the contingency plans.¹¹² Capt Touchette confirmed that he had been involved. He stated that Maj X had asked him to look at the SOP in early December and that he had made recommendations about its content.¹¹³

¹⁰⁷ Recording of the Commission's interview with Col Strickland, Part II, 25 January 2018, at 00h:31m:24s, 00h:49m:31s.

¹⁰⁸ Transcript of the Commission's interview with BGen (Retired) Giguère, Part I, 9 February 2018, at 18-19.

¹⁰⁹ Recording of the Commission's interview with MGen (Retired) Milner, 23 August 2018 at 00h:17m:12s.

¹¹⁰ Transcript of the JTF-Afg CFNIS's interview under caution with Maj X, 25 February 2011 at 29-30.

¹¹¹ *Ibid.*

¹¹² Transcript of the JTF-Afg CFNIS interview with Maj X, 3 February 2011 at 6.

¹¹³ Recording of the Commission's interview with Mr. Touchette, 2 August 2017 at 00h:38m:23s; recording of the JTF-Afg CFNIS interview with Capt Touchette, 20 February 2011 at 00h:11m:19s.

143. Lt Busset told the JTF-Afg CFNIS that she had had to verify and update the SOP because of the increase in the number of detainees.¹¹⁴ It took her about a week to write the SOP, which was then revised by MWO Y, Capt Touchette, his platoon WO and Maj X.¹¹⁵ During her interview with the Commission, Lt Busset thought that it was Capt Touchette and his team who had taken responsibility for compiling the various experts' recommendations regarding the modifications to the SOP so that the final version could be approved by Maj X.¹¹⁶

144. MWO Y also said that he had been involved in revising the SOP. He had told the JTF-Afg CFNIS that a revision of SOP 500 was necessary because of the increase in the number of detainees and the conditions at the DTF. Specifically, procedures to follow in the event of a riot had to be added. The revision of the SOP had been done with Lt Busset. In addition, he himself had prepared a ten-step checklist to accompany SOP 500, in order to provide a list of all the steps to follow.¹¹⁷ The video recording of his interview with the JTF-Afg CFNIS clearly demonstrates that he had a document in his pocket which he called the "checklist" for SOP 500.¹¹⁸ However, the JTF-Afg CFNIS had not kept a copy of that document, and it was not found in the course of this PII, despite the requests for disclosure made to the CF MP Gp and the inspection of the documents held by CJOC. During his interview with the Commission, MWO Y remembered that he had been asked to write an SOP, but he did not remember whether Lt Busset had been involved in preparing the SOP.¹¹⁹

145. PO2 Gervais was interviewed by the JTF-Afg CFNIS in 2011, but he was not questioned about his knowledge of the new SOP 500. During his interview with the Commission, he thought it was possible that the SOP had been amended to cover riot situations, but he did not remember participating in that revision of SOP 500.¹²⁰

¹¹⁴ Transcript of the JTF-Afg CFNIS interview with Lt Busset, 1 February 2011 at 47-48.

¹¹⁵ *Ibid* at 48-50.

¹¹⁶ Transcript of the JTF-Afg CFNIS interview with Maj Busset, 27 November 2017 at 152-153.

¹¹⁷ Transcript of the JTF-Afg CFNIS interview with MWO Y, 6 February 2011 at 5-6.

¹¹⁸ Recording of the JTF-Afg CFNIS interview with MWO Y, 6 February 2011 at 00h:05m:38s.

¹¹⁹ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 18, 57.

¹²⁰ Recording of the Commission's interview with Mr. Gervais, 3 August 2017 at 00h:02m:09s.

5.2.2 The Content of the Modifications

146. SOP 500, “Detainee Operations,” contained the policies and procedures for the detention of any person during the Canadian deployment in Afghanistan. Annex G of that SOP focused on emergency procedures. That SOP and its Annex G had been revised in July 2010.

5.2.3 Annex G, Dated July 22, 2010

147. The section titled “Disturbance” addressed “riots” and “disturbances” without defining those terms. The SOP contained a series of procedures to follow if a detainee or a group of detainees participated in a riot or a disturbance.¹²¹ Essentially, the procedures were that, following a request for assistance from the guard on the catwalk, all of the MPs on duty at the DTF were to go to the administrative area of the DTF and await instructions from the senior MP on duty. The senior MP would then determine what should be done to respond to the situation, including whom to extract from the cells, with what use of force, and the number of MPs needed to carry out the task.¹²² The SOP established a minimum number of guards for entering a cell, depending on the number of detainees. It stated that other MP personnel could also be called upon if necessary.

148. The SOP stated that, if possible, the detainee who had instigated the disturbance should be separated from the other detainees. It was up to the senior MP on duty to determine what equipment would be necessary and to ensure that only the force required to calm the disturbance would be used. The Provincial Operations Centre (POC) had to be informed.¹²³ After that, the JTF-Afg MP Coy C of C had to be informed of the events and of the result, the events had to be recorded in the logbooks, and the statements of the personnel involved had to be taken and placed in the detainee’s file.¹²⁴

¹²¹ Document 148, *SOP #500–Detainee Operations, Annex G, Emergency Procedures* (received at the MPPC on 12 December 2017) (hereinafter, “Document 148”).

¹²² Document 148 at 24.

¹²³ *Ibid* at 26.

¹²⁴ Document 148 at 26.

5.2.4 Annex G, Dated December 26, 2010

149. The SOP dated December 26, 2010, indicates that it was revised by Lt Busset, comd of the KAF MP Pl, and that it was approved by Maj X, comd of the MP Coy.¹²⁵ Lt Busset said that she had revised it in a week.¹²⁶ Annex G describes three response levels to situations or incidents that could occur in the DTF. Level 1 is an injured or ill detainee or a rocket or artillery attack. That level necessitates the participation of the personnel from the shift on duty. Level 2 is a disturbance; it necessitates the participation of the GS Pl. Level 3 is a riot and necessitates the participation of the JTF-Afg MP Coy personnel. The terms “riot” and “disturbance” are not defined.¹²⁷

150. Level 2 in Annex G defines the procedures to follow if a detainee becomes agitated. Of course, many of the procedures are similar to those set out in the preceding version. The guard on the catwalk must first instruct the detainee to cease the disturbance; that is an addition. Next, the shift supervisor must be called if the detainee refuses to obey the orders from the guard on the catwalk. The shift supervisor or the shift supervisor’s assistant must inform the non-commissioned officer responsible for the DTF (PO2 Gervais) and the GS Pl commander, who in turn is to notify the Operations Officer and the comd of the JTF-Afg MP Coy. In addition to continuing to ensure that the personnel on duty at the DTF go to the administrative area to await instructions, the new version of Annex G also states that the GS platoon commander or the platoon warrant officer must go to the catwalk to supervise the operations. Emergency entry into a cell, if deemed necessary, must not be carried out if the other detainees in the cell are calm and cooperative. The use of force is the same as in the preceding version, except that it is specified that pepper spray cannot be used.

151. Level 3 in Annex G establishes the procedures to follow during a riot.¹²⁸ That section states that a disturbance can quickly escalate and turn into a riot, but it does not define what constitutes a riot or how a riot is different from a disturbance. As for a disturbance, the guards on

¹²⁵ Document 092, *SOP #500 – Detainee Operations, Annex G, Emergency Procedures* (received at the MPPC on 5 October 2016) (hereinafter, “Document 092”) at 10.

¹²⁶ Transcript of the JTF-Afg CFNIS interview with Lt Busset, 1 February 2011 at 48.

¹²⁷ Document 092.

¹²⁸ *Ibid* at 5, 8-10.

the catwalk must call the shift supervisor, and the list of the people to notify is the same. However, unlike in the case of a disturbance, if a riot occurs all available personnel at the DTF and at the guardhouse, including the guards on the shift, must go to the catwalk to increase the presence of guards among the detainee population. The senior member of the MP present is responsible for determining whether what is happening constitutes a riot, and, if so, the shift supervisor must inform the GS Pl comd, the Operations Officer and the JTF-Afg MP Coy comd. As for a disturbance, the GS Pl comd or the GS Pl WO must be on the catwalk to supervise the operations. The Operations Officer must contact the international military police unit so that it can establish a security perimeter around the DTF for the duration of the riot.¹²⁹

152. Annex G states explicitly that the personnel must avoid making an emergency entry into the cells during a riot, and that such an entry must be carried out only if the life of a detainee is in danger and the entry is authorized by the JTF-Afg MP Coy comd. If the JTF-Afg MP Coy comd deems it necessary and possible, the instigator of the riot can be separated from the other detainees. The procedures specified in the event that the JTF-Afg MP Coy comd authorizes an emergency entry into the cells are similar to those specified for a disturbance, except that the use of pepper spray is permitted before the entry into the cell. The JTF-Afg MP Coy comd can suspend the daily activities at the DTF, such as visits to the toilets and showers, meals and medical visits, for the duration of the riot. In addition to being recorded in the applicable logbooks, the events must also be video recorded using a handheld camera.¹³⁰ Lastly, the GS Pl personnel must conduct detainee extraction exercises twice a month in order to stay up to date.¹³¹

153. The requirement to practise cell extractions had been added to the riots section. During his interview with the Commission, Maj X said that his personnel had received pre-deployment training for handling a certain number of detainees at the DTF. In late December 2010, the number of detainees at the DTF had exceeded the initial capacity. As a result, Maj X said that the considerable increase in the number of DTF detainees made it necessary to modify SOP 500.

¹²⁹ *Ibid* at 8.

¹³⁰ *Ibid* at 10.

¹³¹ *Ibid*.

Cell extraction exercises were added so that his personnel's training would remain current and so that they would be ready to respond to any incident at the DTF.¹³²

5.2.5 Distribution of the Revised SOP 500

154. Lt Busset said that she had distributed the SOP by email two weeks prior to the exercise held on January 19, 2011 on the tactical network (TacNet) used in theatre.¹³³ She said she had distributed the SOP to WO Grenier, Sgt Bélanger¹³⁴, Sgt Beaudoin¹³⁵, the shift sergeants (via an email address they shared), and to PO2 Gervais and MCpl Côté (via an email address they shared).¹³⁶ She said she had instructed the shift sergeants and supervisors whose English was fairly functional to read the SOP and come see her or the PI WO to ask questions and get explanations.¹³⁷ She added that the shift sergeants were responsible for notifying their troops that the SOP had been revised and informing them of the content.¹³⁸

155. The SOP had not yet been translated into French when she distributed it. Lt Busset explained that the risk of a riot at the DTF was a cause for concern for her CoC as well as that of JTF-Afg.¹³⁹ Accordingly, Maj X wanted the SOP finalized and implemented as soon as possible given the urgency of the situation.¹⁴⁰ She explained that the first version of documents with respect to detainees was generally prepared in English and that the bilingual members of the PI CoC then set to work translating it.¹⁴¹

156. In her interview with CFNIS JTF-Afg, Lt Busset acknowledged that she may not have done enough follow-up to make sure the shift sergeants had read the new SOP and informed their troops of its content.¹⁴² In her interview with the Commission, Lt Busset said that after noting, in the exercise on January 19, 2011, that a number of members did not seem aware of the new

¹³² Transcript of the Commission's interview with Maj X, 21 August 2017 at 28-33, 38, 89-91.

¹³³ Transcript of the CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 12, 14, 40-41, 46, 50.

¹³⁴ Sgt Bélanger was the Police Operations Officer at the DTF; also Document 012.

¹³⁵ Sgt Beaudoin was in charge of the TASO team; also Document 012.

¹³⁶ Transcript of the CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 14, 41, 46-47, 73.

¹³⁷ *Ibid* at 51-52.

¹³⁸ *Ibid* at 41, 51, 73.

¹³⁹ See the reasons identified in part 5.1.4 of this report.

¹⁴⁰ Transcript of the CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 50-53, 61.

¹⁴¹ *Ibid* at 51.

¹⁴² *Ibid* at 52.

SOP 500, she had spoken with the DTF sergeants to make clear to them that, when she sent them an SOP, they were to inform their troops so that they could familiarize themselves with its content.¹⁴³

157. According to MWO Y, the new SOP and the checklist had been distributed to the troops two weeks before the exercise held on January 19, 2011.¹⁴⁴ Sgt Degrasse, who was the shift supervisor on duty during the exercise on January 19, 2011, said he had not received and read the new SOP before the exercise concerned.¹⁴⁵ He said that apparently the document had been sent by email on the tactical network (TacNet). He added that it was quite likely that an individual with access to the inbox of the shared TacNet email account had deleted the revised SOP or moved it to another folder without his knowledge given that he was not the only person with access to that account.¹⁴⁶ As a result, he had not seen the revised SOP before the exercise.¹⁴⁷ He also said that, judging by the comments at the post-exercise debriefing, none of the DTF NCOs had read SOP 500.¹⁴⁸ As he had never received the revised SOP, he had not shared it with his personnel before the exercise either. He said it was only after the exercise that he had been given a copy and that he had notified his troops.¹⁴⁹

158. Sgt Waugh, who was the B shift supervisor, said in his unrecorded interview with CFNIS JTF-Afg on February 2, 2011 that he had [translation] “never received by secure email the new version of SOP 500 containing the directive concerning riots.”¹⁵⁰ He added that he had been informed of the new version of the SOP during the briefing held after the exercise on January 19, 2011.¹⁵¹ So, if Sgt Waugh had been on duty on the morning of the exercise, he may have had the same problem as Sgt Degrasse. It should be noted that this interview seems to have been conducted informally. It was not recorded and seems to have been very brief. In his interview with the Commission, Sgt Waugh said he had never met with CFNIS JTF-Afg investigators for

¹⁴³ Transcript of the Commission’s interview with Maj Busset, 27 November 2017 at 85.

¹⁴⁴ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 6.

¹⁴⁵ Transcript of the CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 9, 11-12, 23-24, 46, 56-57.

¹⁴⁶ *Ibid* at 24-25, 27-28.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* at 23-24, 56-57.

¹⁴⁹ *Ibid* at 24-25, 27-28.

¹⁵⁰ Document 020 at 84, 420.

¹⁵¹ *Ibid*.

an interview during their investigation in 2011.¹⁵² He also said he did not recall having spoken with CFNIS JTF-Afg investigator MCpl O'Bready about the SOPs.¹⁵³ He added that he remembered that a new SOP had been drafted, but he did not recall whether that was before or after the exercise on January 19, 2011. He said that according to current procedures, it would have been his responsibility to disseminate the document to the personnel on his shift and to make sure they had read and understood it.¹⁵⁴

159. MCpl Gasparro, Sgt Degrasse's assistant, and Cpls Bilodeau-Roy, Dauphinais, Dandurand, Firreri, Roy and Gratton, who were directly involved in the events of January 19, 2011, as well as Cpl Young-Jones, who was on the DTF catwalk during the exercise, all stated, both to CFNIS JTF-Afg and to the Commission, that they had not read the new SOP prior to the exercise. Some of the guards said they had read it the next day or shortly after, when Sgt Degrasse told them about it.¹⁵⁵

160. In short, the evidence indicates that Maj X and his officers believed the increase in the number of detainees required that SOP 500 be amended to include the necessary instructions on how to deal with a potential riot at the DTF. SOP 500 was therefore amended in December 2010. Several stakeholders contributed to the changes and the new SOP was approved by Maj X. Lt Busset reported having sent it via TacNet to the NCOs in charge approximately two weeks before the exercise held on January 19, 2011. However, the NCOs all said that they had either not received it or not read it before the exercise.

5.3 Visit from the Canadian Forces Provost Marshal (CFPM)

161. In early January 2011, Col Grubb, CFPM, visited KAF. The CFPM visited the JTF-Afg MP Coy, as he was responsible for providing technical guidance on the MP function and MP operations. The CFPM was also in charge of the CFNIS JTF-Afg detachment.¹⁵⁶ The purpose of

¹⁵² Recording of the Commission's interview with WO Waugh, 2 October 2017 at 02h:05m:18s.

¹⁵³ *Ibid* at 02h:05m:58s.

¹⁵⁴ *Ibid* at 02h:06m:19s.

¹⁵⁵ Transcript of the CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 15; transcript of the CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 24; transcript of the CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 10; transcript of the CFNIS JTF-Afg interview with Cpl Dandurand, 31 January 2011 at 35; transcript of the CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 22.

¹⁵⁶ Transcript of the CFNIS CR interview (for the CFNIS JTF-Afg investigation) with Col Grubb, 28 February 2011 at 5-6.

the CFPM's official visit, which took place from January 2 to 14, 2011, was to enable Col Grubb to observe the conduct of MP operations, to receive feedback from MP members and to discuss operations with them.¹⁵⁷ Accordingly, he visited the various PM areas of operation, including the DTF. Just as the members of the JTF-Afg MP Coy and JTF-Afg CoCs had done, Col Grubb identified the increase in the number of detainees as a concern.¹⁵⁸ In his interview with the CFNIS, Col Grubb confirmed that this issue had been raised during his visit. He said that he first mentioned the issue during his visit to the DTF.¹⁵⁹

162. Col Grubb had pointed out to Col Giguère the risks associated with the increase in population he had seen at the DTF and said he had mentioned the risk of a riot in particular. He had also discussed what measures could be taken to prepare for this possibility, including making sure the Quick Reaction Force (QRF), the unit responsible for responding to crisis situations, was ready to deploy in the event of a riot at the DTF, as the number of guards would not have been enough to contain a riot. He recommended that exercises be conducted with the QRF so that it would be ready to assist the guards if problems arose at the DTF.¹⁶⁰

163. Col Grubb also had discussions with Maj X about this issue and the recommendations he had submitted to Col Giguère.¹⁶¹ He said he had discussed his concerns and possible measures to mitigate the risk with Maj X near the end of his visit. He explained that Maj X had seemed to think it was a point worth remembering and had taken notes so as to be able to obtain the necessary approvals later on for taking some of the action discussed.¹⁶² However, he made clear that he had not instructed Maj X to conduct exercises.¹⁶³

164. During his interview with the Commission, Col Grubb reiterated what he had said about his observations during his DTF visit. He explained that part of his role as CFPM was to provide technical guidance and direction on the various aspects of the MP's work, including detention, as

¹⁵⁷ *Ibid* at 6, 20.

¹⁵⁸ *Ibid* at 9-15, 48.

¹⁵⁹ *Ibid* at 9-15

¹⁶⁰ *Ibid* at 11-15.

¹⁶¹ *Ibid* at 13.

¹⁶² *Ibid* at 41.

¹⁶³ *Ibid* at 42.

the CFPM was also responsible for CF detention services.¹⁶⁴ He said that Maj X shared his concerns with respect to the greater number of detainees.¹⁶⁵

165. Col Grubb remained convinced that his discussions with Maj X could not have been perceived by the latter as an instruction or an order to conduct exercises.¹⁶⁶ While these did not constitute instructions, Col Grubb did say, both in his interview with the CFNIS in 2011 and in his interview with the Commission, that he had talked with Maj X about possible exercises that could be conducted at odd hours or in the middle of the night to ensure that the QRF would be ready to respond.¹⁶⁷

166. Maj X recalled having had general discussions with Col Grubb regarding amendments to SOPs to mitigate the increased threat of a riot due to the significant number of detainees but did not remember any specific discussions as to concerns about this issue or to the possible conduct of exercises.¹⁶⁸

167. In his interview with the Commission, Maj X did not recall the exact date of Col Grubb's visit. He believed that the Col had conducted his visit in February 2011, ie, after the exercise on January 19, 2011, and that he had informed Col Grubb during his visit that the exercise had been held.¹⁶⁹ Maj X did not recall any specific details after being informed of the dates of Col Grubb's visit in January 2011.¹⁷⁰

168. The Commission found no evidence that would indicate that Col Grubb's visit or anything he said played any role in the decision to conduct the January 19, 2011 exercise. Instead, the evidence indicates that Maj X decided on his own initiative to conduct the exercise in issue because of the concerns about the risk of a riot due to the increased number of detainees. These concerns predated Col Grubb's visit. Indeed, the revision of SOP 500 had already been

¹⁶⁴ Transcript of the Commission's interview with Col (Retired) Grubb, 2 February 2018 at 25-26.

¹⁶⁵ *Ibid* at 44-45.

¹⁶⁶ *Ibid* at 47-48.

¹⁶⁷ Transcript of the CFNIS CR interview (for the CFNIS JTF-Afg investigation) with Col Grubb, 28 February 2011 at 20-21; transcript of the Commission's interview with Col (Retired) Grubb, 2 February 2018 at 18.

¹⁶⁸ Transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 29.

¹⁶⁹ It should be noted that Maj X made an error with respect to the date of Col (Retired) Grubb's official visit to KAF. According to Col (Retired) Grubb's testimony, this visit was conducted from January 2 to 14, 2011.

¹⁷⁰ Transcript of the Commission's interview with Maj X, 21 August 2017 at 253-256.

done prior to Col Grubb's visit. Moreover, as we will see, the evidence indicates that planning for the exercise had begun before Col Grubb's visit had ended, although probably after the visit had begun.¹⁷¹

5.4 Purpose and Planning of the January 19, 2011 Exercise

5.4.1 Selection of the Date of the Exercise

169. Shortly after SOP 500 had been revised, Maj X spoke with MWO Y and Capt Touchette about the possibility of holding an exercise at the DTF in the near future. Maj X said that about one week before the exercise, he had asked Capt Touchette to select a date for the exercise.¹⁷² He said the guards' schedule had been taken into consideration in choosing the date. He had wanted the exercise to be held shortly before the shift change.¹⁷³ As a result, they had chosen January 19 at 4 o'clock in the morning because the shift change took place at 0530 hours.¹⁷⁴ Capt Touchette remembered that a date had been chosen for the exercise about 10 days before it was held.¹⁷⁵ However, in his interview with the Commission, MWO Y said he had not had any involvement in selecting the date of the exercise.¹⁷⁶

5.4.2 Purpose of the Exercise

170. According to Maj X, the purpose of the exercise was, first, to recall personnel to the DTF, and then to assess the troops' knowledge of the SOP in order to make sure they were ready for anything.¹⁷⁷ When asked if two people were enough to supervise the exercise, Maj X replied in the affirmative. He explained to MCpl O'Bready that the main purpose of the exercise was to conduct a recall. Regarding MWO Y's role during the exercise, Maj X said he had asked him [translation] "to stay on the catwalk to make sure the actions of the two guards follow their course in the interest of it's that thing, and at the same time to prevent any action that disturbed the detainees."¹⁷⁸ According to Maj X, MWO Y had a [translation] "controller" role; he was to

¹⁷¹ See Part 5.4 of this report discussing the purpose and planning of the exercise held on 19 January 2011.

¹⁷² Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 5-6; transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 31.

¹⁷³ Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 6, 12-13.

¹⁷⁴ *Ibid* at 6; transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 23-24.

¹⁷⁵ Transcript of the CFNIS JTF-Afg interview with Capt Touchette, 20 February 2011 at 4.

¹⁷⁶ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 93.

¹⁷⁷ Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 5-6, 22.

¹⁷⁸ *Ibid* at 26, 37.

[translation] “make sure nobody had the brilliant idea of deciding to disturb the detainees.”¹⁷⁹ Maj X said he had headed to the office of the shift supervisor, Sgt Degrasse, to supervise him. He said he had wanted to make sure the shift supervisor was familiar with the SOP.¹⁸⁰

171. In his cautioned interview on February 25, 2011 (hereinafter “interview on February 25, 2011”), Maj X said that the purpose of the exercise had been, firstly, to make sure the troops knew the SOPs well and, secondly, [translation] “to see how much time it would take to get enough people to be able to respond to a situation”¹⁸¹ at the DTF. He added that he had wanted to make sure [translation] “people knew the SOP for activating” the recall of personnel.¹⁸²

172. When asked to explain why the guards on the catwalk had been involved at the beginning of the exercise if the purpose had been mainly to conduct a recall exercise, Maj X said that he had first wanted to make sure that all the members had read the SOP. Secondly, he had wanted to make sure that the guards understood the [translation] “trigger elements” for performing a recall.¹⁸³ According to Maj X, the trigger [translation] “was saying that there weren’t enough personnel in the guardhouse¹⁸⁴ to handle the crisis”¹⁸⁵ Maj X said he could have gone to the shift supervisor’s office and said: [translation] “Sgt Degrasse, here’s the verbal situation. It’s an exercise. On the catwalk, one of your guards reports such-and-such; what do you do?” That may have been the best way to begin the exercise, but he had wanted to [translation] “make people think.”¹⁸⁶ Maj X said that the purpose of the exercise had been to conduct a recall with a secondary element, ie, to make sure [translation] “people understand what the triggers are for doing a recall.”¹⁸⁷ Maj X provided a similar explanation as to the purpose of the exercise in his interview with the Commission.¹⁸⁸

¹⁷⁹ *Ibid* at 40.

¹⁸⁰ *Ibid* at 21-22.

¹⁸¹ Transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 24.

¹⁸² *Ibid*.

¹⁸³ *Ibid* at 36.

¹⁸⁴ In French, “poste de garde”.

¹⁸⁵ Transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 34.

¹⁸⁶ *Ibid* at 36.

¹⁸⁷ *Ibid*.

¹⁸⁸ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 11-12.

173. Capt Touchette also said that the exercise had been a recall exercise. The purpose had been to assess how quickly personnel called for backup to the DTF and to measure the troops' knowledge of the SOP.¹⁸⁹ MWO Y told CFNIS JTF-Afg that the purpose of the exercise had been to familiarize personnel in case of a riot.¹⁹⁰ MWO Y told the Commission the purpose of the exercise had been to prepare people and to make sure that they knew how to react during a riot and that they had read the SOP. The exercise was also intended to determine how much time it would take personnel to respond at the DTF.¹⁹¹

5.4.3 Planning of the exercise

174. The planning of the exercise was strictly oral and no operation order was prepared. Maj X said that this was not necessary for a recall exercise.¹⁹² The decision to hold the exercise had come from him.¹⁹³ Maj X also recognized that there had been deficiencies in the planning of the exercise. He said the following in his interview on February 25, 2011 with CFNIS JTF-Afg: [translation] "...I admit it, I was at fault before the Canadian Forces for not having done good planning for the exercise...if the actions of my subordinates were done that way because I didn't provide enough guidelines, those things, I am to blame."¹⁹⁴ He also acknowledged in his interview with the Commission that he could have done things differently to avoid the guards entering the DTF during the exercise.¹⁹⁵

175. Capt Touchette told CFNIS JTF-Afg that planning had been minimal. Maj X had wanted to verify members' knowledge of SOP 500 and had ordered Capt Touchette to go to JTF-Afg MP Coy HQ while he and MWO Y conducted the exercise.¹⁹⁶ Capt Touchette said that no plan was written up and no planning was done.¹⁹⁷

¹⁸⁹ Transcript of the CFNIS JTF-Afg interview with Capt Touchette, 20 February 2011 at 5; recording of the Commission's interview with Mr Touchette, 2 August 2017 at 00h:48m:42s, 01h:6m:5s.

¹⁹⁰ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 5.

¹⁹¹ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 90-91, 134-135.

¹⁹² Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 24.

¹⁹³ *Ibid* at 26.

¹⁹⁴ Transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 86-87.

¹⁹⁵ Transcript of the Commission's interview with Maj X, 21 August 2017 at 11, 120.

¹⁹⁶ Transcript of the CFNIS JTF-Afg interview with Capt Touchette, 20 February 2011 at 4-5.

¹⁹⁷ *Ibid*.

176. MWO Y told CFNIS JTF-Afg that he had reported to the DTF with Maj X on the morning of January 19, 2011, but MCpl O'Bready had not asked for further details about the planning, ie, the names of the individuals who had contributed and their roles. MWO Y said that the instructions he had received were to observe how the guards reacted and whether or not they followed the SOPs. He was to observe and control what happened from the catwalk during the exercise.¹⁹⁸ In his interview with the Commission, MWO Y said that the decision to conduct the exercise had come from Maj X.¹⁹⁹ He added that only Maj X and himself had known about the exercise since the other officers had not been notified of the exercise as they, too, were to be evaluated.²⁰⁰ MWO Y said that no plan had been drafted for this exercise. He added that the plan had been to follow the SOP.²⁰¹ His role had been minimal, and his main purpose had been to supervise from the catwalk and to see if the guards knew how to do their job and knew how to respond.²⁰² The reason for him being on the catwalk had been to prevent anyone from going up onto it and disturbing the detainees.²⁰³

177. Aside from Maj X, Capt Touchette and MWO Y, no one else was involved in planning the exercise. The members of the coy, including the CoC of the platoon responsible for the DTF, did not know that an exercise was going to be held. Maj X had intentionally chosen not to inform the other members of the JTF-Afg MP Coy about the exercise, in order to maintain the element of surprise. He said that he [translation] “[had not wanted to] ‘let the cat out of the bag.’”²⁰⁴ In addition, he wanted to evaluate Lt Busset during the exercise. He said, [translation] “So it was also to put her on the spot a bit, when she received the call from Sergeant Degrasse at 4 o'clock in the morning saying, ‘Madam, something’s going on at the detention facility.’” He said that Lt Busset had to be ready to respond and receive the information.²⁰⁵ Capt Touchette also said that Lt Busset was evaluated during that exercise and therefore was not involved in planning it.²⁰⁶

¹⁹⁸ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 13, 15

¹⁹⁹ Transcript of the Commission’s interview with MWO (Retired) Y, 30 August 2017 at 93.

²⁰⁰ *Ibid* at 94.

²⁰¹ *Ibid* at 99.

²⁰² *Ibid* at 94.

²⁰³ *Ibid* at 139-140.

²⁰⁴ Transcript of Commission interview with Maj X, 21 August 2017 at 180.

²⁰⁵ *Ibid*.

²⁰⁶ Recording of Commission interview with Mr. Touchette, 2 August 2017 at 01h:14m:24s.

178. However, the night before the exercise, Maj X apparently informed Col Giguère that there was going to be an exercise at 0400 hours.²⁰⁷ Col Giguère stated to CFNIS JTF-Afg that he had been informed by Maj X [translation] “of an exercise that was supposed to take place in order to validate the recall procedure for the DTF personnel.”²⁰⁸ He had asked Maj X [translation] “to ensure that the members were aware that it would be an exercise and that they did not inadvertently contact the international military police, who would have responded to a real call.”²⁰⁹ During his interview with the Commission, Col Giguère had only a vague recollection of the exercise concerned. He said that he had probably been notified by Maj X that the exercise was being held at the DTF, but that he could not be definite about it.²¹⁰

179. Lt Busset said during her interviews with CFNIS JTF-Afg and the Commission that she would have liked to be involved in the planning for the exercise. She thought that the members of her personnel, such as WO Grenier, PO2 Gervais or MCpl Côté, should have been involved in order to guide and supervise the conduct of the exercise.²¹¹ PO2 Gervais, who was the non-commissioned officer responsible for the operation of the DTF at the time of the events, said that he had not been aware that an exercise was going to take place at the DTF on January 19, 2011.²¹² During his interview with the Commission, his answer was similar: that he had not known of the exercise and that those in charge at the DTF should have been involved in supervising it.²¹³

180. Therefore, the Commission concluded that, according to the evidence gathered in the course of the PII, Maj X, in consultation with only MWO Y and Capt Touchette, had decided to hold an exercise intended to assess knowledge of the new SOP that included the amendments regarding the procedure in the event of a riot in the DTF. Although they had described the exercise as a simple recall exercise for the purpose of determining how quickly the troops could

²⁰⁷ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 30-31.

²⁰⁸ Document 020 at 88 (CFNIS JTF-Afg interview with Col Giguère). The interview was not recorded.

²⁰⁹ *Ibid.*

²¹⁰ Transcript of the interview with BGen (Retired) Giguère, 9 September 2018, Part I at 23-27.

²¹¹ Transcript of CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 26; transcript of Commission interview with Maj Busset, 21 November 2017 at 14.

²¹² Transcript of CFNIS JTF-Afg interview with PO2 Gervais, 1 February 2011 at 24.

²¹³ Recording of Commission interview with Mr. Gervais, 3 August 2017 at 00h:04m:37s, 01h:40m:30s, 02h:53m:15s.

be recalled to the DTF, it is clear from their interviews that knowledge of the SOPs was also to be assessed. The date and time of the exercise had been chosen based on the guards' schedules. However, no plan had been drawn up to determine the role of the supervisors of the exercise and to identify the possible risks associated with holding such an exercise in an operating DTF. The planning was minimal.

5.5 Conduct of the Exercise on January 19, 2011

5.5.1 Start of the Exercise

181. Early in the morning on January 19, 2011, Maj X, Capt Touchette and MWO Y met at JTF-Afg MP HQ to conduct the exercise.²¹⁴ The tasks were determined quickly. Capt Touchette was informed that he should remain at the HQ to answer any telephone calls related to the exercise and to prevent having to request any assistance from outside the DTF.²¹⁵ Maj X and MWO Y went to the DTF to begin the exercise and supervise it.²¹⁶

182. At the time when the exercise was held, the members of Shift A of the GS Pl were on duty at the DTF. Sgt Degrasse was the shift supervisor on site, with support from MCpl Gasparro, his assistant. Eight guards were on duty that morning: Cpl Dauphinais, Cpl Bilodeau-Roy, Cpl Dandurand, Cpl Ferreri, Cpl Gratton, Cpl Roy, Cpl Young-Jones and Cpl Lorette.

183. When the exercise began, Cpl Young-Jones and Cpl Lorette were both assigned to watch the detainees from the DTF catwalk. Cpl Young-Jones was assigned to watch the cells at the far end of the catwalk, i.e., cells 5 to 8, while Cpl Lorette was responsible for the first four, cells 1

²¹⁴ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 6; transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 24; and transcript of Commission interview with Maj X, 21 August 2017 at 126.

²¹⁵ Transcript of CFNIS JTF-Afg interview with Capt Touchette, 20 February 2011 at 5; transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 6; transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 25, 35; transcript of Commission interview with Maj X, 21 August 2017 at 126.

²¹⁶ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 6-7; transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 32-33; transcript of CFNIS JTF-Afg interview with Capt Touchette, 20 February 2011 at 4-5, 8, 12.

to 4.²¹⁷ Unlike the other guards on duty that morning, Cpl Young-Jones and Cpl Lorette were both English speakers with very limited or no knowledge of French.²¹⁸

184. When Maj X and MWO Y arrived at the DTF, they went directly up to the catwalk and met with Cpl Young-Jones and Cpl Lorette. A check of the DTF visitor log, obtained by the Commission as part of this PII, revealed that it contains a record of the visit by Maj X and MWO Y at 0355 hours on January 19, 2011.²¹⁹

185. According to the evidence gathered, the exercise began at 0400 hours. The scenario was given to Cpl Young-Jones; it involved a situation in cells 6, 7 and 8 degenerating to the point that Cpl Young-Jones did not have [translation] “positive control” of the situation.²²⁰ He would then have to begin procedures, i.e., by notifying his shift supervisor, Sgt Degrasse, of the situation so that Sgt Degrasse could recall the troops. However, the Commission notes that the words “disturbance,” “uprising” or “riot”²²¹ were used interchangeably during the interviews with Maj X, MWO Y, Cpl Young-Jones and Cpl Lorette to describe the nature of the situation that was degenerating in the three cells concerned.

186. In his interview on February 3, 2011, Maj X explained that the type of situation in the three cells was a situation of “disturbance.”²²² He also stated that he was the one who had introduced the scenario to Cpl Young-Jones shortly after his arrival on the catwalk with MWO Y.²²³ He added that he told Cpl Young-Jones that when he informed Sgt Degrasse, he should specify that it was an exercise. He also said that he asked him to begin the conversation with Sgt Degrasse by telling him [translation] “exercise, exercise, exercise.”²²⁴ Maj X said that he then went to Sgt Degrasse’s desk, leaving MWO Y on the catwalk, to ensure that Sgt

²¹⁷ Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 4; transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 7; transcript of CFNIS JTF-Afg interview with Cpl Lorette, February 2011 at 4; recording of Commission interview with Sgt Lorette, 4 April 2018 at 01:04:25; see also Annex A.

²¹⁸ Recording of Commission interview with Cpl Young-Jones, 11 September 2017 at 00h:53m:25s, 00h:56m:10s and 00h:56m:35s.

²¹⁹ Document 175, *File #14 KAF MP PL DTF Access Control Register* (received at the MPCC on 24 October 2018).

²²⁰ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 7.

²²¹ In French, “désordre,” “soulèvement” and “émeute,” respectively.

²²² Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 13.

²²³ *Ibid* at 7.

²²⁴ *Ibid*.

Degrasse had indeed understood that it was an exercise.²²⁵ In addition, he wanted to make sure that no calls would be made to anyone outside the coy during the recall of the troops.²²⁶ According to his personal notes taken during the exercise,²²⁷ he was at Sgt Degrasse's desk one minute and twenty seconds after the exercise began.²²⁸

187. However, during his interview on February 25, 2011, Maj X stated that he had used the word "uprising" to describe the situation facing Cpl Young-Jones in the scenario.²²⁹ He had spoken with Cpl Young-Jones in English²³⁰ and had repeated his instructions two or three times, as Cpl Young-Jones did not seem to understand them.²³¹ In addition, in his interview with the Commission in 2017, Maj X could not remember the words he had used to describe the nature of the situation in cells 6, 7 and 8: specifically, whether he had used the word "riot" or "disturbance." However, he explained to the Commission that because he had said that several cells could not be controlled according to the scenario, that meant it was not a "disturbance" but rather a riot.²³²

188. The version of the facts provided by MWO Y in 2011 differs slightly from Maj X's version. MWO Y said that he had launched the exercise himself by talking to the guards on the catwalk.²³³ When asked what words were used when the exercise was launched, MWO Y replied that he had said to the guard, "It's an exercise, a riot or *émeute* exercise, something like that."²³⁴ He could not remember the names of the guards on the catwalk²³⁵ or the language used to communicate with them.²³⁶ He also told the Commission that he thought he had been alone on the catwalk while launching the exercise.²³⁷

²²⁵ *Ibid.*

²²⁶ *Ibid* at 15, 33.

²²⁷ A copy of the personal notes taken by Maj X during the exercise can be found in GO 2011-2411.

²²⁸ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 15.

²²⁹ Transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 38-39, 55.

²³⁰ *Ibid* at 38-39.

²³¹ *Ibid* at 25.

²³² Transcript of Commission interview with Maj X, 21 August 2017 at 136.

²³³ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 7.

²³⁴ *Ibid* at 16.

²³⁵ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 10; transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 121.

²³⁶ Transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 121-122.

²³⁷ *Ibid* at 120.

189. Cpl Young-Jones said that Maj X, upon his arrival on the catwalk, had not explained to him from the beginning that it was an exercise, but that Maj X had asked him what he would do in the hypothetical event of a riot.²³⁸ He replied that he was supposed to contact his superior. He thought that Maj X was testing his personal knowledge. However, when he spoke to MWO Y, MWO Y explained that it was an exercise and that he should call his superior, Sgt Degrasse, and tell him there was a riot in Cell 7.²³⁹ He then contacted Sgt Degrasse from the catwalk to inform him of the situation and told him “there was an uprising in Cell 7 and that it was an exercise.”²⁴⁰

190. Cpl Lorette thought that MWO Y was the one who had talked to them on the catwalk. He said that MWO Y had not said that it was an exercise, but rather had said, “There’s a riot going on right now.”²⁴¹ Cpl Young-Jones had then used the telephone on the catwalk to call Sgt Degrasse after the exercise was launched. At that time, he thought that everyone knew an exercise was in progress, but he could not say so with certainty.²⁴²

191. Thus, the evidence shows that the scenario was indeed given to Cpl Young-Jones. He then contacted Sgt Degrasse from the catwalk to notify him of the exercise. The evidence also shows that Maj X had left the catwalk immediately after launching the scenario, leaving MWO Y on it, and went to Sgt Degrasse’s desk.

5.5.2 Communication of the Information to the Shift Supervisor

192. Sgt Degrasse was at his desk carrying out the morning routine and preparing the shift change, accompanied by MCpl Gasparro, when Maj X arrived at the guardhouse.²⁴³ At the same time, he received the call from Cpl Young-Jones.²⁴⁴ Cpl Young-Jones informed him of the

²³⁸ Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 4; recording of Commission interview with Cpl Young-Jones, 11 September 2017 at 00h:34m:43s.

²³⁹ Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 4-5.

²⁴⁰ *Ibid* at 5, 8.

²⁴¹ Transcript of CFNIS JTF-Afg interview with Cpl Lorette, 16 February 2011 at 5.

²⁴² *Ibid* at 7.

²⁴³ The Commission interview with Sgt (at the time of the events) Degrasse on 24 October 2017 was not recorded on audiotape, at his express request.

²⁴⁴ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 6. It should be noted that during his interview with CFNIS JTF-Afg in 2011 and with the Commission in 2017, MCpl Gasparro said that he had received the call from Cpl Young-Jones, who spoke to him about a situation on the catwalk. He looked at the monitors of the DTF surveillance cameras but saw that the detainees were sleeping. Not understanding what Cpl Young-Jones was telling him, he passed the telephone to Sgt Degrasse. See also the transcript of the CFNIS JTF Afg

exercise and told him that there was an “uprising situation.”²⁴⁵ Not understanding the meaning of the term “uprising situation,” he looked at the monitors of the surveillance cameras showing the DTF’s eight cells and saw that everything was calm, as the detainees were sleeping.²⁴⁶

193. Sgt Degrasse said that Maj X had never given him the parameters of the exercise or whispered the answers to him during it. On that question, he explained, [translation] “He [Maj X] arrived and he stood, like, back a bit.”²⁴⁷ He said that he had then informed Maj X that he was going up to the catwalk to see what was happening, and that Maj X said something like [translation] “Yes, go and see.”²⁴⁸ When he left to go to the catwalk to clarify the question with Cpl Young-Jones, MCpl Gasparro had remained at his desk.²⁴⁹

194. During his interview on February 3, 2011, Maj X was asked what exact instructions he had given to Sgt Degrasse upon his arrival. He replied that he had first asked Sgt Degrasse whether he understood that it was an exercise. Sgt Degrasse had said yes, but had also said that he did not understand what Cpl Young-Jones was trying to tell him because of a [translation] “lack of communication.”²⁵⁰ He had then asked Sgt Degrasse to continue with his normal routine at the DTF and not to intervene.²⁵¹ He also confirmed that Sgt Degrasse had left the premises to go up to the catwalk, as he did not understand what Cpl Young-Jones was trying to tell him. According to his notes, at [translation] “4.5 minutes later, he [Sgt Degrasse] confirmed the information.”²⁵²

195. Maj X repeated what he had said during his interview of February 25, 2011, and added that he had told Sgt Degrasse that, if he had questions, he should ask him.²⁵³ In addition, during his interview with the Commission in 2017, he clearly stated that he had told Sgt Degrasse that

interview with MCpl Gasparro, 31 January 2011 at 4, 8; and the recording of the Commission interview with MCpl(ret’d) Gasparro, 7 November 2011 at 00h:14m:33s, 00h:16m:03s, 00h:19m:00s.

²⁴⁵ In French, “une situation de soulèvement.” Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 13.

²⁴⁶ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 7-8, 13.

²⁴⁷ *Ibid* at 41-42.

²⁴⁸ *Ibid* at 7.

²⁴⁹ *Ibid* at 14.

²⁵⁰ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 32.

²⁵¹ *Ibid* at 8, 32.

²⁵² *Ibid* at 16.

²⁵³ Transcript of CFNIS JTF-Afg cautioned interview with Maj X, February 2011 at 26.

the purpose of the exercise was to conduct a recall and see whether he knew the SOPs, and that no one was supposed to enter the DTF.²⁵⁴ Maj X always maintained that he had been assured that Sgt Degrasse understood that it was an exercise and that he should not change his routine at the DTF. However, Sgt Degrasse stated that Maj X had not given him the parameters of the exercise upon his arrival or whispered the answers during the exercise.

5.5.2.1 Surveillance Camera Monitors at the DTF

196. The surveillance camera monitors at the DTF were located in front of the shift supervisor's and his assistant's desks.²⁵⁵ Sgt Degrasse and MCpl Gasparro both stated that they had looked at the monitors when they received the call from Cpl Young-Jones.²⁵⁶ They both noticed that the detainees were sleeping and that there did not seem to be any problem at that moment.

197. Maj X provided two different versions of the events during his interviews with CFNIS JTF-Afg. In his interview on February 3, 2011, he said the following regarding the surveillance camera monitors at the DTF: [translation] "On the video, we could see that everyone was sleeping. You know, there was no reason to do a cell extraction. And that wasn't the purpose of the exercise either."²⁵⁷ When asked whether he had had a [translation] "view of the cameras" from his position at Sgt Degrasse's desk, he said no, adding that he had had [translation] "[his] back to the cameras."²⁵⁸ However, during his interview on February 25, 2011, Maj X first stated that he had not looked at the monitors. He explained that the monitors were [translation] "behind" him and that he was only listening and taking notes.²⁵⁹ His statement in his interview with the Commission was similar: he said that the monitors were on when he came back to Sgt Degrasse's desk, because they were supposed to be on all the time.²⁶⁰

²⁵⁴ Transcript of Commission interview with Maj X, 21 August 2017 at 135.

²⁵⁵ See Annex B.

²⁵⁶ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 4, 8; transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 7-8, 13.

²⁵⁷ Transcript of CFNIS JTF-Afg interview with Maj X, February 2011 at 12.

²⁵⁸ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 36; transcript of the Commission's interview with Maj X, 21 August 2017 at 158.

²⁵⁹ Transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 60.

²⁶⁰ Transcript of Commission interview with Maj X, 21 August 2017 at 157-158.

198. We can therefore conclude, based on the evidence gathered, that Sgt Degrasse had a brief telephone conversation with Cpl Young-Jones. As he did not understand the meaning of the English term “uprising situation” and was uncertain as to the nature of the exercise that had been launched, since the images on the monitors were not consistent with what was said in the call, he left to go up onto the catwalk. Maj X and MCpl Gasparro stayed at the guardhouse while Sgt Degrasse went up to the catwalk.

5.5.2.2 Sgt Degrasse Goes up to the Catwalk

199. Sgt Degrasse said that, when he arrived on the catwalk, he asked MWO Y what was going on. MWO Y told him to go and see Cpl Young-Jones, who was at the end of the catwalk,²⁶¹ which he did. Cpl Young-Jones, a little hesitantly, informed him that according to the information he had received from MWO Y, there was [translation] “an exercise,” [translation] “some kind of riot” happening in cells 6, 7 and 8. MWO Y had not given any other instructions.²⁶²

200. Sgt Degrasse said that he had contacted MCpl Gasparro from the telephone on the catwalk and told him, [translation] “Exercise, exercise, exercise . . . there’s a riot going on right now in cells 6, 7 and 8.”²⁶³ Following that instruction, MCpl Gasparro informed him that he was going to send shift members to the catwalk.²⁶⁴ MWO Y, who was beside him at that moment, asked him what he would do as a procedure when faced with that type of situation. He said he told him that he would conduct a recall and possibly enter the cells, given the situation.²⁶⁵ He said that MWO Y then told him, [translation] “No...Call your people...You’ll review your SOPs.”²⁶⁶

201. Cpl Young-Jones confirmed to CFNIS JTF-Afg that, at some point – he could not remember the exact time – Sgt Degrasse came up to the catwalk for a short while and talked to him and MWO Y. He said that Sgt Degrasse gave him some instructions: “he was just telling me

²⁶¹ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 7.

²⁶² *Ibid.*

²⁶³ *Ibid* at 43.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid* at 7-8, 44.

²⁶⁶ *Ibid* at 8.

to make sure it's recorded in the books and to just basically do my part and observe the scenario, like what's going on inside the cell."²⁶⁷ Sgt Degrasse then left the catwalk to manage the situation.

202. MWO Y made no mention of a possible interaction with Sgt Degrasse on the catwalk during his interview with CFNIS JTF-Afg. In his interview with the Commission, MWO Y said that he had no recollection of talking with Sgt Degrasse upon his arrival at the DTF on the morning of the exercise or of seeing Sgt Degrasse on the catwalk that morning.²⁶⁸

203. MCpl O'Bready did not ask Cpl Lorette any questions in that regard when he interviewed him during the CFNIS JTF-Afg investigation in 2011. Cpl Lorette did not state that he had seen Sgt Degrasse on the catwalk or seen him talking with Cpl Young-Jones or MWO Y. During his interview with the Commission, Cpl Lorette could not remember whether Sgt Degrasse had appeared on the catwalk during the exercise. He stated that he remembered only Cpl Young-Jones and MWO Y being present on the catwalk during the exercise.²⁶⁹ Since it was a temporary assignment and he had not worked for long at the DTF, he remembered very little about that period of his tour in Afghanistan.

204. Even though MWO Y and Cpl Lorette did not remember Sgt Degrasse being on the catwalk on the morning of the exercise, the evidence shows that Sgt Degrasse did indeed go to the catwalk and interact with Cpl Young-Jones. It is clear that, at that moment, Sgt Degrasse confirmed that he was in a riot exercise situation. In addition, only Sgt Degrasse stated that he had telephoned MCpl Gasparro while he was on the catwalk. None of the other witnesses said they had observed that. However, MCpl Gasparro stated that he had received a call from Sgt Degrasse from the catwalk telling him that an exercise was underway and to send the troops to the DTF.

²⁶⁷ Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 9.

²⁶⁸ Transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 119, 143.

²⁶⁹ Transcript of Commission interview with Sgt Lorette, 4 April 2018 at 00h:46m:17s.

5.5.3 The Guards and the Extraction of the Detainee

205. As mentioned previously, MCpl Gasparro confirmed receiving the call from Sgt Degrasse and said that Sgt Degrasse has asked him to send [translation] “everyone” to the DTF.²⁷⁰

MCpl Gasparro said that he informed Cpl Dauphinais, who was with him at the time, of the exercise and instructed him to gather the other guards who were in the break room and to join Sgt Degrasse at the DTF.²⁷¹ MCpl Gasparro said that, at the moment of the call, he was seated at Sgt Degrasse’s desk and that Maj X moved to his side while taking notes.²⁷² MCpl Gasparro said that he and Maj X moved to the shift supervisor’s assistant’s desk. He stated that he then began the procedures for recalling the troops.²⁷³

206. During his interview with the Commission, MCpl Gasparro confirmed that he received a call from Sgt Degrasse informing him that the exercise was being held. When questioned as to how long Sgt Degrasse was absent from the guardhouse, MCpl Gasparro estimated that about 5 to 10 minutes had elapsed between the Sgt’s departure and return.²⁷⁴ MCpl Gasparro said that when he and Maj X were talking about the calls to make, Maj X could see the DTF’s surveillance camera monitors, which allowed him to observe the actions of the detainees in the cells. However, he could not confirm whether Maj X had actually been paying attention to the monitors.²⁷⁵

207. Maj X did not mention a conversation with MCpl Gasparro while they were alone in the guardhouse. During the interview on February 25, 2011, MCpl O’Bready told Maj X that, at Sgt Degrasse’s request, MCpl Gasparro had notified Cpl Dauphinais of the exercise and had

²⁷⁰ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 5.

²⁷¹ *Ibid.* It should be noted that during his interview with the Commission, MCpl Gasparro said that he had asked Cpl Dauphinais to inform the guards who were in the break room about the exercise, then join Sgt Degrasse below the catwalk. See also recording of Commission interview with MCpl (Retired) Gasparro, November 7 2017 at 00h:28m:03s and 00h:28m:21s.

²⁷² Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 5.

²⁷³ *Ibid.* at 5-6. It should be noted that, during his interview with the Commission in 2017, MCpl Gasparro said that after Sgt Degrasse left, he had a discussion with Maj X about what he would do in a riot situation at the DTF. That discussion led him to carry out a recall of the troops. See also the recording of the Commission interview with MCpl (Retired) Gasparro, November 7 2017 at 00h:24m:43s and 00h:34m:10s.

²⁷⁴ Recording of the Commission interview with MCpl (Retired) Gasparro, 7 November 2017 at 00h:24m:43s and 00h:38m:18s.

²⁷⁵ *Ibid.* at 00h:24m:43s and 00h:39m:06s.

asked him to inform the guards in the break room. Maj X said that he did not remember that event.²⁷⁶

208. It should be mentioned that Maj X referred to his notes during his interviews on February 3, 2011, and February 25, 2011, in order to describe certain things he had observed during the exercise. Following those interviews, on March 2, 2011, Maj X asked MCpl O'Bready to meet with him again to give him more details about the method he had used in order not to create confusion about the moment when certain events had purportedly happened. Maj X explained during that third meeting with the CFNIS JTF-Afg that what he had written in his notebook reflected the time elapsed from the start of the exercise recorded using a timer rather than the actual time.²⁷⁷ Maj X confirmed during his interview with the Commission that he had used that method, and he reiterated that he had timed the events which he had written down in his notebook starting from the moment the exercise began, and that he could not confirm the specific time.²⁷⁸

209. Maj X's recollection of MCpl Gasparro's involvement in the exercise seemed vague during his interview with the Commission. He said that he remembered that MCpl Gasparro had initiated the recall of the troops, but later in the interview he corrected himself, saying that he had seen Sgt Degrasse conduct the recall and communicate with Lt Busset, an event which he had written in his notebook at 7.75 minutes.²⁷⁹ It should be mentioned that Maj X had written in his notebook at 4.5 minutes, "Info confirmed."²⁸⁰ Maj X stated that it was Sgt Degrasse who had told him that he had confirmed the information about the exercise with Cpl Young-Jones. However, the entry in the notebook, if it was made at the time when the words were said as described by Maj X, is more consistent with the testimony of MCpl Gasparro, who said that he had received Sgt Degrasse's call from the catwalk confirming the exercise.

²⁷⁶ Transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 71.

²⁷⁷ Transcript of CFNIS JTF-Afg interview with Maj X, 2 March 2011 at 7-9.

²⁷⁸ Transcript of Commission interview with Maj X, 21 August 2017 at 159, 194.

²⁷⁹ Document 020 at 337.

²⁸⁰ *Ibid.*

210. Cpl Dauphinais confirmed what MCpl Gasparro had said. He stated that he had been intercepted by MCpl Gasparro when he was returning from the washroom located outside.²⁸¹ Cpl Dauphinais explained that MCpl Gasparro was on the telephone at his desk and Maj X was taking notes near the [translation] “bulletin board” when MCpl Gasparro asked him to wait with him.²⁸² Once the call ended, MCpl Gasparro gave him the following instructions: [translation] “Go and get your group – the guys on the other side in the break room, the patrol guys – tell them it’s an exercise, we’ve got a riot.”²⁸³ However, during his interview with the Commission, he said that he did not recall Maj X being present during his interaction with MCpl Gasparro.²⁸⁴

211. We can therefore conclude that MCpl Gasparro received a call from Sgt Degrasse while he was at Sgt Degrasse’s desk. He intercepted Cpl Dauphinais to tell him that there was a riot exercise and instructed him to notify the guards who were in the break room to go and join Sgt Degrasse at the DTF. We conclude that this happened under the watchful eye of Maj X, who was taking notes in his notebook.

5.5.3.1 Mobilization of the Guards in the Break Room

212. After receiving MCpl Gasparro’s directives, Cpl Dauphinais went to the break room. He stated that he told the guards where the exercise was happening, as follows: [translation] “Let’s go, guys. Let’s go, hell, we’ve got a riot on the other side. That’s the scenario, let’s go, hurry up.”²⁸⁵ He said that, because the guards were slow to react, he repeated his directions with more emphasis.²⁸⁶

213. Corporals Bilodeau-Roy, Firreri and Roy all stated that Cpl Dauphinais had entered the break room shouting that there was a riot in the DTF.²⁸⁷ Cpl Gratton told both JTF Afg CFNIS and the Commission that an individual – he did not remember who – had entered the break room

²⁸¹ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 6.

²⁸² *Ibid* at 11.

²⁸³ *Ibid* at 6; recording of Commission interview with Cpl Dauphinais, 24 August 2017 at 00h:35m:50s and 00h:43m:56s.

²⁸⁴ Recording of Commission interview with Cpl Dauphinais, 24 August 2017 at 00h:45m:28s.

²⁸⁵ Transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 6.

²⁸⁶ *Ibid* at 6.

²⁸⁷ Transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at ; transcript of CFNIS JTF-Afg interview with Cpl Firreri, 30 January 2011 at 5; transcript of CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 8.

to tell them that there was a riot at the DTF.²⁸⁸ Cpl Dandurand stated that he was in front of Sgt Degrasse's desk when the exercise began for him.²⁸⁹ However, during his interview with the Commission, he said that he had been dozing in the break room with other guards when Cpl Dauphinais entered, clapping his hands, to inform them that there was a riot in the DTF.²⁹⁰

214. As soon as Cpl Dauphinais informed his five colleagues of the situation at the DTF and told them that they had to go there, MCpl Gasparro started recalling the troops. The break room was located just a few feet from MCpl Gasparro's desk, but MCpl Gasparro told CFNIS JTF-Afg that he had not heard Cpl Dauphinais talking with his colleagues, as he was on the telephone recalling the troops.²⁹¹ During his interview with the Commission, MCpl Gasparro said that he remembered that Cpl Dauphinais had gone to the break room and informed the guards, who all left, presumably to go to the DTF.²⁹²

215. During his interview on February 3, 2011, Maj X referred to his notebook in order to recap the events, and he said that at 5.5 minutes, "the duty shift"²⁹³ left to go to the catwalk in order to create a show of force.²⁹⁴ In his interview on February 25, 2011, when asked whether he had heard Cpl Dauphinais enter the break room and inform the guards of the exercise, and had seen them leaving the break room, Maj X replied that he did not remember him saying that or what had happened in the break room. When asked again whether he had seen the guards leave the break room, Maj X finally acknowledged that he had seen them leave, but that at that moment he assumed that they were leaving to conduct the normal routine at the DTF, as it was time for the detainees' morning visit to the washrooms.²⁹⁵ He added that he had not seen them leave the room [translation] "in a panic," and he did not remember which door they used when they left the room.²⁹⁶

²⁸⁸ Transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 5; recording of Commission interview with Cpl Gratton, 13 September 2017 at 00h:38m:48s and 00h:42m:26s.

²⁸⁹ Transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 5, 9-10.

²⁹⁰ Recording of Commission interview with MCpl Dandurand, 4 October 2017 at 00h:14m:10s, 00h:15m:01s and 00h:15m:20s.

²⁹¹ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 11.

²⁹² Recording of Commission interview with MCpl (Retired) Gasparro, 11 July 2017 at 01h:26m:13s and 01h:26m:40s.

²⁹³ In French: "le quart de travail en fonction" (Shift A).

²⁹⁴ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 16.

²⁹⁵ Transcript of CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 76.

²⁹⁶ *Ibid* at 77.

216. There can be no doubt that Cpl Dauphinais communicated convincingly with the five other guards who were in the break room at that moment. They all left for the DTF at the same time through Door 11, which is at the rear of the break room and leads to the DTF.²⁹⁷ The five guards (not including Cpl Dauphinais) said during their interviews with CFNIS JTF-Afg that at the moment when they left the break room, they believed they were in a real situation when the exercise began for them, and that no one had told them from the beginning that it was an exercise.²⁹⁸ They said the same thing during their interviews with the Commission. Thus, despite the fact that Cpl Dauphinais was with the five other guards from the beginning of the exercise until the extraction of the detainees, it seems that only he was aware at that moment that it was an exercise. Corporals Bilodeau-Roy, Firreri, Roy, Dandurand and Gratton thought that they were in a real situation.

5.5.3.2 The Guards' Encounter with Sgt Degrasse

217. Following the announcement made by Cpl Dauphinais, the six guards quickly left the break room to go to the DTF. According to the testimonies gathered by the Commission, to get there, they went along the guardhouse toward Door 13.²⁹⁹ After passing through that door, they headed for the DTF entrance where the lockers used for storing the service weapons were located. That was also the place where they could access the stairs leading to the catwalk and the door leading to the DTF cells.

218. Sgt Degrasse told CFNIS JTF-Afg that he encountered the guards who were coming from the guardhouse at the moment when they came through the door leading to the DTF. After they had entered and gone to the lockers containing the service weapons, Sgt Degrasse, seeing that MCpl Gasparro was not there, returned to see that the guards had already entered the area below the catwalk in the DTF's cell corridor.³⁰⁰ Sgt Degrasse explained that he had given the cell numbers and had told the guards to wait until he returned.³⁰¹ On that point, Sgt Degrasse said

²⁹⁷ See Annex A.

²⁹⁸ Transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 10-11; transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 6; transcript of CFNIS JTF-Afg interview with Cpl Firreri, 30 January 2011 at 17, 21, 35; transcript of CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 12; transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 9.

²⁹⁹ See Annex A.

³⁰⁰ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 8-9, 17.

³⁰¹ *Ibid* at 8-9, 17.

that he was not sure whether the guards were listening attentively. He said that it was possible that they had not all heard the order to wait, as some of them were farther away from him.³⁰²

219. MCpl O'Bready asked Cpl Dandurand whether he had run into Sgt Degrasse and whether the Sgt had asked him to wait.³⁰³ Cpl Dandurand stated that he had heard someone say, [translation] "Wait. Wait" when they arrived in front of Cell 7, but he could not confirm whether that person was Sgt Degrasse.³⁰⁴ Corporals Dauphinais, Bilodeau-Roy and Firreri stated that they had run into Sgt Degrasse when they arrived at the DTF near the service-weapon lockers.³⁰⁵ In addition, Cpl Dauphinais acknowledged that he had heard Sgt Degrasse's instructions. He thought that the Sgt had given them the instruction, [translation] "Everyone stay below."³⁰⁶ Corporals Gratton and Roy did not remember that event.³⁰⁷

220. Corporals Young-Jones and Lorette, who were both on the catwalk at that moment, did not recount that event, and they were not asked about it specifically during their interviews with CFNIS JTF-Afg. Cpl Young-Jones told the Commission that he had no recollection of that event. As mentioned previously, Cpl Lorette did not remember Sgt Degrasse being present on the catwalk.³⁰⁸ Corporals Young-Jones and Lorette also stated that they did not remember hearing the guards in the corridor below the catwalk.

221. During his interview with CFNIS JTF-Afg, MWO Y was not questioned regarding the presence of Sgt Degrasse on the catwalk or the instructions that Sgt Degrasse may have given to the guards who were below the catwalk. During his interview with the Commission, MWO Y said that he did not remember Sgt Degrasse coming up onto the catwalk during the exercise.³⁰⁹

³⁰² *Ibid* at 17-18.

³⁰³ Transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 20, 36-37.

³⁰⁴ *Ibid* at 36-37.

³⁰⁵ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 30 January 2011 at 7, 13; transcript of CFNIS JTF-Afg interview with Cpl Firreri, 30 January 2011 at 5; transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 11.

³⁰⁶ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 7.

³⁰⁷ Transcript of CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 14; transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 13-14; recording of Commission interview with Cpl Gratton, 13 September 2017 at 00h:44m:47s.

³⁰⁸ Recording of Commission interview with Sgt Lorette, 4 April 2018 at 00h:46m:20s.

³⁰⁹ Transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 143.

5.5.3.3 The Guards' Preparation

222. The six guards went to the service-weapon storage lockers at the entrance to the DTF. Once the weapons had been put away, the guards entered the first door leading to the cells. There, the six guards picked up the equipment necessary for dealing with a riot. According to the guards, they discussed the equipment required and the division of tasks for handling the situation. During his interview with the Commission, Cpl Dandurand said that they had talked in a normal tone during that discussion, meaning that they did not whisper or talk loudly.³¹⁰ Following that brief discussion, the guards took a shield, batons and restraint equipment, namely earmuffs, goggles and plastic handcuffs, and went through the door leading to the corridor below the catwalk where the cells were located.³¹¹

223. During the interviews conducted by CFNIS JTF-Afg, all of the guards' descriptions of that part of the exercise were very similar. They stated that they had taken the anti-riot gear deemed necessary after discussing the roles. Cpl Dauphinais was in charge of gathering the keys to the cells,³¹² Cpl Gratton was responsible for gathering the restraint equipment,³¹³ and the other guards took the shields and batons into the room located directly under the entrance to the catwalk which gave access to the cell corridor.³¹⁴ The guards confirmed those facts during their interviews with the Commission. According to their testimonies, they then entered the corridor below the catwalk which gave access to the cells and asked for instructions.

5.5.3.4 Cell 7

224. According to the evidence gathered, the six guards entered the corridor that gave access to the cells without having any specific idea of the nature of the operation to be carried out and were seeking instructions or direction from their colleagues and supervisors on the catwalk. First, they stopped in front of Cell 2, which was located at the entrance to the cell corridor.³¹⁵

³¹⁰ Recording of Commission interview with Cpl Dandurand, 4 October 2017 at 03h:00m:33s.

³¹¹ *Ibid* at 01h:52m:15s.

³¹² Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 10.

³¹³ Transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 13; transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 7.

³¹⁴ Transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 12.

³¹⁵ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 8.

Sgt Degrasse saw them there, told them they were not in the right place and directed them to cells 7 or 8.³¹⁶

225. Three guards told CFNIS JTF-Afg that they had heard a guard on the catwalk tell them, “Cell 7.”³¹⁷ Corporals Young-Jones and Lorette, two English speakers, were working on the catwalk at that moment. Cpl Ferreri identified Cpl Young-Jones as the one who had given the directions.³¹⁸ Cpl Lorette told CFNIS JTF-Afg that it was possible that he and Cpl Young-Jones had told the guards to go to Cell 7. Therefore, it is reasonable to believe that one of the two guards on the catwalk had told the guards who were in the corridor to go to Cell 7. In addition, Cell 7 was one of the cells identified as problematic when the exercise scenario was launched. According to the evidence gathered, the six guards immediately went to Cell 7, in which there was only one detainee.

226. It should be noted that that conversation among the six guards on the catwalk, while there was confusion, and even a certain urgency, should not have gone unnoticed by anyone who had the task of supervising an exercise at the DTF. However, during his interview with CFNIS JTF-Afg, MWO Y, who had been on the catwalk at the time, stated that he had heard nothing below the catwalk before the morning washroom routine. MCpl O’Bready told him that, according to the testimonies, the guards below the catwalk had stopped in front of Cell 2 and that one of the guards on the catwalk had told them to go to Cell 7. Only MWO Y stated that he had not seen the response team enter. MWO Y, who had the role of observing and controlling the actions of the guards on the catwalk, stated that he had not seen the guard on the catwalk speak to the response team.³¹⁹ During his interview with the Commission, MWO Y maintained that he did not remember Sgt Degrasse being present on the catwalk during the exercise or the arrival of the guards.³²⁰

³¹⁶ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 8; transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 8-10.

³¹⁷ Transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 7, 12, 14; transcript of CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 9; transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 10-11.

³¹⁸ Transcript of CFNIS JTF-Afg interview with Cpl Ferreri, 30 January 2011 at 9, 20; also Document 152, Answers to interview questions by email from Sgt Ferreri, 26 February 2018 at 4.

³¹⁹ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 25-27.

³²⁰ Transcript of Commission interview with MWO (ret’d) Y, 30 August 2018 at 119-121.

5.5.3.5 Entry of the Guards into Cell 7

227. During the investigation conducted by CFNIS JTF-Afg, only Corporals Gratton and Dandurand stated that they had heard “Go” or “Okay” during the exercise of January 19, 2011 while they were in front of Cell 7.³²¹ Corporals Bilodeau-Roy and Dauphinais stated that they had not received any instructions.³²² Cpl Roy first said that he had asked the people on the catwalk if everything was okay before entering, then corrected himself, stating that they had not received the authorization or the instruction to enter as such, but that they had been given the cell number.³²³ Lastly, Cpl Ferreri answered MCpl O’Bready’s question about who had given the “go” by saying that everything had been quick, but without saying that he had heard a “go” or that a “go” had been received.³²⁴

228. Corporals Young-Jones and Lorette did not state that they had given authorization to enter the cell. Cpl Lorette said that he had not seen what was happening at that cell. Cpl Young-Jones said that he had seen the extraction, but he was not asked whether he had given the authorization to enter. He stated the following: “Throughout the exercise, while it was being performed, they did remove a detainee to use Cell 7.”³²⁵ Later in the interview, MCpl O’Bready asked him the following question: “Did he [MWO Y] – from his position, could he see the detainee in Cell 7 with the guys going inside? Because you saw them going in the cell.”³²⁶ Cpl Young-Jones answered as follows:

Yes [...] The majority of the time, he was on the other side of the catwalk, but at one point, he did come over that I witnessed that he came over to my side and talked to them over the edge where – it would be the bathroom’s here, the medical trailer/van, just upper and lower catwalk, okay.³²⁷

229. During their interviews with the Commission, only Cpl Bilodeau-Roy gave a different version than the one he had given to CFNIS JTF-Afg in 2011. He said that he had obtained the authorization, i.e., the “go,” from the catwalk before entering the cell. Cpl Bilodeau-Roy said

³²¹ Transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 37; transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 8, 14.

³²² Transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 14; transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 8.

³²³ Transcript of CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 15-16.

³²⁴ Transcript of CFNIS JTF-Afg interview with Cpl Ferreri, 30 January 2011 at 30-31.

³²⁵ Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 5.

³²⁶ *Ibid* at 12.

³²⁷ *Ibid* at 12-13.

that, according to the procedure for entering the cells, authorization was required before carrying out any intervention in a cell.³²⁸ It should also be noted that Corporals Dandurand and Roy had no recollection of that portion of the exercise on January 19, 2011.³²⁹

230. Therefore, we can conclude that the guards went to Cell 7, where they stopped. Based on the evidence gathered, it seems unlikely that one of the three people on the catwalk authorized the guards to enter Cell 7. The guards were probably simply directed to that cell. Once they were in front of it, having received no instructions, the guards decided collectively to enter Cell 7 in order to extract the detainee.

5.5.3.6 Extraction of the Detainee

231. The testimonies gathered regarding the extraction corroborate the images recorded on the videotape disclosed to the Commission. The videotape of the extraction in question shows Corporals Dandurand, Bilodeau-Roy, Roy, Ferreri and Gratton, followed by Cpl Dauphinais, entering Cell 7 at 04:08:43, according to the video timestamp. The Commission notes that the video of the extraction of the detainee does not show any excessive use of force by the guards during the extraction. Therefore, contrary to what was alleged in the anonymous complaint, the evidence clearly demonstrates that the guards did not enter the detainees' cells with 9-mm pistols and did not pin detainees to the walls or apply arm locks.³³⁰

232. During their interviews, the guards said that they had entered the detainee's cell in diamond formation with one guard holding a shield in front, flanked by two guards on each side and a fourth behind them. A fifth was a short distance away, holding the restraint equipment. Cpl Bilodeau-Roy ordered the detainee to get up, and the detainee obeyed the order. The detainee then put on his sandals to walk toward the guards. Cpl Bilodeau-Roy grabbed him and passed him to Cpl Ferreri and they left the cell. According to some guards, Cpl Bilodeau used a firm tone when addressing the detainee.³³¹ The procedure used by the guards during the

³²⁸ Recording of Commission interview with Sgt Bilodeau-Roy, 26 July 2017 at 00h:44m:30s.

³²⁹ Recording of Commission interview with Sgt Roy, 29 August 2017 at 01h:07m:58s; recording of Commission interview with Cpl Dandurand, 4 October 2017 at 02h:15m:47s.

³³⁰ See part 5.6 of this report for a discussion of the other exercises at the DTF.

³³¹ Transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 23; transcript of CFNIS JTF-Afg interview with Cpl Ferreri, 30 January 2011 at 23.

extraction of the detainee is confirmed by the images that can be seen on the video of the extraction of the detainee concerned. It should be noted that the video of the extraction of the detainee has no sound.

5.5.4 Actions Following the Extraction of the Detainee

233. Except for Cpl Gratton, the guards who participated in the extraction said during their interview with CFNIS JTF-Afg that they had received no instructions from anyone on the catwalk when they were in the corridor outside Cell 7 with the detainee.³³² Cpl Gratton said that an individual said [translation] “Look, put him back in the cell,” but he could not confirm the individual’s identity.³³³

234. Everything seemed calm in the DTF, and the majority of the guards said that one of them had asked the detainee if he wanted to go to the washroom, since it would soon be time for the morning routine. The detainee refused the guards’ offer and they simply put him back in his cell. That was at 04:10:40, according to the timestamp on the extraction video. Also visible on the video was the detainee returning quietly to his bunk and going underneath the covers. He did not seem upset, nor did he show any signs of physical injury as he returned to his bed and got back under the covers. The guards said that the operation had taken only a few minutes. According to the video timestamp, the operation took less than two minutes, from 04:08:43 hours to 04:10:40 hours.

5.5.4.1 Washroom Routine

235. Once the detainee was returned to his cell, the guards decided to conduct the morning washroom routine. It should be noted that the washroom routine began after the extraction, around 0411 hours. Cpl Dauphinais said that he had left the cell corridor to get the keys to the other cells in order to carry out the morning routine.³³⁴

³³² Transcript of CFNIS JTF-Afg interview with Cpl Bilodeau-Roy, 31 January 2011 at 18; transcript of CFNIS JTF-Afg interview with Cpl Dandurand, 30 January 2011 at 26.

³³³ Transcript of CFNIS JTF-Afg interview with Cpl Gratton, 21 February 2011 at 14-15.

³³⁴ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 9-10.

236. Cpl Dandurand also said during his interview with the Commission that he had heard MWO Y say some words after the extraction of the detainee. He stated that he heard MWO Y say, [translation] “No, no, no, that’s not how it’s done! Not like that, no, no, no, no, no, no.”³³⁵ Cpl Dandurand said that he knew MWO Y’s voice well and that there was no doubt that it was him, even though he had not observed him directly at the moment when MWO Y was speaking to them.³³⁶ The voice was coming from the catwalk. When asked whether MWO Y was talking to the guards below the catwalk, Cpl Dandurand replied, [translation] “No, he was talking to the people who were on the catwalk.”³³⁷

237. MCpl Gasparro told CFNIS JTF-Afg that, after making a few calls, he had left his desk shortly after Sgt Degrasse’s return in order to supervise the guards from the catwalk.³³⁸ Once he arrived on the catwalk, he observed the guards, who were taking the detainees to the washrooms. He stated that he encountered MWO Y.³³⁹ MWO Y then told him that he should tell the guards to pause the normal routine during the exercise. He stated that he had told MWO Y that he was not the one who decided the time for the washrooms, but that it should be done before the prayer. He therefore told MWO Y that the decision was up to him. MWO Y told him to continue the normal washroom routine.³⁴⁰ MCpl Gasparro said that he had gone down below the catwalk to put away his weapons and had carried out the washroom routine with the other guards.³⁴¹

238. MWO Y told CFNIS JTF-Afg that he had asked why the guards were carrying out the washroom routine during the exercise. The interaction described by MWO Y is consistent with what MCpl Gasparro said. During his interview with the Commission, MWO Y did not remember interacting with MCpl Gasparro on the catwalk concerning the washroom routine during the exercise. However, he stated that he thought he had seen him on the catwalk.³⁴²

³³⁵ Recording of Commission interview with Cpl Dandurand, 4 October 2017, Part I at 02h:20m:35s.

³³⁶ *Ibid* at 02h:22m:08s, 02h:24m:20s and 02h:29m:12s.

³³⁷ Recording of Commission interview with Cpl Dandurand, 4 October 2017, Part I at 02h:29m:10s.

³³⁸ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 6.

³³⁹ *Ibid* at 7.

³⁴⁰ *Ibid* at 7, 12-13; recording of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 00h:06m:29s and 00h:07m:03s.

³⁴¹ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 7-8; recording of Commission interview with MCpl (Retired) Gasparro, July 11 2017 at 00h:55m:00s.

³⁴² Transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 243.

239. We can conclude that MCpl Gasparro left the guardhouse sometime after Sgt Degrasse's return in order to go to the catwalk. The testimonies of MCpl Gasparro and MWO Y indicate that, when MCpl Gasparro arrived on the catwalk, MWO Y said that the morning washroom routine should not be carried out. We can also conclude that the extraction of the detainee occurred between Sgt Degrasse's departure from the DTF and MCpl Gasparro's arrival on the catwalk. The testimonial evidence demonstrates that the washroom routine began after the detainee had been returned to his cell.

5.5.4.2 MWO Y and the Extraction of the Detainee

240. During his interview with CFNIS JTF-Afg, MWO Y first said that he had heard noise coming from the cells during the exercise. He said that the noise was caused by the guards carrying out the detainees' normal washroom routine. MWO Y stated that he asked the guards why they were carrying out those tasks during the exercise. He said that the guards replied, [translation] "... We can't interrupt the service."³⁴³ He said that he then told them to continue the routine, saying, [translation] "We won't involve the detainees."³⁴⁴ A few minutes after that discussion, he heard a noise coming from the direction of the cells at the far end of the catwalk. He stated that he asked one of the guards who was beside him, whom he could not identify, what was happening, but that the guard did not know.³⁴⁵ He said that he then asked the guards, [translation] "What's going on? Stop it."³⁴⁶ He said that he learned [translation] "much later" that the guards had extracted a detainee from his cell at that point.³⁴⁷

241. When asked whether he had given instructions to the guards who were below the catwalk, MWO Y replied that he did not remember.³⁴⁸ MWO Y indicated that he was near the first cells above the stairs during the exercise.³⁴⁹ He stated that he was standing near the telephone in the middle of the catwalk.³⁵⁰ He said that he had remained [translation] "in pretty much the same place" during the exercise, i.e., [translation] "beside...the guard" to

³⁴³ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 8.

³⁴⁴ *Ibid.*

³⁴⁵ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 21.

³⁴⁶ *Ibid* at 8.

³⁴⁷ *Ibid.*

³⁴⁸ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 13.

³⁴⁹ *Ibid* at 16-17.

³⁵⁰ *Ibid* at 18-19.

[translation] “see what he...see what he was going to say on the telephone, et cetera.”³⁵¹ He said that when he heard the noise, he had to move, and he also described the catwalk and its two sections, i.e., the first part, made of wood, and the second part, made of metal. He said that he could not see through [translation] “the metal platform.” On that subject, he also said, [translation] “I didn’t know what was happening when I heard the noise from there, because I couldn’t see.”³⁵²

242. It should be noted that none of the guards who participated in the extraction of the detainee stated in their interviews with CFNIS JTF-Afg that they had heard MWO Y address the group, or one of them specifically, at the time of the extraction to give them instructions, or even after the extraction of the detainee, despite the instructions that MWO Y had apparently received from Maj X. According to Maj X, he had had to ensure that the detainees were not disturbed during the exercise.³⁵³

243. When asked whether he had thought he was in the right place during the exercise, given that his task was to ensure that the guards did not enter the cells, especially since there was no direct observation of the floor below the catwalk, MWO Y replied, [translation] “Yes and no.” MWO Y added that there are situations that can’t be foreseen. He said he had not expected that a shift sergeant would take the initiative to carry out a cell extraction. He said that it was completely out of context. Therefore, to answer the question, MWO Y said that he had had to watch what was happening on the catwalk. He added that in the future, he would put a guard in front of the entrance to the DTF, in the centre, where the cells were located.³⁵⁴ He also said that his task had been to remain on the catwalk and observe what the guards there were doing. He added that his role was not to prevent the guards [translation] “from entering the detention facility.”³⁵⁵ That statement contradicts Maj X’s. As mentioned previously, Maj X said that MWO Y had had the role of controlling the exercise from the catwalk and was supposed to ensure that the guards were not disturbing the detainees during the exercise.³⁵⁶

³⁵¹ *Ibid* at 18.

³⁵² *Ibid* at 17.

³⁵³ See part 5.4.2 of this report for a discussion of the objective of the exercise.

³⁵⁴ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 28-29.

³⁵⁵ *Ibid* at 29.

³⁵⁶ See part 5.4.2 of this report for a discussion of the objective of the exercise.

244. When asked whether he knew that there were guards below the catwalk, given that he had heard noise, MWO Y said yes.³⁵⁷ However, he added that he had thought it was time for the detainees' morning washroom routine. MCpl O'Bready asked him whether that would have been a good time, when he heard the noise, to go down below the catwalk to see what was happening.³⁵⁸ MWO Y repeated that he had thought it was the normal routine, i.e. the time of the washroom routine. MCpl O'Bready then asked him why he had not confirmed that that was actually the case by going down below the catwalk. MWO Y replied by asking why he would have confirmed that information, adding that [translation] "I was told" that it was the washrooms, so he thought the noise concerned was occurring because the guards were carrying out the detainees' morning washroom routine.³⁵⁹

245. Thus, MCpl O'Bready, despite directing a few questions to MWO Y, did not try to find out why he had, in his own words, told the guards below the catwalk, [translation] "Stop it." If MWO Y had thought, as he claimed, that the guards were carrying out the normal washroom routine, he had no reason to ask them to stop their work – especially if he had not observed the guards carrying out the extraction of the detainee as he stated.

246. During his interview with the Commission, MWO Y repeated that he had heard noise while he was on the catwalk during the exercise.³⁶⁰ He could not be specific about the nature of the noise or exactly where it was coming from. When asked whether he had witnessed the extraction, he replied that he had little recollection of that event.³⁶¹

247. During his interview with CFNIS JTF-Afg, Cpl Young-Jones said that MWO Y had approached him during the exercise to speak to the guards below the catwalk. When asked what MWO Y had said to the guards, Cpl Young-Jones could not say what MWO Y had said to them because he did not understand French, the language used during that conversation.³⁶² In his interview with the Commission, Cpl Young-Jones could not remember exactly what had

³⁵⁷ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 30.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid* at 31.

³⁶⁰ Transcript of the Commission interview with MWO (Retired) Y, 30 August 2017 at 19, 145.

³⁶¹ *Ibid* at 145.

³⁶² Transcript of CFNIS JTF-Afg interview with Cpl Young-Jones, 31 January 2011 at 13.

happened during the exercise. He was more uncertain of his answer when he said that it was possible that MWO Y had communicated with the guards while they were doing the extraction of the detainee: “He may have approached them but I don’t independently recall him.”³⁶³

248. During his interview with CFNIS JTF-Afg, Cpl Lorette stated that he had seen MWO Y go to the far end of the catwalk above the cell where the extraction had taken place, although he seemed less than certain.³⁶⁴ He did not say that MWO Y had talked to the guards below the catwalk. During his interview with the Commission, Cpl Lorette was also uncertain of his recollections of the event of January 19, 2011. He could not confirm with certainty that MWO Y had gone to the far end of the catwalk. He added that MWO Y had not talked with the guards below the catwalk, as he had remained with Cpl Young-Jones and himself. He said that he thought that if MWO Y had talked with the guards, it would have been a post-exercise meeting and that when he was on the catwalk he had not talked with anyone below the catwalk.³⁶⁵

5.5.5 Maj X’s Notes concerning the Extraction of the Detainee

249. Maj X, referring to his notes from the exercise during his interview on February 3, 2011, had the following to say about the extraction:

[translation]

After that, at 10 minutes 45, that’s when I wrote “Extraction complete of troublemaker.” That means there was an extraction that was fictional as far as I was concerned, because just before, I had said to Sergeant Degrasse, in the first minute, “It’s an exercise, you continue your normal routine.” And that, I remember it very clearly. I said to him, “You continue your normal routine.”³⁶⁶

250. In addition, Maj X said that no one had told him that a cell extraction had been carried out at the DTF, that he had heard it said but could not identify who had been talking about it.³⁶⁷ It should be noted that Maj X was not asked any questions regarding what he had written in his notebook at 10:45, either during his interview on February 25, 2011 or on March 2, 2011 during his third meeting with CFNIS JTF-Afg.

³⁶³ Recording of Commission interview with Cpl Young-Jones, 11 September 2017 at 01h:23m:08s.

³⁶⁴ Transcript of CFNIS JTF-Afg interview with Cpl Lorette, 16 February 2011 at 19.

³⁶⁵ Recording of Commission interview with Sgt Lorette, 4 April 2018 at 00h:43m:02s.

³⁶⁶ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 17.

³⁶⁷ *Ibid* at 23.

251. During his interview with the Commission, Maj X said that 10 minutes and 45 seconds after the exercise began, Sgt Degrasse, who was seated in front of him, told him that he had extracted the person who had been causing “trouble” from his cell.³⁶⁸ He had then made a note of that event in his notebook, explaining that he was writing down in it the actions taken by Sgt Degrasse throughout the exercise. He had thought that it was a fictional cell extraction. Sgt Degrasse stated to the Commission that he did not remember whether Maj X had had a notebook during the exercise. He said that he had never said the words “cell extraction complete of troublemaker” or that he would carry out a cell extraction.³⁶⁹ He stated that he learned later that morning, possibly during a post-exercise debrief, that there had been an extraction.³⁷⁰

252. In addition, Maj X stated several times that the surveillance camera monitors at the DTF were behind him and that he could not watch them, but he also said that he could see on the monitors that the detainees were sleeping. According to the testimonies gathered, it is possible, with a little movement, to view the monitors and observe any activity inside the cells. On the balance of probability, it is likely that the words in Maj X’s notebook had been written following the observation of the extraction on the monitors. It also seems more likely that that observation was made by Maj X rather than by Sgt Degrasse or MCpl Gasparro, neither of whom would have had any reason to deny that fact if one of them had actually communicated the information to Maj X during the exercise or if they had discussed it in front of him. As mentioned previously, the time shown on the video timestamp at the end of the extraction is 04:10:40, and it coincides with the less precise timing used by Maj X, namely 10 minutes and 45 seconds. According to the testimonies, only MCpl Gasparro, Maj X and possibly Sgt Degrasse were at the desk at that exact time.

5.5.6 Discussion between MWO Y and Cpl Dauphinais

253. During his interview with CFNIS JTF-Afg, Cpl Dauphinais said that he had seen MWO Y coming down the stairs from the catwalk while he was on his way to pick up a second set of keys to carry out the washroom routine. He said that MWO Y had started saying

³⁶⁸ Transcript of Commission interview with Maj X, 27 August 2017 at 166-167.

³⁶⁹ Summary of Commission interview with WO Degrasse, 24 October 2017 at 8.

³⁷⁰ *Ibid* at 4.

[translation] “stupid things” to him.³⁷¹ Cpl Dauphinais described the interaction as follows: [translation] “I couldn’t tell you in his own words, but he was saying it was shitty. The SOPs weren’t followed. We didn’t do our job... I knew he was pissed off...³⁷² When asked what had made him think MWO Y was [translation] “pissed off,” Cpl Dauphinais replied that it was the attitude and the way in which MWO Y was talking to him. He said that MWO Y said something like the following: [translation] “You have no business entering the cell.”³⁷³ When asked whether the guards were present during that exchange with MWO Y, Cpl Dauphinais said no.³⁷⁴ Cpl Dauphinais testified to similar effect during his interview with the Commission.³⁷⁵ He assumed that MWO Y’s reaction was due to the fact that they had entered the cell, but he could not say for sure.³⁷⁶

254. MWO Y did not mention that exchange when he presented his version of the facts during his interview with CFNIS JTF-Afg. In addition, when asked, he did not remember that encounter with Cpl Dauphinais at the bottom of the stairs leading to the catwalk.³⁷⁷ However, when MCpl O’Bready read to him the words he was said to have uttered, particularly a swear word, MWO Y stated that he did not recall using that word and then saying that the SOPs had not been followed.³⁷⁸ He then said that he did not remember exactly what he had said.³⁷⁹ On that question, during his interview with the Commission, MWO Y said it was possible that he had had a conversation with Cpl Dauphinais, but did not remember it.³⁸⁰ Thus, it is possible to conclude that there was in fact an encounter between Cpl Dauphinais and MWO Y. Although in the beginning, he had said that he had no recollection of that encounter, MWO Y did not deny it later, and even said during his interview with CFNIS JTF-Afg that the SOP had not been followed. His only remaining objection was regarding the exact words he was said to have used during that conversation with Cpl Dauphinais, which he said he did not remember.

³⁷¹ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 10.

³⁷² *Ibid* at 25.

³⁷³ Transcript of CFNIS JTF-Afg interview with Cpl Dauphinais, 31 January 2011 at 26.

³⁷⁴ *Ibid* at 26; recording of Commission interview with Cpl Dauphinais, 24 August 2017 at 00h:59m:21s.

³⁷⁵ Recording of Commission interview with Cpl Dauphinais, August 2017 at 00h:42m:32s.

³⁷⁶ *Ibid* at 00h:57m:53s, 00h:59m:00s.

³⁷⁷ Transcript of CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 32.

³⁷⁸ *Ibid* at 32-33.

³⁷⁹ *Ibid* at 33.

³⁸⁰ Transcript of Commission interview with MWO (Retired) Y, 30 August 2017 at 163.

255. That brief encounter at the foot of the stairs leading to the catwalk is quite revealing. If the guards were simply carrying out the normal morning routine and were not part of the recall exercise, MWO Y would have had no reason to say that the guards did not know the SOP. His bad mood at the time of that encounter also demonstrates the knowledge of an act that was not part of the DTF's normal routine. That aspect – an important aspect given the controller role which MWO Y was supposed to play during the exercise on the catwalk – was not explored by CFNIS JTF-Afg during its investigation. In fact, MWO Y was supposed to ensure that the detainees were not disturbed during the exercise.

5.5.7 Activities at the Guardhouse

256. MCpl Gasparro stated to CFNIS JTF-Afg that, before leaving to join the members of his shift at the DTF, he had begun the recall procedures while at his desk. First, he had contacted Lt Busset. He had then tried to call PO2 Grenier but was unsuccessful. He had immediately tried to call PO2 Gervais.³⁸¹ He said that in each call he had informed them that it was a riot exercise and had said [translation] “exercise, exercise, exercise.”³⁸² In addition, he said that the people contacted seemed surprised and did not seem to be aware that the exercise was being held. Maj X was at his side and was taking notes.³⁸³

257. Although we cannot determine the exact time when Sgt Degrasse returned to the guardhouse, we can deduce that it was while the extraction of the detainee was in progress. The evidence shows that the extraction occurred following that brief exchange between Sgt Degrasse and the guards who were already in the corridor leading to the cells. Sgt Degrasse then had to go to the DTF, which took more than a minute, according to Maj X's notes, which showed 1 minute and 20 seconds to get from the catwalk to the shift supervisor's desk.

258. Sgt Degrasse told CFNIS JTF-Afg that he had returned to his desk and had seen MCpl Gasparro making telephone calls.³⁸⁴ Sgt Degrasse then sat down at the computer and started searching for the SOP on the riot situation with which he was faced in the exercise,

³⁸¹ Transcript of CFNIS JTF-Afg interview with MCpl Gasparro, 31 January 2011 at 6.

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 9.

namely SOP 500.³⁸⁵ Sgt Degrasse said that he had looked for that SOP but did not find it on TacNet or in the books of SOPs in his desk. He stated that he had then brought out a small black book which had been given to him at a previous meeting. He stated that he looked in that book for the information regarding riots but found nothing in that document.³⁸⁶ He realized, much too late, that it was an old version of SOP 500.

259. Sgt Degrasse thought that the extraction had been carried out while he was back at his desk.³⁸⁷ When asked to specify how the recall of the troops to the DTF had been conducted, Sgt Degrasse first said that it was MCpl Gasparro who had begun recalling the troops.³⁸⁸ During the recall, he consulted the SOPs in his desk, but there was only the one about disturbance situations. That SOP stated that the POC LO³⁸⁹ had to be informed of the situation. Sgt Degrasse said that he had asked Maj X whether he should contact the POC LO anyway, given that it was an exercise. Maj X asked him, [translation] “Does it say that [in the SOPs]?” to which, Sgt Degrasse said, he had answered yes. Maj X had then told him to do it. Sgt Degrasse said that it was the only call he had made during the exercise.³⁹⁰ When asked whether Maj X had given instructions, such as instructions to enter a cell, Sgt Degrasse answered, [translation] “Absolutely not.”³⁹¹ Sgt Degrasse gave similar testimony during his interview with the Commission.³⁹²

5.5.8 Arrival of Lt Busset and the Recalled Troops

260. Lt Busset told CFNIS JTF-Afg that she had received a telephone call from MCpl Gasparro between 0403 hours and 0405 hours. MCpl Gasparro informed her of the exercise as follows: [translation] “Madam, exercise, exercise, exercise. We’re recalling the company. There’s a riot in the detention facility.”³⁹³ MCpl Gasparro then passed the telephone to

³⁸⁵ *Ibid* at 9, 19.

³⁸⁶ *Ibid* at 9-10, 19.

³⁸⁷ *Ibid* at 11.

³⁸⁸ *Ibid* at 28.

³⁸⁹ The abbreviation “POC LO” stands for “Provincial Operations Centre Liaison Officer.” (In French: “agent de liaison du Centre provincial des opérations.”)

³⁹⁰ Transcript of CFNIS JTF-Afg interview with Sgt Degrasse, 30 January 2011 at 29.

³⁹¹ *Ibid* at 31.

³⁹² Summary of the Commission interview with WO Degrasse, 24 October 2017 at 5.

³⁹³ Transcript of CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 6.

Maj X. During her conversation with Maj X, he informed her that it was an exercise within the company and not to contact [translation] “anyone” outside the company.³⁹⁴

261. Lt Busset said that upon her arrival at the guardhouse, around 0420 or 0425 hours, she had given instructions that the eight or nine members of Shift B were to report to the most senior member on the catwalk in order to create [translation] “a show of force” as set out in the SOP.³⁹⁵ She and PO2 Grenier then walked toward Sgt Degrasse’s desk.³⁹⁶ When they arrived at the desk, Sgt Degrasse was there. Regarding Maj X’s position, Lt Busset said, [translation] “And Major was, like, on the left, you know, where the cameras for the detainees were.”³⁹⁷ Lt Busset said that she had asked Sgt Degrasse to inform her about the situation. Sgt Degrasse had told her there was a disturbance situation in cells 6, 7 and 8. She said that she had told Sgt Degrasse that a disturbance should be dealt with at his level and that he knew what to do.³⁹⁸

262. Lt Busset said that Maj X then entered the office and informed her that it was not a disorder situation, but a riot in cells 6, 7 and 8.³⁹⁹ She said that she had replied by telling Maj X that it would be a riot situation if they had completely lost control of the DTF, but not if they had lost control of three cells. Maj X finally replied that it was a riot at the DTF. She then asked Sgt Degrasse to tell her what he had done so far. He told her, [translation] “Well, there are problematic detainees in cells 6, 7 and 8. So we put everyone on the catwalk. We recalled the entire company.”⁴⁰⁰

263. She then told Sgt Degrasse to stay at the desk while she and PO2 Grenier went to the catwalk to assess the situation.⁴⁰¹ When she was preparing to go up to the catwalk, Maj X announced the end of the exercise. She said that it was around 0430 hours when the exercise ended. Maj X then asked her to gather the members of her personnel who were on the catwalk

³⁹⁴ *Ibid* at 6.

³⁹⁵ Transcript of CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 8, 36.

³⁹⁶ *Ibid* at 8.

³⁹⁷ *Ibid* at 9.

³⁹⁸ *Ibid* at 8.

³⁹⁹ *Ibid* at 8-9.

⁴⁰⁰ *Ibid* at 9.

⁴⁰¹ *Ibid* at 9-10.

and to do a debriefing with them in the break room. After that, there would be a second debriefing with the non-commissioned officers.⁴⁰²

264. During her interview with the Commission, Lt Busset referred to the transcript of her interview with CFNIS JTF-Afg in 2011 to refresh her memory on that part of the exercise. She repeated what she had said, which seemed to be what she remembered of the events.⁴⁰³

265. During Maj X's interview on February 3, 2011, MCpl O'Bready questioned him about the conversation that Lt Busset said she had had with him. In that regard, Maj X stated the following: [translation] "To be frank with you, I don't remember a whole lot of details, because it all happened so fast. ... I, what ... according to my notes, if I can rely on my notes, it was more of a briefing on the situation, on what had happened. And I looked at Lieutenant Busset, and I said, [translation] 'What we're doing now is a recall.'"⁴⁰⁴ During his interview with the Commission, Maj X said the same thing concerning the arrival of Lt Busset and his interaction with her. He stated that he had approached her while Sgt Degrasse was filling her in on the situation and had simply told her that it was only a recall exercise. He also stated that the exercise had ended at 0437 hours, according to his personal notes from the exercise.⁴⁰⁵

266. According to the testimonies gathered during the investigation conducted by CFNIS JTF-Afg and during the PII, we can conclude that Lt Busset arrived at the guardhouse at about 0425 hours. That corresponds closely to the note made by Maj X in his notebook, where he recorded Lt Busset's arrival at 26.5 minutes. Maj X's notes also confirm that Lt Busset then obtained a report on the situation from Sgt Degrasse at 28 minutes.

5.5.8.1 Recalled Members go to the Catwalk

267. The recalled troops of Shift B went to the catwalk upon their arrival at the DTF. According to Lt Busset, the purpose of the procedure was to ensure a presence on the catwalk and thus demonstrate a show of force.⁴⁰⁶ She told CFNIS JTF-Afg that she had given instructions

⁴⁰² *Ibid* at 10.

⁴⁰³ Transcript of Commission interview with Maj Busset, 27 November 2017 at 12-13.

⁴⁰⁴ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 34-35; recording of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 00h:28m:48s.

⁴⁰⁵ Transcript of CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 18.

⁴⁰⁶ Transcript of the CFNIS JTF-Afg's interview with Lt Busset, 1 February 2011 at 36.

to that effect.⁴⁰⁷ She said that after Maj X ended the exercise, he asked her to gather together her troops who were on the catwalk for a debriefing.

268. Cpl Young-Jones also mentioned to CFNIS JTF-Afg the presence of Shift B, who had gone to the catwalk until they were asked to meet in the break room for a meeting.⁴⁰⁸ He said the following: “They joined us all on the catwalk for a short time, and then they were removed later by Master Warrant Officer [Y] and taken down into the – lounging room---. And I believe they had a meeting there.”⁴⁰⁹

269. During his interview with Commission, Cpl Young-Jones repeated his statements about the members of Shift B who went to the catwalk. According to him, he thought that they were there to demonstrate a show of force for dissuasive purposes.⁴¹⁰ Cpl Young-Jones said that the troops were on the catwalk for two to three minutes.⁴¹¹

270. Maj X was interviewed three times in 2011, but the matter of the recalled troops from Shift B who had gone to the catwalk to demonstrate a show of force was not addressed in those meetings. During his interview with the Commission, Maj X initially stated that the recalled guards were to report to the guardhouse to receive additional instructions. Maj X said that the guards were not to take action before being informed of the subsequent tasks to be carried out. When asked whether the guards who arrived before or with Lt Busset had gone up to the catwalk, Maj X replied: [translation] “I wasn’t there, I can’t tell you.”⁴¹² During his interview with CFNIS JTF-Afg, MWO Y did not mention any additional troops on the catwalk when he was there and was not asked about this matter. During his interview with the Commission, MWO Y had little recollection of the troop recall. He did not remember seeing other members on the catwalk.⁴¹³

⁴⁰⁷ *Ibid* at 36.

⁴⁰⁸ Transcript of the CFNIS JTF-Afg’s interview with Cpl Young-Jones, 31 January 2011 at 5-6.

⁴⁰⁹ *Ibid* at 5-6.

⁴¹⁰ Recording of the Commission’s interview with Cpl Young-Jones, 11 September 2017 at 00h:31m:04s.

⁴¹¹ *Ibid* at 00h:43m:57s.

⁴¹² Transcript of the Commission’s interview with Maj X, 21 August 2017 at 203.

⁴¹³ Transcript of the Commission’s interview with MWO (Retired) Y, 30 August 2017 at 235.

271. The recalled members of Shift B went to the catwalk to demonstrate a show of force. Although it is impossible to determine the exact time of this show of force, we can conclude that it occurred towards the end of the exercise, a few minutes before or upon the arrival of Lt Busset. Maj X also stated that he did not see the recalled troops of Shift B go to the DTF and that they were to report to the break room to receive additional instructions. He added that the recalled guards were not to take the initiative to go there without prior instructions. This testimony seems to contradict that of Lt Busset on this matter. She stated that Maj X had asked her to gather together her troops who were on the catwalk for a debriefing after ending the exercise. She had sent her troops to the catwalk according to the new SOP 500.⁴¹⁴

272. Lt Busset estimated that the exercise ended around 0430 hours at the latest. All of the recalled members, as well as the members from the other shift on duty at the DTF who could make themselves available, were therefore asked to attend a debriefing in the break room. According to Maj X's notes, it took place during the 10-minute period between when Lt Busset arrived at the guardhouse at the DTF and the end of the exercise, because he wrote "EX end" at 0437 hours.⁴¹⁵

273. It is important to note that during the 2011 investigation, CFNIS JTF-Afg did not interview any of the Shift B guards or members of the GS Pl at the DTF during the exercise, except for Lt Busset, PO2 Gervais and Sgt Waugh.⁴¹⁶ However, all of the guards in Shift A on duty at the DTF on the morning of the exercise were interviewed.⁴¹⁷

⁴¹⁴ Document092 at 8, para 11 c).

⁴¹⁵ Document020 at 338.

⁴¹⁶ Document020 at 84. Unrecorded audio/video interview. MCpl O'Bready met with Sgt Waugh, but there is no note in the GO 2011-2411 concerning a debriefing in which he participated.

⁴¹⁷ According to GO 2011-2411, MCpl O'Bready also interviewed MCpl Perreault, the Shift B 2IC, in the presence of Cpl Michaud, a Shift B guard. The latter was met with to clarify the allegation that the detainee was so afraid when he was extracted from his cell that he urinated in his pants. Document020 at 87. This interview is not recorded on audio/video.

5.5.9 First Post-Exercise Debriefing

274. According to the evidence gathered, a first debriefing was held in the break room mainly with the Shift B members recalled to the DTF. The Shift A members assigned to the toilet routine were able to attend towards the end.⁴¹⁸ There are reasons to believe that some guards commented on the conduct of the exercise, which was not unanimously supported by the troops. Thus, Lt Busset told CFNIS JTF-Afg that two guards provided comments when she asked those present whether they had questions, after she had discussed the strengths of the exercise.⁴¹⁹

275. First, Cpl Bolduc,⁴²⁰ a guard from Shift B, stated that he did not understand why they had conducted a recall exercise in the middle of the night for a riot.⁴²¹ Lt Busset said that this comment had seemed odd because it was contrary to the new SOP on riots. When she informed him that the recall situation was in the new SOP distributed two weeks before the exercise, Cpl Bolduc stated that he had not [translation] “seen” it.⁴²² Lt Busset said that she had therefore informed Sgt Waugh that she expected him to provide his troops with this information, to which Sgt Waugh replied: [translation] “yes, ma’am, I will make sure of it.”⁴²³ Second, Cpl Bilodeau-Roy stated that they had entered a cell. On this matter, Lt Busset stated the following:

[translation] I said: “Well, why did you enter the cell?” “Well, because they told us there was a detainee who was messing around. And so we... And so we entered the cell.” And so then I said: “Yes, but you’re not authorized. The SOP very clearly states that you do not enter unless you are under order.”⁴²⁴

276. At that point, Lt Busset said that she had asked PO2 Gervais to substantiate this statement by Cpl Bilodeau-Roy. Lt Busset then said that the meeting was brief because Maj X seemed in a rush to hold his own debriefing with the shift supervisors and people in charge of the DTF.⁴²⁵

⁴¹⁸ Transcript of the CFNIS JTF-Afg’s interview with MCpl Gasparro, 31 January 2011 at 15; transcript of the CFNIS JTF-Afg’s interview with Cpl Roy, 31 January 2011 at 17-18; transcript of the CFNIS JTF-Afg’s interview with Cpl Dandurand, 30 January 2011 at 33; recording of the Commission’s interview with Sgt Lorette, 4 April 2018 at 00h:50m:25s.

⁴¹⁹ Transcript of the CFNIS JTF-Afg’s interview with Lt Busset, 1 February 2011 at 11.

⁴²⁰ Not to be confused with Maj Bolduc, who was the 2IC of CFNIS at the end of the 2011 investigation.

⁴²¹ Transcript of the CFNIS JTF-Afg’s interview with Lt Busset, 1 February 2011 at 11.

⁴²² *Ibid* at 11.

⁴²³ *Ibid* at 11; also recording of the CFNIS JTF-Afg’s interview with Lt Busset, 1 February 2011 at 00h:11m:53s-00h:12m:28s.

⁴²⁴ *Ibid* at 11.

⁴²⁵ Transcript of the CFNIS JTF-Afg’s interview with Lt Busset, 1 February 2011 at 11.

She therefore left the break room to go to the second debriefing, after asking the guards to proceed with the shift change.⁴²⁶ During her interview with the Commission, Lt Busset repeated her statements about the first post-exercise debriefing. Lt Busset added that Maj X and MWO Y attended the debriefing and that it was Maj X who led it.⁴²⁷ From what she could remember, Maj X did not reply to Cpl Bilodeau-Roy's comments, but rather ended the debriefing in order to hold a second one.⁴²⁸

277. During his interview with CFNIS JTF-Afg, PO2 Gervais stated that he attended the first debriefing led by Lt Busset. PO2 Gervais confirmed that Cpl Bilodeau-Roy made some comments during that debriefing.⁴²⁹ In that regard, PO2 Gervais said that Cpl Bilodeau-Roy had stated that he was not [translation] "comfortable with the matter of the shields," but that no one during the debriefing had mentioned entering the cells.⁴³⁰

278. MCpl O'Bready met with Sgt Waugh, but there is no note in the CFNIS JTF-Afg investigation report about a debriefing in which Sgt Waugh participated. During his interview with the Commission, Sgt Waugh recalled a meeting at the DTF after the January 19, 2011, exercise. He said that Lt Busset and Maj X attended that meeting, as did Sgt Degrasse and PO2 Gervais. He did not remember seeing WO Grenier or MWO Y during the meeting, but that did not necessarily mean that they did not attend.⁴³¹

279. During his February 3, 2011 interview, Maj X said that a debriefing had been held with [translation] "Lt Busset and the sergeants and up,"⁴³² but did not mention the debriefing with the Shift B troops recalled to the DTF. During his interview with the Commission, Maj X only discussed the debriefing with the NCOs in charge at the DTF and the shift supervisors. When asked whether there was a debriefing with all of the members recalled to the DTF, Maj X replied

⁴²⁶ *Ibid.*

⁴²⁷ Transcript of the Commission's interview with Maj Busset, 27 November 2017 at 72.

⁴²⁸ *Ibid* at 78-79.

⁴²⁹ During his interview with the Commission, Mr. (PO2 at the time of the events) Gervais confirmed Cpl Bilodeau-Roy's statements as recounted during his interview with CFNIS JTF-Afg; recording of the Commission's interview with Mr. Gervais, 11 April 2018 at 01h:26m:10s.

⁴³⁰ Transcript of the CFNIS JTF-Afg's interview with PO2 Gervais, 1 February 2011 at 6; recording of the CFNIS JTF-Afg's interview with PO2 Gervais, 1 February 2011 at 00h:05m:02s.

⁴³¹ Recording of the Commission's interview with WO Waugh, 2 October 2017 at 01h:43m:55s, 01h:46m:20s.

⁴³² Transcript of the CFNIS JTF-Afg's interview with Maj X, 3 February 2011 at 8.

that there was not and that he did not generally address everyone, especially when things did not go well.⁴³³

280. MWO Y did not mention any post-exercise debriefing in his interview with CFNIS JTF-Afg. MWO Y told the Commission that he had no memory of a post-exercise debriefing, although he conceded that standard practice at the time dictated that there should have been one.⁴³⁴

281. It should be noted that eight guards from Shift B were interviewed by the Commission for the PII and several of them had no memory of a formal debriefing following their recall in the exercise. In fact, only four⁴³⁵ were able to remember a post-exercise debriefing with varying degrees of detail. One of the guards, Cpl Bolduc, initially told the Commission that he could remember a short debriefing attended by Lt Busset, Maj X and MWO Y, but without further details. He could not remember what was discussed in the meeting. However, he did remember that Lt Busset spoke during the meeting and that he spoke with her.⁴³⁶

282. So there is reason to believe that Cpl Bolduc made some comments, as did Cpl Bilodeau-Roy, during this post-exercise debriefing. It may also be concluded that Maj X, Lt Busset and MWO Y attended that debriefing. However, there seem to be some contradictions about who conducted the debriefing, although it can be determined that Lt Busset did in fact speak during the debriefing.

⁴³³ Transcript of the Commission's interview with Maj X, 21 August 2017 at 185-186.

⁴³⁴ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 166.

⁴³⁵ Recording of the Commission's interview with Cpl Stocker, 25 July 2017 at 00h:49m:11s, 01h:01m:18s; recording of the Commission's interview with Sgt Michaud, 31 August 2017 at 00h:52m:17s, 00h:52m:42s; recording of the Commission's interview with Cpl Tremblay, 27 July 2017 at 01h:05m:20s, 01h:08m:01s, 01h:23m:06s, 01h:15m:47s; and recording of the Commission's interview with Mr. Bolduc, 9 January 2018 at 00h:56m:46s.

⁴³⁶ Recording of the Commission's interview with Mr. Bolduc, 9 January 2018 at 00h:56m:46s.

5.5.10 Second Post-Exercise Debriefing

283. Following the first debriefing, Maj X held a second debriefing at the DTF with Lt Busset and the shift supervisors.⁴³⁷ Maj X said that the debriefing was held after the exercise, at 0437 hours. The debriefing lasted about 10 minutes.⁴³⁸

284. Maj X told CFNIS JTF-Afg that the major point that he raised during the debriefing was that the troops were not familiar with the new SOP 500 or the procedures for conducting a cell extraction. As such, he had asked that the SOP be reviewed by all members of the company so that they might note the [translation] “levels of authority for conducting a recall, for conducting a cell extraction ...”⁴³⁹

285. During his interview with the Commission, Maj X stated that at the time of the debriefing, he had not been informed of the extraction. He said that he had requested that a debriefing be held because it is normal practice following an exercise.⁴⁴⁰ Since it was his exercise, he led the discussion. He said that the SOP was not known during the debriefing. When asked whether there had been a discussion during the debriefing about the authority required to enter a cell, Maj X stated that he had talked about this matter because it was in his notes. However, he said that there were not really any discussions with the participants at the debriefing, as they were mainly [translation] “in listening mode” rather than in [translation] “information-sharing mode.”⁴⁴¹

286. When Maj X was asked whether he had a discussion with MWO Y about his observations of the exercise on the catwalk before holding the debriefing with the shift supervisors, Maj X replied that he had not.⁴⁴² The Commission investigators also asked him

⁴³⁷ Transcript of the CFNIS JTF-Afg’s interview with Maj X, 3 February 2011 at 8, 18.

⁴³⁸ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 181, 185-186.

⁴³⁹ Transcript of the CFNIS JTF-Afg’s interview with Maj X, 3 February 2011 at 00h:29m:32s. Note that MCpl O’Bready did not ask him other questions about the interview debriefing. MCpl O’Bready also did not address the matter of post-exercise debriefings with Maj X during his February 25, 2011 and March 2, 2011 interviews.

⁴⁴⁰ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 187.

⁴⁴¹ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 188-189.

⁴⁴² *Ibid* at 181.

whether, in the event that MWO Y had observed the extraction, he should have informed him of it immediately. Maj X replied to this as follows:

[translation] Honestly, I think that he wasn't even aware that an extraction had taken place. That's what I'm telling you, it's that no one knew that an extraction had taken place. Because, when I found out at 0400 hours . . . sorry, when I found out between 0830 hours and 0930 hours, regardless of the timing that was given, you know, my response was really to go see him and say: "Are you aware that an extraction took place?" There was no knowledge of it. Otherwise, he would have told me that an extraction had taken place.⁴⁴³

287. When asked whether he had spoken to Lt Busset after the exercise, but before 0830 hours, Maj X replied that he had. In that regard, he said: [translation] "Yes, right after I held the debrief with her group, we returned to her office, where I told her: 'Make sure your people know the SOP because it was not convincing this morning.'"⁴⁴⁴ He added that he included in his personal notes "overall assessment failed."⁴⁴⁵ He said that the exercise was [translation] "a big failure."⁴⁴⁶

288. During her interview on February 1, 2011, Lt Busset told CFNIS JTF-Afg that she attended the debriefing by Maj X. They allegedly discussed major aspects of the exercise, including those in need of improvement. One of the major aspects was the recall speed of her platoon. In 20-25 minutes, the recalled members were at the DTF. They noted that this time could be improved, i.e., decreased to 15 minutes.⁴⁴⁷ Another aspect to improve was the fact that the shift supervisors had to ensure that their troops familiarized themselves with the new SOP regarding riots. Lastly, as a general point, she said that Maj X had informed them that during a riot, the only time they could enter a cell was when he gave them the order to do so.⁴⁴⁸

289. When asked to specify who had attended that debriefing, Lt Busset said that WO Grenier, MWO Y, Maj X, and Sgts Degrasse, Waugh and Bélanger, as well as PO2 Gervais were present.⁴⁴⁹ MCpl O'Bready also asked her whether Maj X knew that guards had entered a cell and whether this point had been addressed in the debriefing. Lt Busset explained that Maj X had

⁴⁴³ *Ibid* at 181-182.

⁴⁴⁴ *Ibid* at 183.

⁴⁴⁵ *Ibid* at 183; see Document 020 at 338.

⁴⁴⁶ Transcript of the Commission's interview with Maj X, 21 August 2017 at 183.

⁴⁴⁷ Transcript of the CFNIS JTF-Afg's interview with Lt Busset, 1 February 2011 at 13-14.

⁴⁴⁸ *Ibid*.

⁴⁴⁹ *Ibid* at 43, 73.

only raised as a general and non-specific point the fact that members should not enter the detainees' cells during a riot unless he ordered it. She said that none of the sergeants seemed aware of the fact that members had entered a cell. She said that Maj X was also not aware.⁴⁵⁰ At no time was the fact that guards had entered a cell during the exercise raised during the debriefing.⁴⁵¹ Lt Busset repeated her statements during her interview with the Commission. She referred to the transcript of her first interview with CFNIS JTF-Afg in order to recall the events and did not add anything to her previous statements on the matter.

290. Sgt Degrasse told MCpl O'Bready that he attended a post-exercise debriefing led by Maj X. MCpl O'Bready asked him whether Maj X had talked about the reasons for the guards carrying out a cell extraction. Sgt Degrasse said that he thought that Maj X did not know about it at that time. He also said that Maj X had asked questions during the debriefing about who should be contacted in the event of a riot and who could authorize a cell extraction. Sgt Degrasse said that he had replied that he could do so as shift supervisor. Maj X had told him [translation] "no" and had asked the group whether anyone knew the correct answer. Sgt Degrasse stated that no one seemed to know the answer and Maj X then informed them that he was the only individual, as Coy OC, who could order a cell extraction.⁴⁵²

291. Sgt Degrasse repeated his statements during his interview with the Commission. Sgt Degrasse also said that he learned that there had been an extraction only after the debriefing. Sgt Degrasse said that MWO Y did not speak during the debriefing or mention an extraction at the DTF.⁴⁵³

292. During his interview with CFNIS JTF-Afg, PO2 Gervais said that he had attended Maj X's debriefing. During the debriefing, Maj X asked the participants questions about the SOP procedures. PO2 Gervais said that some people did not know the procedures. PO2 Gervais also said that the debriefing lasted about half an hour and, at that point, he had not yet been informed that a detainee had been extracted from his cell during the exercise.⁴⁵⁴

⁴⁵⁰ *Ibid* at 44.

⁴⁵¹ *Ibid*.

⁴⁵² Transcript of the CFNIS JTF-Afg's interview with Sgt Degrasse, 30 January 2011 at 24.

⁴⁵³ Summary of the Commission's interview with WO Degrasse, 24 October 2017 at 5.

⁴⁵⁴ Transcript of the CFNIS JTF-Afg's interview with PO2 Gervais, 1 February 2011 at 6.

293. During his interview with the Commission, PO2 Gervais confirmed that he attended a debriefing with Maj X. PO2 Gervais seemed to confuse the two debriefings. He even said that he did not think that he attended the second debriefing by Maj X because it did not concern him.⁴⁵⁵ However, he made comments similar to those made by Sgt Degrasse and Lt Busset regarding certain comments made in the debriefing. PO2 Gervais thought that Maj X had asked Sgt Degrasse questions about the SOP and his responsibilities in a recall, such as, who should be contacted according to the SOP.⁴⁵⁶

294. During his interview with the Commission, Sgt Waugh stated that he remembered attending a debriefing. However, he could not remember who had requested that the debriefing be held, but it was probably Maj X. He also said that he could not remember details of the debriefing.⁴⁵⁷ Sgt Waugh thought that the issue of the detainee's extraction had been raised in the debriefing but could not provide any specific information on the matter.⁴⁵⁸

295. Based on the evidence gathered, we can conclude that a second debriefing, led by Maj X, was held and that Lt Busset, MWO Y, WO Grenier and Sgts Degrasse, Waugh and Bélanger, as well as PO2 Gervais, attended it. It seems that the cell extraction carried out during the exercise was not discussed during that debriefing. However, there is no doubt that Maj X raised the issue of the authority required in order to proceed with an extraction in a riot situation and reminded the members present that he was the only one who had that authority under the new SOP.⁴⁵⁹

296. It is therefore reasonable to question why Maj X commented on the authority required to proceed with an extraction. According to the testimonies gathered during the CFNIS JTF-Afg investigation and during the PII, it seems as though none of those present at the debriefing knew that a cell extraction had been conducted by the guards during the exercise. Maj X told the Commission that he had not had a conversation with MWO Y about the exercise before holding the debriefing. However, it seems normal in such a context that the two people responsible for the exercise would have exchanged comments on the exercise before giving feedback to the

⁴⁵⁵ Recording of the Commission's interview with Mr. Gervais, 3 August 2017 at 01h:27m:24s.

⁴⁵⁶ *Ibid* at 01h:28m:56s.

⁴⁵⁷ Recording of the Commission's interview with WO Waugh, 2 October 2017 at 01h:47m:06s, 01h:47m:35s.

⁴⁵⁸ Recording of the Commission's interview with WO Waugh, 2 October 2017 at 01h:48m:15s, 01h:49m:12s.

⁴⁵⁹ Document 092 at 8-9, para 11, f, g.

participants. Raising the matter of the authority required to carry out a cell extraction in the debriefing reinforces our opinion that the note added by Maj X, which corresponds to the actual time when the extraction was carried out, demonstrated that he was aware of the extraction as it was taking place. It is very likely that Maj X observed the extraction concerned on the DTF surveillance camera monitors when he was in the shift supervisor's office. It is therefore very likely that Maj X knew that a cell extraction had been carried out during the exercise when he held the debriefing with the shift supervisors.

5.6 Other Exercises at the DTF

5.6.1 Purpose of the Exercises

297. On February 24, 2011, after his February 20, 2011 interview with CFNIS JTF-Afg, Capt Touchette informed Capt da Silva that other exercises had been conducted at the DTF. According to an investigative activity prepared by Capt da Silva,⁴⁶⁰ Capt Touchette had informed him that he had witnessed a discussion between Maj X and Lt Busset concerning exercises at the DTF. During that discussion, Maj X had given the order to Lt Busset to make sure to make noise during the exercises at the DTF, either by shouting or making noise with objects, in order to demonstrate a show of force and scare the detainees. Capt Touchette did not remember the exact date of that discussion. However, he added that Lt Busset had recently been ordered by Maj X to cease the exercises at the DTF. Capt Touchette said that he was not present when that counter order was given.

298. MCpl O'Bready met with Lt Busset and Capt Touchette a second time on February 24, 2011, to gather information about the exercises concerned. During that interview, Capt Touchette said that in early December 2010, seeing the increased detainee population, Maj X had asked that exercises be held at the DTF. According to Capt Touchette, the primary objective of the exercises was to provide training to members at the DTF, such as instructions on making dynamic entries into cells.⁴⁶¹ He explained that Maj X wanted to conduct these exercises at the

⁴⁶⁰ Document 020 at 96.

⁴⁶¹ Transcript of the CFNIS JTF-Afg's interview with Capt Touchette, 24 February 2011 at 5.

DTF because the members' shouts upon entering the cell would send [translation] "a message to calm the detainees. It will scare them a little."⁴⁶²

299. When asked whether the objective to calm and scare the detainees was attributable to a potential uprising situation among the detainees, Capt Touchette replied that it was not and stated instead that it was in anticipation, because the detainee population at the DTF was going to increase.⁴⁶³ Capt Touchette added that Maj X stated in front of him that the exercises at the DTF were to take place in an empty cell. It was a direct order.⁴⁶⁴ Capt Touchette did not remember whether Lt Busset was present when Maj X gave the order. However, he stated that Lt Busset was aware of the concept of [translation] "calming" the detainees.⁴⁶⁵ He also said that at one point, Lt Busset had selected a date, as per Maj X's instructions, to conduct these exercises.⁴⁶⁶ Capt Touchette could not provide more information on the conduct of the actual exercises, because he stated that he did not attend them.⁴⁶⁷

300. During her February 24, 2011, interview, Lt Busset said that the increase in the detainee population was causing concern among her CoC and that of JTF-Afg. As such, she had received two orders from Maj X: to hold cell extraction exercises twice a month and, once the SOP 500 was reviewed, to carry out a company riot recall exercise.⁴⁶⁸ According to Lt Busset, Maj X's intent was to make noise to show the detainees that they had to remain calm and that the guards were able to respond in a riot situation. Lt Busset explained that, on the one hand, the objective of these exercises was to ensure that members at the DTF were up to date with DTF policies and practices, to keep equipment up to date, and to see how the members interacted among themselves during the exercises.⁴⁶⁹ On the other hand, the objective was to impress the detainee population and calm tension and nerves among the detainees.⁴⁷⁰ Lt Busset said that she had this conversation in the presence of Capt Touchette and possibly MWO Y.⁴⁷¹

⁴⁶² *Ibid* at 6.

⁴⁶³ *Ibid* at 8.

⁴⁶⁴ *Ibid* at 6.

⁴⁶⁵ *Ibid* at 7.

⁴⁶⁶ *Ibid*.

⁴⁶⁷ *Ibid*.

⁴⁶⁸ Transcript of the CFNIS JTF-Afg's interview with Lt Busset, 24 February 2011 at 2-3.

⁴⁶⁹ *Ibid* at 10.

⁴⁷⁰ *Ibid* at 5, 10.

⁴⁷¹ *Ibid* at 4.

301. When asked whether she had received an order from Maj X to make noise during the cell extraction exercises, Lt Busset said that she did not receive an actual order, but that it was a clear instruction whereby the guards had to make noise during the exercises. Lt Busset added that discussions about this matter were held a number of times.⁴⁷²

302. During the review of the 2011 CFNIS JTF-Afg investigation, conducted by CFNIS CR in 2016, Maj Leblanc interviewed Lt Busset on February 18, 2016, about the incidents that occurred during the January 19, 2011, exercise. During the interview, Lt Busset repeated her previous statements about the reasons for holding exercises in 2011, namely, the rapid increase in the detainee population and the possibility of a riot at the DTF. She provided similar comments in her December 12, 2017, interview with the Commission.⁴⁷³

303. During his cautioned interview on February 25, 2011, Maj X confirmed that he had given the instructions to hold two exercises a month and to make noise during them. He said that he wanted to show the detainees that his personnel had control of the DTF; he stated the following in this regard: [translation] “by making noise, things like that, sometimes it shocks your ears, to make sure that it calms tempers.”⁴⁷⁴ In addition, he wanted to ensure that the personnel at the DTF was capable of responding in a riot situation.⁴⁷⁵ Maj X said that the objective was not to scare the detainees, but to demonstrate a form of control over the situation by the guards, given the growing population of detainees.⁴⁷⁶ Maj X stated that during the exercises, the detainees did not see anything, but they could hear.⁴⁷⁷

304. During his interview with the Commission, Maj X seemed to attribute the making of noise to the use of shields and batons during an extraction exercise.⁴⁷⁸ However, he repeated that making noise during cell extraction exercises could calm the detainees’ nerves. In that regard, he said: [translation] “But if I’m not mistaken, you know, making noise to enter the cell is part of

⁴⁷² *Ibid.*

⁴⁷³ Transcript of the Commission’s interview with Maj Busset, 12 December 2017 at 68.

⁴⁷⁴ Transcript of the CFNIS JTF-Afg’s cautioned interview Maj X, 25 February 2011 at 105.

⁴⁷⁵ *Ibid* at 106.

⁴⁷⁶ *Ibid* at 106-107.

⁴⁷⁷ *Ibid* at 109.

⁴⁷⁸ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 83.

the extraction to warn the detainees, you know, that something is going to happen when we enter, and sometimes it calms tempers.”⁴⁷⁹

305. There seems to be no doubt that Maj X requested that cell extraction exercises be held in the DTF, driven by the increase in detainee population and the need to ensure that the guards were ready to respond to any eventuality in the DTF. Capt Touchette and Lt Busset both confirmed that Maj X requested that these exercises be held inside the DTF. As previously mentioned, no evidence was gathered in the PII establishing that Maj X gave the order to terrorize the detainees or that the objective of the exercises was to terrorize the detainees. One of the objectives of the exercises was to show the detainees that the guards could control the DTF in any situation. Therefore, a show of force during these exercises was necessary to meet this objective. This is very different than trying to terrorize detainees, contrary to what is alleged in the anonymous complaint.⁴⁸⁰

5.6.2 Exercises prior to January 19, 2011

306. Lt Busset said that four exercises were conducted at the DTF during which the guards were to make noise as per Maj X’s instructions. Two of those exercises were held in December 2010 and the other two in January 2011. Lt Busset said that Maj X attended two of these exercises.⁴⁸¹ He attended them to observe the members at the DTF and not to supervise them. It was also an opportunity for Maj X to meet the personnel at the DTF.⁴⁸²

307. Lt Busset told the Commission that Maj X had conducted two exercises, one of which was inside the DTF, before the exercise on January 19, 2011.⁴⁸³ During that exercise, an empty cell, [translation] “the first on the left upon entering [the DTF],”⁴⁸⁴ had been used, but she could not remember which recall troops had participated in the exercise concerned. Lt Busset specified that it was an emergency cell extraction exercise, and that no detainee was in the cell. They were using guards to play the detainee role in the exercise.⁴⁸⁵ Lt Busset explained that the guards wore

⁴⁷⁹ *Ibid* at 84.

⁴⁸⁰ See Chapter II, which discusses the complaint.

⁴⁸¹ Transcript of the CFNIS JTF-Afg’s interview with Lt Busset, 24 February 2011 at 9.

⁴⁸² *Ibid*.

⁴⁸³ Transcript of the Commission’s interview with Maj Busset, 12 December 2017 at 36.

⁴⁸⁴ *Ibid* at 9.

⁴⁸⁵ *Ibid*.

their anti-riot protection equipment along with helmets and carried batons. When asked who was responsible for preparing the exercise or whether a plan had been prepared, Lt Busset said that she did not know. However, she added that it was Maj X who was running the exercise and giving the instructions for it.⁴⁸⁶ She stated that Maj X told the guards [translation] “Make noise, be sure you make noise.”⁴⁸⁷

308. The Commission investigators interviewed 47 witnesses who may have participated in the exercises either directly because of their daily duties at the DTF or because they were part of the company and could be called in to provide assistance to the DTF. Fourteen of them, including Maj X and Lt Busset stated that they participated in exercises at the DTF. For the most part these exercises were held well before the January 19, 2011 incident in an empty cell.⁴⁸⁸

309. The Commission investigators also met with the interpreter who worked at the DTF at the time of the incidents on two occasions as part of this PII. In his first interview, the interpreter told the Commission that he remembered seeing guards take shields and batons and enter the DTF compound occasionally as part of exercises. He said that he did not participate in the exercises. He explained that the MP simply asked him to inform the detainees that an exercise was going to be held at the DTF.⁴⁸⁹ The interpreter said that he had not received complaints from detainees concerning the exercises.⁴⁹⁰ The guards were using an empty cell and he could hear the noise that they made during the exercise when they hit their shields and shouted.⁴⁹¹

310. During a second interview with the interpreter, he added some specific details about the conduct of these exercises at the DTF. He remembered that he had observed an exercise at the DTF. The guards had used an empty cell that he thought was the first on the right upon entering the hallway to the cells.⁴⁹² The four or five guards had batons and shields and were entering the

⁴⁸⁶ Transcript of the Commission’s interview with Maj Busset, 12 December 2017 at 49-50.

⁴⁸⁷ *Ibid* at 50-51.

⁴⁸⁸ The Commission’s interviews with Sgt Roy (on 29 August 2017), Cpl Mustard (on 13 September 2017), Sgt Bilodeau-Roy (on 26 July 2017), Sgt Bélanger (on 29 September 2017), Cpl Gratton (on 13 September 2017), Cpl Vanier (on 26 October 2017), Cpl Dickson (on 14 November 2017) and WO Degrasse (on 24 October 2017).

⁴⁸⁹ Transcript of the Commission’s interview with the interpreter, May 3 2018 at 22.

⁴⁹⁰ *Ibid* at 4.

⁴⁹¹ *Ibid* at 52-53.

⁴⁹² Transcript of the Commission’s interview with the interpreter, 16 May 2018 at 23.

cell to intervene, while other guards were playing the detainee role. He observed the exercise for a few minutes before returning to his office just outside the DTF.⁴⁹³

5.6.3 Exercises after January 19, 2011

311. During his February 3, 2011, interview, Maj X said to MCpl O'Bready that a cell extraction exercise had taken place at the DTF in the same week as the recall exercise on January 19, 2011. He added: [translation] "We emptied one cell, we used actors, and then we conducted the cell extraction."⁴⁹⁴

312. During his interview with the Commission, Maj X stated that he remembered two cell extraction exercises and could provide the exact date of one of them because he had personally assessed the exercise. He said that this exercise took place on January 21, 2011 at 1000 hours in cell 2 and lasted about 15 to 20 minutes.⁴⁹⁵ Maj X said that he had required that the SOP state that cell extraction incidents be recorded on video to protect the guards in the event of an incident and that everything had to be recorded in the detainee log.⁴⁹⁶ He also said that his notes indicate that, during the January 21, 2011 exercise, one of the guards was supposed to video the exercise on the catwalk, but he could not remember which one had recorded the exercise.⁴⁹⁷ He could not confirm whether this video recording still existed.⁴⁹⁸

313. Maj X confirmed the presence of Lt Busset and the interpreter at that exercise, but he could not identify the other guards who participated or how many there were. He also thought that he used a soldier to play the detainee role to make the exercise more real. Maj X stated that the guards participating in the cell extraction made noise, not those on the catwalk.⁴⁹⁹ He said that the detainees could not see the ongoing exercise, but were undoubtedly able to hear it.⁵⁰⁰ Maj X said that the January 21, 2011 exercise was conducted according to procedures. The

⁴⁹³ *Ibid* at 25.

⁴⁹⁴ Transcript of the CFNIS JTF-Afg's interview with Maj X, 3 February 2011 at 24.

⁴⁹⁵ Transcript of the Commission's interview with Maj X, 21 August 2017 at 20, 25, 42, 52.

⁴⁹⁶ *Ibid* at 45-46, 90.

⁴⁹⁷ *Ibid* at 46-47.

⁴⁹⁸ *Ibid* at 97.

⁴⁹⁹ *Ibid* at 84-85.

⁵⁰⁰ Transcript of the Commission's interview with Maj X, 21 August 2017 at 43.

objective was to validate the SOP and ensure that the intervention team knew how to use the equipment.⁵⁰¹

314. Maj X told the Commission that he did not remember attending the cell extraction exercise at the DTF before the January 19, 2011 exercise. He thought that the exercise had been run by Lt Busset and that she was responsible for it.⁵⁰² He also thought that these exercises had been discussed previously with Lt Busset at the Operations Centre.⁵⁰³ Maj X stated that the exercises had been conducted according to his instructions.⁵⁰⁴ However, he could not provide additional information on the exercise instructions provided to Lt Busset.⁵⁰⁵ When the Commission investigators asked Maj X whether he had issued the instruction that the guards had to make noise during the cell extraction exercises, he explained that it was part of the procedure and had two objectives. First, it served to inform the detainees that there was [translation] “something about to happen” when the intervention team entered the cell, and second, it would calm [translation] “the tempers” of the detainees.⁵⁰⁶

5.6.4 End of the Exercises

315. Lt Busset stated during her February 24, 2011 interview that following the start of the CFNIS JTF-Afg investigation, Maj X instructed her not to conduct anymore exercises inside the DTF.⁵⁰⁷ She said that this instruction came from JTF-Afg CoC.⁵⁰⁸ Capt Touchette also confirmed Lt Busset’s statements in his February 24, 2011 interview. He told MCpl O’Bready that during a conversation with Lt Busset on February 23, 2011, she had told him that she had received an order from Maj X to cease exercises at the DTF.⁵⁰⁹ Capt Touchette stated that he had been surprised by this counter-order because Maj X had insisted on several occasions that exercises be held at the DTF.⁵¹⁰

⁵⁰¹ *Ibid* at 47, 51-52.

⁵⁰² *Ibid* at 22.

⁵⁰³ *Ibid* at 23.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ *Ibid*.

⁵⁰⁶ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 84.

⁵⁰⁷ Transcript of the CFNIS JTF-Afg’s interview with Lt Busset, 24 February 2011 at 6-7.

⁵⁰⁸ *Ibid* at 11.

⁵⁰⁹ Transcript of the CFNIS JTF-Afg’s interview with Capt Touchette, 24 February 2011 at 4.

⁵¹⁰ *Ibid* at 4-5; recording of the Commission’s interview with Mr. Touchette, 2 September 2017 at 01h:22m:43s.

316. When asked about the other exercises at the DTF during his February 25 interview, Maj X stated that they had been cancelled.⁵¹¹ During his interview with the Commission, Maj X said that there had been no more exercises following the one that he had supervised on January 21, 2011. He said that the order to cease exercises had come to him from LCol Strickland following the start of the CFNIS JTF-Afg investigation concerning the January 19, 2011 exercise.⁵¹² LCol Strickland said in his interview with the Commission that he ordered Maj X to cease holding exercises at the DTF.⁵¹³

317. We may therefore conclude that following the January 19, 2011 incident, after the start of the CFNIS JTF-Afg investigation, LCol Strickland instructed Maj X to cease holding exercises at the DTF. According to testimony, Maj X complied with the instruction and informed Lt Busset accordingly.

VI CFNIS JTF-AFG INVESTIGATION

318. According to GO 2011-2411, on January 29, 2011, LCol Strickland asked CFNIS JTF-Afg to conduct an investigation into the January 19, 2011 exercise.⁵¹⁴ The CFNIS is a unit of the CF that is incorporated into the Regular Force and assigned to the CFMP Gp. The role of the CFNIS is to “conduct independent investigations of serious or sensitive service and criminal offences against the property and personnel of DND and the CF command and control.”⁵¹⁵ A serious or sensitive investigation is one “which, by the nature of the allegation, or through those who are, or may be implicated, could have a strategic or national impact.” MP detachments may request technical and specialized support from the CFNIS in their investigations.⁵¹⁶ The immediate superior of the CO of the CFNIS is the CO of the CF MP Gp, who is also the Canadian Forces Provost Marshal (CFPM). The CFNIS is organized into six detachments and

⁵¹¹ Transcript of the CFNIS JTF-Afg cautioned interview with Maj X, 25 February 2011 at 104.

⁵¹² Transcript of the Commission’s interview with Maj X, 21 August 2017 at 220.

⁵¹³ Recording of the Commission’s interview with Col Strickland, 25 January 2018 at 01h:39m:28s.

⁵¹⁴ Document 020 at 21.

⁵¹⁵ *Canadian Forces Organization Order*, No 3692, October 2007 at para 3 [CFOO].

⁵¹⁶ *Military Police Policies and Technical Procedures (MPPTP)*, Chapter 6, *Military Police Investigations: General*, October 2007 at paras 22, 24 [MPPTP]. Replaced by CF MP Order 2-381, *Authority of Canadian Forces National Investigation Service*, 14 August 2015.

each is overseen by an officer responsible for the functioning and administration of their detachment.⁵¹⁷

6.1 CFNIS JTF-Afg

319. Unlike JTF-Afg MP Coy, which reported directly to JTF-Afg CoC, the CFNIS JTF-Afg detachment reported directly to the CO CFNIS JTF-Afg, who reported to the CFPM.⁵¹⁸ The role of the CFNIS JTF-Afg detachment was basically to conduct investigations of serious or sensitive offences⁵¹⁹ concerning or involving members of JTF-Afg. For example, CFNIS JTF-Afg could conduct investigations of cases of sexual assault, suicide or death of CF members on mission, including allegations of mistreatment of detainees by CF members in theatre.⁵²⁰ At the end of an investigation, CFNIS JTF-Afg could lay charges under the *Code of Service Discipline* against the subjects of the investigation, if applicable.⁵²¹

6.1.1 Members of CFNIS JTF-Afg

320. At the time of the events set out in the complaint, the detachment was made up of a detachment Comd, Capt da Silva, and four investigators: Sgt Parent, Sgt Mantha, MCpl O'Bready and MCpl Carrier. Capt da Silva supervised the operational activities of the team members and ensured that the detachment investigations were conducted properly. He was also responsible for assigning investigation files to the team members. In his supervisory role, he could provide advice to the investigators and determine the scope of the investigations conducted by his personnel.⁵²²

321. Capt da Silva was assisted by Sgt Parent, who essentially acted as 2IC of the detachment.⁵²³ In addition to actively participating in the investigations, Sgt Parent supervised the conduct of the investigations and reviewed various documents prepared by the investigators,

⁵¹⁷ *Ibid*, MPPTP, Chapter 6 at para 23.

⁵¹⁸ *Ibid* at para 23. The CO CFNIS was LCol Delaney (now BGen (Retired)) and the 2IC was Maj Bolduc (now LCol (Retired)). At the time, Col Grubb (Retired) was the CFPM; Document 020 at 346-354 at para 19.

⁵¹⁹ MPPTP, Chapter 6 at para 24.

⁵²⁰ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 10-11.

⁵²¹ *The Queen's Regulations and Orders for the Canadian Forces* (QR&O), Volume II – Disciplinary, Chapter 107 to para 107.02 (c) [QR&O].

⁵²² Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 30, 145.

⁵²³ Transcript of the Commission's interview with WO Parent, 9 October 2018 at 13-14.

such as the interview plans, prior to approval by the CO.⁵²⁴ Sgt Mantha was an investigator within the detachment. When Sgt Parent was away, Sgt Mantha acted as 2IC of the detachment in the interim. Sgt Mantha also acted as a mentor to MCpl Carrier, who had very little experience in the CFNIS at the time of the events.⁵²⁵ In fact, MCpl Carrier was completing his investigator training with the CFNIS when he was deployed to KAF.⁵²⁶ Lastly, MCpl O'Bready conducted investigations assigned to him by Capt da Silva or Sgt Parent. MCpl O'Bready was assigned as the lead investigator in the investigation of the January 19, 2011 exercise.⁵²⁷

6.1.2 Their Experience and Training

322. Capt da Silva was the team member with the most years' experience as MP, having joined the CF in 1982. During his career, he rose through the non-commissioned member ranks and was deployed in several missions abroad. In 2006, he was transferred to CFNIS Eastern Region (ER), located in Area Support Unit (ASU) Valcartier, Quebec. In 2007, he received his officer's certificate and was transferred to the position of officer in charge of operations and later became CFNIS ER detachment commander. Aside from the MP basic training and the various levels of qualification associated with it, Capt da Silva completed leadership, information systems security and non-commissioned member to officer training. Before joining CFNIS, Capt da Silva took an investigator course with the CF in 1994, at the Canadian Forces Military Police Academy (CFMPA) at Canadian Forces Base (CFB) Borden, Ontario.⁵²⁸

323. Sgt Parent joined the CF in 1994, starting out in the infantry, and joined the MP in 1999.⁵²⁹ He was transferred to CFNIS ER in 2002 and remained there until 2007 when he was transferred to CFB Bagotville, Quebec as patrol team leader. In 2008, he returned to CFNIS ER and remained there until his deployment to KAF in 2010.⁵³⁰ Sgt Parent completed the MP basic training. He also completed specialized training at Quebec's national police academy in Nicolet, Quebec, for example, investigator training, including criminal law applied to police

⁵²⁴ *Ibid* at 99.

⁵²⁵ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 8.

⁵²⁶ Transcript of the Commission's interview with WO Carrier, 1 October 2018 at 4.

⁵²⁷ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 35; see document 020 at 22.

⁵²⁸ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 9-11.

⁵²⁹ Transcript of the Commission's interview with WO Parent, 9 October 2018 at 4.

⁵³⁰ *Ibid* at 6-7.

investigations; training in offences related to sexual assault and physical abuse of young children; and training in taking a statement from a suspect on video. Sgt Parent said that statement-taking and note-taking were subjects covered in his investigator training.⁵³¹

324. Sgt Mantha enlisted in the CF in 1996 and joined the MP in 2001.⁵³² He worked as a patrol officer for several years before joining the CFNIS in 2004, where he spent nearly 10 years. Sgt Mantha completed the MP basic training as well as the various levels of qualification associated with it. He also took other training during his CF career, including the investigator course and taking a statement from a suspect.⁵³³

325. MCpl O'Bready joined the CF in 1990 as a crewman on armoured vehicles. In 2001, he changed jobs and joined the MP. He was transferred to ASU Valcartier, where he worked as a patrol officer.⁵³⁴ In 2004, he was deployed abroad in a Canadian embassy and then transferred to the CFNIS at CFB Bagotville, Quebec, in 2006. He was transferred to ASU Valcartier again in 2008, still within the CFNIS, and remained there until his deployment to KAF in 2010. MCpl O'Bready completed the MP basic training and other training while he was a patrol officer. When he joined the CFNIS, he received three weeks of investigator training. MCpl O'Bready said that that training included a key component on interviews and interrogations, crime scene management, collection of evidence, and preparation of search warrants and investigation plans.⁵³⁵

326. MCpl Carrier joined the CF Regular Force in 2002. He completed his training at the MP academy in 2003 and was then transferred to ASU Edmonton, Alberta, where he worked as a patrol officer. He was then transferred to CFB Trenton, Ontario, still as a patrol officer. He was deployed to Afghanistan for the first time in an earlier roto within the Operational Mentoring and Liaison Team (OMLT). Upon his return from that mission, he was promoted to MCpl and transferred to CFNIS Central Region (CR). He was part of the surveillance team and worked mainly on drug investigations. When he completed the CFNIS's investigator training, he was

⁵³¹ *Ibid* at 11.

⁵³² Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 3.

⁵³³ *Ibid* at 4-5.

⁵³⁴ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 5.

⁵³⁵ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 6.

deployed for a second time to Afghanistan with roto 3-10 in November 2010. He therefore had no experience as an investigator in the CFNIS at the time of the events set out in the complaint.⁵³⁶

6.2 Personnel Available and Request for Assistance from the CFNIS Headquarters

6.2.1 Selection of the Investigator

327. During their interviews with the Commission, Sgt Mantha and MCpl O'Bready both said that they were outside the country at the time of the January 19, 2011 incident. Sgt Mantha was on mission leave at the time of the incident, until his return to KAF in early February 2011, when the investigation had already begun.⁵³⁷ Sgt Mantha was therefore not available as a possible candidate to begin the investigation on January 30, 2011. MCpl O'Bready was outside KAF following his brother's unexpected death and funeral.⁵³⁸ Sgt Parent had to leave on his mandatory mission leave in the days following the start of the investigation, and said that it was difficult to change mission leave.⁵³⁹ Sgt Parent was leaving on mission leave in February.⁵⁴⁰ MCpl Carrier had not completed his investigator training in the CFNIS.⁵⁴¹ He therefore did not have the necessary experience to conduct an investigation of this magnitude.⁵⁴²

328. It should be noted that the testimonies of the CFNIS JTF-Afg members differed concerning the assignment of lead investigator in this case. MCpl O'Bready stated that Sgt Parent had informed him of the situation upon his return to KAF from personal leave. Sgt Parent allegedly informed him that Capt da Silva was waiting for him to return to the country to assign a sensitive file to him.⁵⁴³ Sgt Parent thought that they had waited for MCpl O'Bready to return to begin the investigation because he, himself, had to leave on his mandatory mission leave in the days following the start of the investigation.⁵⁴⁴

⁵³⁶ Transcript of the Commission's interview with WO Carrier, 1 October 2018 at 3-4.

⁵³⁷ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 68-69, 107-108.

⁵³⁸ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 26-27, 43-44.

⁵³⁹ Transcript of the Commission's interview with WO Parent, 9 October 2018 at 68.

⁵⁴⁰ *Ibid.*

⁵⁴¹ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 96.

⁵⁴² *Ibid.*

⁵⁴³ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 43-45.

⁵⁴⁴ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 96.

329. As for Capt da Silva, he initially said that he thought he had assigned the file to Sgt Parent or Sgt Mantha.⁵⁴⁵ However, he changed his statement when the Commission investigators told him about a document in GO 2011-2411⁵⁴⁶ stating that the investigation had been assigned to MCpl O’Bready.⁵⁴⁷ Capt da Silva said that he had no concerns about assigning the file to MCpl O’Bready, who, he said, was an investigator with experience in investigations of this type.⁵⁴⁸ He did not remember whether or not MCpl O’Bready was outside of KAF at the time of the investigation, but he recalled that MCpl O’Bready had gone back to Canada for personal reasons in addition to his mandatory mission leave.⁵⁴⁹ Capt da Silva did not think he would have waited for MCpl O’Bready to return to start the investigation, given its sensitive nature.⁵⁵⁰

6.2.2 Request for Assistance from CFNIS Headquarters

330. Capt da Silva said that immediately after receiving the complaint, he called Maj Bolduc to inform him of the situation.⁵⁵¹ Capt da Silva said that he had asked Maj Bolduc to send a team of independent investigators to KAF so that they could investigate the incident, given the physical proximity and the close ties between his personnel members and those of the JTF-Afg MP Coy. To the best of his recollection, Capt da Silva said to Maj Bolduc, [translation] “We worked with those guys in Quebec City [...]. We know them a bit.”⁵⁵² Maj Bolduc purportedly told Capt da Silva that he was not going to send a team of investigators to KAF to investigate the file. Maj Bolduc purportedly also said that they were professionals and that they were capable of conducting the investigation in a professional manner.⁵⁵³

331. Maj Bolduc, for his part, said that he did not receive a request for assistance from Capt da Silva.⁵⁵⁴ Capt da Silva purportedly never asked Maj Bolduc for additional resources nor did he say that he was unable to take charge of the investigation.⁵⁵⁵ The Commission

⁵⁴⁵ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 97.

⁵⁴⁶ Document 020 at 22.

⁵⁴⁷ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 97.

⁵⁴⁸ *Ibid* at 97-98.

⁵⁴⁹ *Ibid* at 313-314.

⁵⁵⁰ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 314.

⁵⁵¹ *Ibid* at 88.

⁵⁵² *Ibid* at 87-88.

⁵⁵³ *Ibid* at 89.

⁵⁵⁴ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 86-87.

⁵⁵⁵ *Ibid* at 86-87.

investigators then asked Maj Bolduc if he had considered sending another team of investigators to KAF, given how close the members of CFNIS JTF-Afg and the JTF-Afg MP Coy were.⁵⁵⁶ He stated that he did not remember considering it and that, even if he had, he thought that he would not have been in a position to deploy additional resources.⁵⁵⁷

6.3 Initial Planning of the Investigation

332. A two-page investigation plan was drafted for this file.⁵⁵⁸ The plan contains 12 fields in which the following information is recorded:

- under “Date,” “30 January 2011” is written;
- under “Topic,” “Negligence, section 124, NDA” is written;
- the “Synopsis” field contains a summary of the complaint;
- under “Tasks,” eight tasks are listed;⁵⁵⁹
- under “Evidence (matrix),” eight pieces of evidence are listed;⁵⁶⁰
- the “Interviews” field contains a list of 15 witnesses (and Maj X and MWO Y), 8 of whom were interviewed after February 1, 2011; 2 of the 15 interviews had not yet been completed, as the document states that these individuals were on mission leave and were set to return on February 20, 2011;
- under “Plan,” it is written that [translation] “following various interviews with the people involved, determine whether an offence was committed against the detainee under the NDA, the [Criminal Code] of Canada or the Geneva Convention, and submit the necessary recommendations to prevent all other incidents of this type and supervise this kind of training”;⁵⁶¹
- under “Time Assessment,” “30 days” is written;

⁵⁵⁶ *Ibid* at 87.

⁵⁵⁷ *Ibid*.

⁵⁵⁸ Document 020 at 120-121. The investigation plan contains 12 fields in which information is recorded. These fields are called: “Date,” “Topic,” “Synopsis,” “Tasks,” “Evidence (matrix),” “Interviews,” “Plan,” “Time Assessment,” “Date completed,” “Prepared by,” “Date reviewed” and “Reviewed by.”

⁵⁵⁹ The tasks are as follows: 1) obtain written statements from Maj X and Lt Busset; 2) obtain the training plan for the exercise; 3) obtain the video recording of 18 January 2011 of the detainee’s cell; 4) obtain the assistance of an interpreter for the detainee’s interview; 5) obtain the video interview with the detainee; 6) meet with the RMP to validate/determine the alleged offences; 7) draft the “*précis des faits*” (Crown brief); and 8) draft the MPIR. Document 020 at 121.

Document 020 at 121.

⁵⁶⁰ The pieces of evidence are as follows: 1) determine the identity of the offender; 2) the date and location of the offence; 3) the task or military duty imposed on the accused; 4) whether the accused was told that a task or military duty had been imposed on him; 5) the standard of care imposed on the accused; 6) that the accused’s conduct, his actions or omissions were in line with the task or the duty imposed on him; 7) that, through his conduct, the accused did not exercise diligence with respect to the standard imposed on him; and 8) that the accused was in the appropriate state of mind to authorize the description “negligent performance.” Document 020 at 121-122.

⁵⁶¹ Document 020 at 122.

- under “Date completed,” “1 February 2011” is written;
- under “Prepared by,” “MCpl O’Bready” is written;
- under “Date reviewed,” “30 January 2011” is written; and
- under “Reviewed by,” “Capt. R. da Silva” is written.

333. The investigation plan was reviewed by Capt da Silva on January 30, 2011 and completed on February 1, 2011. During his interview with the Commission, Capt da Silva said that he had reviewed the investigation plan at the start of the investigation, and, since he was satisfied with the plan, did not suggest any changes.⁵⁶² Sgt Parent had no recollection of having helped draft the investigation plan. However, he was convinced that he had reviewed it. He explained that he always reviewed investigation plans before they were submitted to Capt da Silva for approval. He also described the investigation plan as being a [translation] “living document.”⁵⁶³

334. MCpl O’Bready, for his part, stated that he had prepared the investigation plan and that he had no help in preparing the document, although it was reviewed by Sgt Parent and Capt da Silva.⁵⁶⁴ According to MCpl O’Bready, the investigation plan is a [translation] “living” document and changes were made to it regularly during the investigation.⁵⁶⁵ MCpl O’Bready did not take personal notes of the changes made to the investigation plan, because it was not a police activity, and doing so would have been a duplication of effort.⁵⁶⁶ He also said that changes were made to the document as needed, but he could not consult the previous versions of the investigation plan, because they had not been stored in SAMPIS.⁵⁶⁷

335. The list of tasks in the investigation plan is brief. There are eight tasks in the list. Four of them were completed on January 30, 2011 and involved obtaining documents and materials, including the written statements from Maj X and Lt Busset,⁵⁶⁸ the training plan for the exercise, the video recording of “18 January 2011” of the detainee’s cell, and Lt Busset’s video interview

⁵⁶² Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 115–117.

⁵⁶³ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 108.

⁵⁶⁴ Transcript of the Commission’s interview with the Sgt (Retired) O’Bready, 23 October 2018 at 69, 72, 74.

⁵⁶⁵ *Ibid* at 77-78, 103.

⁵⁶⁶ *Ibid* at 76.

⁵⁶⁷ *Ibid*.

⁵⁶⁸ The written statement, dated 20 January 2011, from Lt Busset regarding the 19 January 2011 exercise and the briefing note, dated 28 January 2011, prepared by Maj X about the exercise concerned.

with the detainee. The document states that Maj X had been asked for the training plan, but it didn't exist. The last task, carried out on February 2, 2011, involved meeting with the Regional Military Prosecutor (RMP) in order to validate or determine the alleged offences. Drafting the "précis des faits" (Crown brief) and the Military Police Investigation Report (MPIR) are the final two tasks, but the investigation plan does not specify when those tasks were carried out.

336. The offence written in the investigation plan under "Topic" is "Negligence, section 124, NDA." That section reads as follows:

Negligent performance of duties

*124 Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.*⁵⁶⁹

337. Capt da Silva said that the investigation initially focused on [translation] "mistreatment of detainees", not negligent performance of duties, and the direction of the investigation changed following the first interviews.⁵⁷⁰ The investigation demonstrated that the detainees had not been mistreated and the direction of the investigation therefore changed.⁵⁷¹ When asked how the offence set out in section 124 of the *NDA* had been identified, Capt da Silva replied that he had assessed the evidence gathered up to that point and had made the determination himself.⁵⁷² He said that Maj X and MWO Y were subject to section 124 of the *NDA* because of their behaviour during the exercise concerned.⁵⁷³

338. MCpl O'Bready stated that he had included the offence of negligent performance of duties in the investigation plan.⁵⁷⁴ This addition originated with him and not Capt da Silva⁵⁷⁵. He explained that when he received a complaint, he determined at the outset the potential offences that would be investigated. Some offences were then withdrawn as the investigation progressed, because evidence was not found.⁵⁷⁶

⁵⁶⁹ *NDA*, s 124.

⁵⁷⁰ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 116.

⁵⁷¹ *Ibid* at 116.

⁵⁷² *Ibid* at 128-129.

⁵⁷³ *Ibid* at 129-131.

⁵⁷⁴ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 69, 72.

⁵⁷⁵ *Ibid* at 67.

⁵⁷⁶ *Ibid*.

6.4 Interviews Conducted

339. The investigators met with a total of 21 individuals. Regarding the subjects of this investigation, Maj X and MWO Y were first interviewed as persons involved in this file on 3 February and February 6, 2011, respectively. Between January 30, 2011, and February 24, 2011, MCpl O'Bready conducted formal interviews with audio and video recordings with the following people:

- On January 30, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Sgt Degrasse, Shift A Supervisor, JTF Afg MP Coy;
- On January 30, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Cpl Dandurand, Shift A Guard, JTF Afg MP Coy;
- On January 30, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Cpl Ferreri, Shift A Guard, JTF Afg MP Coy;
- On January 31, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Cpl Dauphinais, Shift A Guard, JTF Afg MP Coy;
- On January 31, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed MCpl Gasparro, Assistant Shift A Supervisor, JTF Afg MP Coy;
- On January 31, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Cpl Bilodeau-Roy, Shift A Guard, JTF Afg MP Coy;
- On January 31, 2011, MCpl O'Bready, assisted by MCpl Carrier, interviewed Cpl Young-Jones, Shift A Guard, JTF Afg MP Coy;
- On January 31, 2011, MCpl O'Bready, assisted by MCpl Carrier, interviewed Cpl Roy, Shift A Guard, JTF Afg MP Coy;
- On February 1, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Lt Busset, General Support Platoon Commander, JTF Afg MP Coy, first interview;
- On February 1, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed PO2 Gervais, NCO in charge of DTF, JTF Afg MP Coy;
- On February 3, 2011, MCpl O'Bready, assisted by Sgt Parent, interviewed Maj X, CO of JTF Afg MP Coy;
- On February 6, 2011, MCpl O'Bready, assisted by Sgt Mantha, interviewed MWO Y, Sergeant Major of JTF Afg MP Coy;
- On February 8, 2011, MCpl O'Bready, assisted by Sgt Mantha and an interpreter, interviewed the detainee extracted from his cell during the January 19, 2011, exercise;

- On February 16, 2011, MCpl O’Bready, assisted by Sgt Mantha, interviewed Cpl Lorette, Shift A Guard, JTF Afg MP Coy;
- On February 20, 2011, MCpl O’Bready, assisted by Sgt Mantha, interviewed Capt Touchette, Operations Officer, JTF Afg MP Coy, first interview;
- On February 21, 2011, MCpl O’Bready, assisted by Sgt Mantha, interviewed Cpl Gratton, Shift A Guard, JTF Afg MP Coy;
- On February 24, 2011, MCpl O’Bready, assisted by MCpl Carrier, interviewed Lt Busset, second interview;
- On February 24, 2011, MCpl O’Bready, assisted by MCpl Carrier, interviewed Capt Touchette, second interview.

340. Sgt Parent assisted MCpl O’Bready in taking statements from nine witnesses, including the first interview with Maj X. Sgt Mantha was on leave at the time of the incident and at the start of the investigation. His duties began on February 6, 2011, when he assisted MCpl O’Bready in taking MWO Y’s statement, as well as four additional statements. MCpl Carrier also assisted MCpl O’Bready in taking six statements.

341. MCpl O’Bready also conducted four brief series of interviews that were not recorded with the following people involved to obtain clarifications regarding certain information obtained during the interviews:

- On February 1, 2011, MCpl O’Bready interviewed Cpls Ferreri, Roy, Bilodeau-Roy and MCpl Gasparro regarding the allegation that the detainee was so afraid during the cell extraction that he urinated in his pants;
- On February 2, 2011, MCpl O’Bready interviewed Sgt Waugh, Shift B Supervisor, JTF Afg MP Coy to verify whether he had received SOP 500 containing the directive on riots at the DTF;
- On February 3, 2011, MCpl O’Bready interviewed MCpl Perrault, Assistant to the Shift B Supervisor, and Cpl Michaud, Shift B Guard, both of JTF Afg MP Coy, to clarify the allegation that the detainee was so afraid during the cell extraction that he urinated in his pants;
- On February 3, 2011, MCpl O’Bready interviewed Col Giguère to verify whether he had been informed by Maj X of an exercise to validate the DFT troop recall procedures.

342. MCpl O’Bready submitted, between February 18 and 24, 2011, three written requests for assistance to CFNIS Central Region (CR) located in Ottawa and CFNIS Western Region (WR)

located in Edmonton so that they could conduct interviews with persons involved or expert witnesses as part of the investigation. Note that each of these requests for assistance stated that they were in reference to a negligent performance of duties file in which Maj X and MWO Y were suspects.⁵⁷⁷

343. On February 18, 2011, he asked CFNIS CR to interview as a person involved Col Grubb, who was CFPM at the time.⁵⁷⁸ The purpose of this interview was to obtain Col Grubb's version of his visit to Afghanistan in January 2011 and the discussions he purportedly had with Maj X regarding the DTF. On February 28, 2011, MCpl Taylor, assisted by MCpl Arnold, both of CFNIS CR, interviewed Col Grubb. This interview was audio and video recorded.⁵⁷⁹

344. On February 22, 2011, he asked CFNIS WR to interview as an expert Maj Ferguson, CO CF Service Prison and Detention Barracks in Edmonton, Alberta. The purpose was to obtain Maj Ferguson's opinion on planning and holding an exercise in a detention centre and the rules surrounding this situation.⁵⁸⁰ On March 3, 2011, MS Gazzellone, assisted by MCpl Peters, interviewed Sgt Leighton Larson and MCpl Frank Szabon, both identified as expert witnesses regarding pre-deployment training on detainees and detainee handling in theatre. Because of prior commitments, Maj Ferguson could not attend this interview.⁵⁸¹ The interview was audio and video recorded.⁵⁸²

345. On February 24, 2011, he submitted a second request for assistance to CFNIS CR to ask them to interview as an expert Maj Wight, during his assignment as OC JTF Afg MP Coy Roto 9.⁵⁸³ The purpose was to obtain Maj Wight's opinion on planning and holding an exercise involving detention centre guards and the rules surrounding this situation. On February 28, 2011, MCpl Taylor, assisted by MCpl Arnold, interviewed Maj Wight. The interview was audio and video recorded.⁵⁸⁴

⁵⁷⁷ Document020 at 43, 45, 50.

⁵⁷⁸ *Ibid* at 43.

⁵⁷⁹ *Ibid* at 249-252.

⁵⁸⁰ *Ibid* at 45.

⁵⁸¹ *Ibid* at 114.

⁵⁸² *Ibid* at 267.

⁵⁸³ *Ibid* at 50.

⁵⁸⁴ Document020 at 241.

6.5 New Information and Additional Interviews

346. On February 24, 2011, Capt Touchette informed Capt da Silva that other exercises had been conducted at the DTF. Capt da Silva wrote an investigative activity in GO 2011-2411.⁵⁸⁵ Following information provided by Capt Touchette to Capt da Silva, MCpl O’Bready, assisted by MCpl Carrier, interviewed Lt Busset and Capt Touchette for a second time on February 24, 2011 to gather information regarding these exercises. These two interviews were audio and video recorded. No other DTF witnesses were interviewed regarding this matter, which was potentially relevant in the CFNIS JTF-Afg investigation.

347. In his interview with the Commission, Capt da Silva, who originally obtained this information from Capt Touchette, had no memory of this allegation against Maj X.⁵⁸⁶ MCpl O’Bready said that the purpose of the additional interviews was to obtain further information regarding these previous exercises held at the DTF. However, he said that he was never assigned to further investigate this matter.⁵⁸⁷ MCpl O’Bready nevertheless included the details of this allegation, as well as Maj X’s position regarding the allegation, in the “*précis des faits*” (Crown brief) submitted to the RMP:

[translation] Regarding the allegation that he asked the guards to make noise during training in the DTF to scare the detainees, he [Maj X] stated that he had given the directive to carry out two exercise[s] a month and to make noise to show the inmates that the guards had control of the DTF and that helped calm down the detainees. He stated that the goal was not to scare the detainees.⁵⁸⁸

6.6 Change in Maj X’s and MWO Y’s Status

348. On February 25, 2011, MCpl O’Bready, accompanied by MCpl Carrier, informed Maj X that his status in the investigation had changed, from “person involved” to “subject”. At this point, Maj X was informed that he was [translation] “suspected of offences under sections 124 and 129 of the *NDA*.”⁵⁸⁹ That same day, MCpl O’Bready, assisted by MCpl Carrier, interviewed Maj X regarding the incident of January 19, 2011.⁵⁹⁰ This was a cautioned interview and was

⁵⁸⁵ Document 020 at 96. See Part 5.6, which discusses other DTF exercises.

⁵⁸⁶ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 212-214.

⁵⁸⁷ Document 020 at 323.

⁵⁸⁸ Document 020 at 56, 436; transcript of CFNIS JTF-Afg’s cautioned interview with Maj X, 25 February 2011 at 105-106.

⁵⁸⁹ Document 020 at 52.

⁵⁹⁰ *Ibid.*

audio and video recorded. On March 2, 2011, MCpl O’Bready met with Maj X a third time at Maj X’s request, because he wanted to provide him with more details concerning his statement of February 25, 2011. This interview was audio and video recorded.

349. MWO Y, like Maj X, was informed of his change in status on February 25, 2011, by MCpl O’Bready, accompanied by MCpl Carrier.⁵⁹¹ According to GO 2011-2411, MWO Y was informed that he was [translation] “suspected of offences under sections 124 and 129 of the *NDA*.” However, he informed MCpls O’Bready and Carrier that he was not willing to meet with them for an interview to give them his version of the facts.⁵⁹²

350. On February 26, 2011, Capt da Silva informed Col Giguère that Maj X and MWO Y were suspects. Capt da Silva explained the upcoming procedures and reiterated that CFNIS JTF-Afg understood the operational implications of the investigation and that he had to complete the investigation as quickly as possible.⁵⁹³

6.7 Documents and Evidence in GO 2011-2411

351. GO 2011-2411 reveals that CFNIS JTF-Afg obtained a number of documents and other evidence in their investigation. The audio and video recordings of the formal interviews conducted during their investigation were entered as evidence. The following documents can be found in GO 2011-2411:

- Notebooks of five CFNIS JTF-Afg members who participated in this investigation, as well as to CNFIS CR and CFNIS WR investigators who assisted the CFNIS JTF-Afg team during the investigation;⁵⁹⁴
- Various administrative documents related to the CFNIS JTF-Afg investigation or the interviews conducted with persons involved or investigation subjects, such as the two-page form of Maj X’s legal rights;⁵⁹⁵

⁵⁹¹ *Ibid* at 53.

⁵⁹² *Ibid*.

⁵⁹³ *Ibid* at 54.

⁵⁹⁴ Document 020 at 212-240; transcript of the Commission’s interview with WO Parent, 9 October 2018 at 6-7, 282, 293.

⁵⁹⁵ Document 020 at 106-107, 324, 466-467 (satisfactory survey form); at 465-468 mandatory security measures); Document 020 at 280, 270-272 (preamble / Sgt Larson forms); Document 020 at 288, 262-269 (various interview documents related to Col Grubb’s interview); at 289, 245-248 (various interview documents related to Maj Wight’s interview).

- Lt Busset’s written statement regarding the January 19, 2011 exercise;⁵⁹⁶
- An excerpt from Maj X’s notebook during the January 19, 2011 exercise;⁵⁹⁷
- A task statement from Maj X;⁵⁹⁸
- A briefing note prepared by Maj X regarding the January 19, 2011 exercise;
- A chain of emails between CNFIS JTF-Afg members and the RMP assigned to the file,⁵⁹⁹ as well as a chain of emails between Capt da Silva and Maj Huppé;⁶⁰⁰
- Maj Casswell’s emails dated May 15 and 21, 2011, and April 6, 2011;⁶⁰¹
- Maj X’s email dated February 25, 2011 to Maj Grubb informing him that he is the subject of an CFNIS JTF-Afg investigation into the incident of January 19, 2011;⁶⁰²
- The two-page cover letter of the investigation report, GO 2011-2411;⁶⁰³
- The two-page cover letter of the “*précis des faits*” (Crown brief), including the “*précis des faits*” (Crown brief) and the pre-charge screening (redacted);⁶⁰⁴
- Three versions of MP technical directives regarding Op Athena.⁶⁰⁵

352. According to MCpl Carrier’s notebook, he went to the DTF on the morning of January 30, 2011, to pick up certain documents and the video recording of Cell 7 where the detainee extraction allegedly took place.⁶⁰⁶ These documents listed by MCpl Carrier were: the catwalk visitor log; the log of members on duty on the catwalk; the cell 7 detainee’s journal; and the DTF daily report. The notes indicate that the January 19, 2011 daily report had already been sent. According to MCpl Carrier, this document consisted of an overview of the DTF’s daily activities. MCpl Carrier stated in his interview with the Commission that he did not seize the logs, but rather made a copy of the information considered necessary to the investigation. He added that he submitted these copies to MCpl O’Bready, but did not mention this in his notes, even though he considered them evidence.⁶⁰⁷

⁵⁹⁶ Document 020 at 298, 336.

⁵⁹⁷ *Ibid* at 309, 337-338.

⁵⁹⁸ *Ibid* at 329-332.

⁵⁹⁹ *Ibid* at 339.

⁶⁰⁰ *Ibid* at 62-63.

⁶⁰¹ *Ibid* at 335, 455-456.

⁶⁰² *Ibid* at 101.

⁶⁰³ *Ibid* at 460-461.

⁶⁰⁴ *Ibid* at 333 (cover letter); at 378-454 (“*précis des faits*” (Crown brief)); at 458-459 (“pre-charge screening”).

⁶⁰⁵ Document 020 at 346-354, 356-363.

⁶⁰⁶ *Ibid* at 213.

⁶⁰⁷ Transcript of the Commission’s interview with WO Carrier, 1 October 2018 at 77.

353. MCpl O’Bready was in charge of the CFNIS JTF-Afg vault and therefore responsible for all evidence, including the evidence in investigation file GO 2011-2411, in which he was lead investigator. He remembered reviewing the copies of the various logs and viewing the video recording of the extraction of the detainee from his cell. However, he said that he believed he went to the DTF himself to consult this information and did not remember making copies.⁶⁰⁸ However, he stated that the copies of these documents would have been scanned in the CFNIS image file and recorded as evidence. Cpl O’Bready did not remember asking an investigator to collect the logs and other documents on the catwalk and instead, remembers going there himself.⁶⁰⁹

354. MCpl O’Bready was interviewed by CFNIS CR investigators, namely, Maj Leblanc and CPO 2 Rouillard, in 2016. When the Commission investigators spoke to MCpl O’Bready about his interview with Maj Leblanc, they told him about the discussion with Maj Leblanc regarding a document that MWO Y had given to him during his interview on February 6, 2011. MWO Y had referred to that document during his interview, describing it as a “check list” he had used during the exercise. MCpl O’Bready was informed that the document concerned was not included in the list of evidence in SAMPIS, as had been stated by Maj Leblanc. MCpl O’Bready seemed to believe that the document ought to be in GO 2011-2411 file and that it had been uploaded as images just as the police notes had been.

355. During his interview with the CFNIS CR investigators, MCpl O’Bready stated that there had been a problem with the repatriation of evidence.⁶¹⁰ The transcript of the interview states that MCpl O’Bready explained that the documentary evidence seized was still included in the evidence, even when the documents were classified as secret. When the CFNIS CR investigators asked him, what had happened to the document that MWO Y had given him, MCpl O’Bready repeated that there had been a problem with the repatriation of evidence.⁶¹¹ Upon further questioning, MCpl O’Bready could not remember what had happened, but stated that there had

⁶⁰⁸ Transcript of Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 123.

⁶⁰⁹ *Ibid* at 127-128.

⁶¹⁰ Document 065 at 227.

⁶¹¹ Transcript of the CFNIS CR interview with Sgt (Retired) O’Bready, 1 June 2016 at 16-18.

been a problem when the members of the in-theatre CFNIS Detachment tried to send the evidence to Canada.

356. During his interview with the Commission, Maj Leblanc did not remember this statement by MCpl O’Bready. CPO 2 Rouillard, who conducted the interview, told the Commission that MCpl O’Bready had told him about this problem with the repatriation of evidence, but was unable to tell him the nature of the problem.

357. MCpl O’Bready told the Commission that he remembered having discussed evidence with Maj Leblanc and CPO 2 Rouillard. In addition, while discussing some emails from Capt da Silva that were disclosed with file GO 2011-2411, the Commission investigators asked MCpl O’Bready if, after reviewing the file, he believed that certain documents were missing. MCpl O’Bready could not remember if evidence classified as secret was kept with the evidence or in another location. It is possible that this missing evidence was secret and was never uploaded into SAMPIS. However, it should still have accompanied the file and been disclosed to the Commission along with the file.

6.8 Preparing the “*précis des faits*” (Crown Brief)

358. The “*précis des faits*” (Crown brief) is a 72-page document. It contains the following: a cover letter, a seven-page prosecution summary,⁶¹² the summaries of statements obtained during interviews conducted in the course of the investigation, Lt Busset’s written statement regarding the exercise on January 19, 2011, an excerpt from Maj X’s notes during the exercise on January 19, 2011, Maj X’s statement of tasks, MP Technical Directive OP Athena dated October 2009, the administrative activities of CFNIS JTF-Afg regarding the change in status of Maj X and MWO Y, and the Records of Disciplinary Proceedings of Maj X and MWO Y.⁶¹³

359. During his interview with the Commission, MCpl O’Bready stated that he had prepared the “*précis des faits*” (Crown brief).⁶¹⁴ At the request of Capt da Silva, Maj Bolduc printed it and

⁶¹² It should be noted that the table of contents in the “*précis des faits*” (Crown brief) states “Sommaire du cas EG 2411-2011” [translation] “GO 2411-2011 case summary” instead of “Sommaire du procureur” [translation] “prosecution summary.” This prosecution summary (“Prosecution Summary-1”) can also be found on pages 23 to 29 of GO 2011-2411.

⁶¹³ Document 020 at 378-379.

⁶¹⁴ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 357.

disclosed it to the RMP in Ottawa. However, he was indeed the one who wrote it.⁶¹⁵ For his part, Sgt Parent stated that he did not think he had reviewed the “*précis des faits*” (Crown brief), but he could not recall his degree of involvement in the case following his return from mission leave.⁶¹⁶

360. Capt da Silva prepared the cover letter, dated March 7, 2011, to the attention of the RMP with the “*précis des faits*” (Crown brief) attached.⁶¹⁷ Capt da Silva checked the content of the “*précis des faits*” (Crown brief). He stated that this is the normal procedure and that, since the letter was signed, it therefore confirmed that he had reviewed the “*précis des faits*” (Crown brief) to ensure everything was there. When asked whether he thought the evidence was sufficient for the prosecutor to issue an opinion supporting a decision to lay charges, he replied that he was [translation] “completely” satisfied with its content. He added that he had not received any request from the RMP for further investigation following the submission of the “*précis des faits*” (Crown brief).⁶¹⁸ Maj Bolduc confirmed that he had printed the “*précis des faits*” (Crown brief) and ensured that it was sent to the RMP assigned to this case for analysis and recommendations.⁶¹⁹

6.9 Preparing the Case Summary

361. According to GO 2011-2411, two case summaries were prepared in this case. The first is a five-page case summary written during the course of the investigation by MCpl O’Bready, dated February 22, 2011.⁶²⁰ It contains a chronological summary of the events up to February 8, 2011, the date on which the detainee was interviewed by CFNIS JTF-Afg. It states that the chronological summary of events was completed by CFNIS JTF-Afg members following the various interviews conducted in the course of their investigation.⁶²¹ Although this document is dated February 22, 2011, MCpl O’Bready began drafting a case summary on February

⁶¹⁵ Document 020 at 378-379.

⁶¹⁶ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 158.

⁶¹⁷ Document 020 at 333-334, 428-429.

⁶¹⁸ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 231.

⁶¹⁹ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 61.

⁶²⁰ Document 020 at 30-34.

⁶²¹ Document 020 at 34.

7, 2011.⁶²² This case summary was amended by MCpl O'Bready on February 11, 20 and 23 2011⁶²³ and by Capt da Silva on February 7 and 20, 2011.⁶²⁴

362. A second six-page summary was drafted by Sgt Parent on April 14, 2011⁶²⁵ and amended by Capt da Silva on April 14 and 16, 2011.⁶²⁶ This summary contained some amendments relative to the first case summary drafted by MCpl O'Bready. The Commission investigators asked Sgt Parent to explain the reasons why a second case summary had been drafted in this case. After reviewing the document concerned, Sgt Parent stated that this summary had been drafted for BGen Milner, so he could decide whether he wanted to take administrative or disciplinary action against Maj X and MWO Y.⁶²⁷ Sgt Parent could not recall exactly why he had removed the first three paragraphs pertaining to extraction exercises conducted at the DTF prior to the exercise on January 19, 2011, as well as the testimony of Lt Busset and Capt Touchette regarding the order given by Maj X to make noise during the exercises and that the goal was to [translation] "calm" the detainees. He explained that an abridged version had been drafted because this summary had been designed to be given to the military CoC. Sgt Parent thought that Capt da Silva had asked him to write it, but he was not sure.⁶²⁸

363. MCpl O'Bready said that he could not explain why someone else had drafted this second case summary. Sgt Mantha could not recall whether he had been involved in the drafting of the second summary, but said that it was possible that Sgt Parent had asked him to read it. He thought that Sgt Parent had written this report because MCpl O'Bready was away on mission leave at the time.

⁶²² Document 089, GO 2011-2411 Case Notes, 28 July 2016 (received at the MPCC on 29 September 2016) at 56 (hereinafter "Document 089").

⁶²³ Document 089 at 48, 50-54.

⁶²⁴ Document 089 at 50, 56.

⁶²⁵ Document 020 at 35-40.

⁶²⁶ Document 089 at 29, 31.

⁶²⁷ Transcript of the Commission's interview with WO Parent, 9 October 2018 at 305.

⁶²⁸ *Ibid* at 307.

6.10 Conclusion of the Investigation

364. Capt da Silva drafted the final remarks of the investigation on April 14, 2011.⁶²⁹ With regard to the conduct of Maj X and MWO Y, the two subjects of this investigation, he stated that the CFNIS JTF-Afg investigation had determined that

[translation]

“Maj [X] hastily prepared a recall exercise for which the control measures were defective, resulting in one detainee being extracted from his cell. Maj X admitted that he had not adequately planned the exercise. This conduct appears to be more a case of professional misconduct than criminal behaviour;

MWO [Y] was on the first section of the catwalk, near the centre, so he could not directly observe cell 7. He basically remained in the same spot during the exercise, thus demonstrating passive behaviour. This nonchalant attitude also appears to be more of a case of professional misconduct than criminal behaviour.”⁶³⁰

365. It should be noted that the last paragraph of the investigation’s concluding remarks reads as follows: [translation] “. . . the CFNIS JTF-Afg deems that it is in the interests of military justice not to lay charges in this case and to use its discretionary authority to give the CoC the opportunity to take the appropriate actions. This investigation has concluded.”⁶³¹

366. The decision not to lay charges in this case can also be found in the cover letter for the MPIR from CO CFNIS, LCol Delaney, dated April 18, 2011.⁶³² This letter was signed by Maj Bolduc on behalf of LCol Delaney and was submitted to Comd JTF-Afg for execution.⁶³³

⁶²⁹ Document 020 at 122-123.

⁶³⁰ *Ibid.*

⁶³¹ Document 020 at 123.

⁶³² *Ibid* at 460.

⁶³³ *Ibid* at 460 at para 4.

Allegation #1: The CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010-2011.

VII DEFICIENCIES IDENTIFIED IN THE CFNIS JTF-AFG INVESTIGATION

367. The Commission must determine whether there are deficiencies in this investigation. The Commission must then assess the nature of the deficiencies and the possible impact of these deficiencies on the investigation. Lastly, the Commission must assess these deficiencies to decide whether this investigation collected sufficient evidence to support the charges contained therein or that may have been drafted following this investigation.

7.1 Lack of Resources and Experience

368. After receiving LCol Strickland's complaint on January 29, 2011, Capt da Silva had to assign an investigator to the file. Though Sgt Parent was there on January 29, 2011, he was scheduled to go on mission leave on February 6, 2011. Sgt Mantha returned to KAF from his mission leave immediately before Sgt Parent departed. MCpl Carrier had not completed his investigator training; he therefore had neither the experience nor the training required to conduct an investigation of this magnitude. MCpl O'Bready was in Canada when the exercise took place on January 19, 2011, but he arrived at KAF at around 0300 hours on January 30, 2011. He was greeted by Sgt Parent, who informed him that he was expected to meet with Capt da Silva on the morning of January 30, 2011 to receive an investigation assignment.⁶³⁴

369. An MP since 2001, MCpl O'Bready had only four years of experience in the CFNIS before this investigation. He had therefore not received advanced training in investigations. He had never investigated major cases. Capt da Silva decided to assign MCpl O'Bready as the lead investigator.

370. That said, Capt da Silva's initial reply to Commission investigators' questions on this matter speaks volumes. His first reaction was to assign a sergeant to this task; he even stated that [translation] "it sure wasn't the Master-Corporal."⁶³⁵ He explained this by stating that his choice

⁶³⁴ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018.

⁶³⁵ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 96.

of a sergeant was based on experience, not rank. He said that MCpl O’Bready already had a lot of work as the person in charge of the evidence vault, and he had prepared the “*précis des faits*” (Crown brief) in other investigations. MCpl Carrier did not have the necessary training. Also, this was an [translation] “important investigation.”⁶³⁶

371. But when it was pointed out that MCpl O’Bready had investigated this file, he stated that MCpl O’Bready had [translation] “experience in similar investigations.”⁶³⁷ Furthermore, Sgt Parent could help him, and MCpl O’Bready could go to Sgt Parent, Sgt Mantha and Capt da Silva if he had problems.⁶³⁸ It should be noted that Sgt Parent, the most experienced investigator in the group, was not present for the most crucial stage of the investigation. He was away from KAF on deployment leave from February 7, 2011, to March 2, 2011. Also, Capt da Silva stated that he removed himself from the file because he did not want [translation] “it to be tainted.”⁶³⁹ Capt da Silva described his conflict with Maj X during this interview, and this will be explored in greater detail in Part 7.12 of the report.

372. Nevertheless, he should have discussed the file with the investigators.⁶⁴⁰ A review of the case notes⁶⁴¹ shows that Capt da Silva added nine documents to GO 2011-2411 and that he made changes to various documents 35 times over the period from January 30 to March 6, 2011.⁶⁴² Capt da Silva explained that he may have corrected some documents, but was careful not to change the meaning of the text; these were simply corrections to grammar, spelling and syntax.⁶⁴³

373. Capt da Silva’s recollections are often vague, and he frequently gave answers based on what he assumed had happened rather than actual recollections of events. His testimony indicates that he would have preferred to assign a sergeant to this investigation instead of MCpl O’Bready. This will be discussed in greater detail in Part 7.8.1 of the report.

⁶³⁶ *Ibid* at 96.

⁶³⁷ *Ibid* at 98.

⁶³⁸ *Ibid* at 98-99.

⁶³⁹ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 91.

⁶⁴⁰ *Ibid*.

⁶⁴¹ See part 7.2 of this report.

⁶⁴² Document 089 at 38-69.

⁶⁴³ Summary of the Commission’s interview with Capt (Retired) da Silva, 15 September 2020.

7.2 Security and Military Police Information System

7.2.1 Security and Military Police Information System

374. The Security and Military Police Information System (SAMPIS) is the electronic records management system for all incidents reported to the MP. This software is adapted from a commercial system that is used by law enforcement agencies across Canada. SAMPIS is classified as a Protected-B system. The MP have been using SAMPIS since 2001.

375. Access to SAMPIS is restricted to three groups: all Regular Force (Reg F) or Reserve Force (Res F) military police and Military Police (MP) members of the CF MP Gp appointed under section 156 of the *NDA* and employed in a law enforcement capacity; all Reg F or Res Force MPs and MPs of the CF MP Gp who require access to SAMPIS data as part of their regular duties; and any public servant, contract employee, or other member of the Canadian Forces employed by or posted to a position within the CF MP Gp or Department of National Defence SAMPIS infrastructure support groups who require access to SAMPIS data as part of their regular duties.⁶⁴⁴

376. GO reports are produced through SAMPIS. Users must select from the various options to create and complete a document according to a well-defined list. Users can insert the dates and times they wish, or let SAMPIS enter the date and time on a document.

7.2.2 Security and Military Police Information System Case Notes

377. Case notes⁶⁴⁵ are an important component of SAMPIS. SAMPIS records dates and times and a description based on a pre-established menu of actions taken by various people involved in a GO. This information is found in the GO case notes. Therefore, the case notes present a sequence of actions from beginning to end of a GO. One can see who initiated a GO, created a document, modified a document or added a document to a GO, and when these actions were completed.

378. Every entry in the case notes indicates the date and time, as well as the user's name and MP badge number. It is interesting to note that the date and time indicated by SAMPIS are not

⁶⁴⁴ CF MP Order 2-630, *Security and Military Police Information System (SAMPIS)*, 26 June 2015 at paras 3-4, 17.

⁶⁴⁵ "Case notes" is the English translation of the French term "Notes du SISEPM."

necessarily the local date and time where the entry was made in the system, but may be the local time associated with the user's account.

379. Here is an example of this explanation. For a SAMPIS user who typically works at ASU Valcartier, in Quebec, the local time associated with their account would be the time at ASU Valcartier. That user is deployed to KAF. The user makes entries in a GO. The date and time indicated in the case notes by SAMPIS would be the local date and time at ASU Valcartier, not at KAF, if the user had not changed their account to have KAF local time associated with this account. It is therefore essential to know this feature of SAMPIS in order to correctly interpret the information entered in the case notes.

7.2.3 GO 2011-2411

380. The dates and times entered in the case notes of these investigators are the local dates and times at ASU Valcartier because the investigators did not modify their SAMPIS accounts during their deployment at KAF.⁶⁴⁶ Daylight savings time means the clocks went forward one hour on the second Sunday in March, and fell back one hour on the first Sunday in November. The months of January and February are in the standard time period, not daylight savings time.

381. ASU Valcartier is located in the UTC-5 (Eastern) time zone, and KAF is in the UTC+4.5 time zone. Therefore, the time difference between ASU Valcartier and KAF is +9.5 hours. So one has to add 9.5 hours to the time indicated in the case notes to determine when at KAF this action took place. As stated in Chapter 5, the times entered in this PII report are in KAF local time, unless clearly indicated otherwise.

382. The dates and times entered in the various documents created by CFNIS JTF-Afg investigators are in KAF local time. However, these dates and times do not mean the document was created exactly on that date and at that time, but rather this is the date and time that were entered by the investigator. The exact dates and times of document creation or modification in GO 2011-2411 can be found in the case notes.⁶⁴⁷

⁶⁴⁶ Summary of the Commission's interview with Sgt (Retired) O'Breedy, 14 September 2020; summary of the Commission's interview with Capt (Retired) da Silva, 15 September 2020.

⁶⁴⁷ CF MP Order 2-126.5, *SAMPIS Text Types*, 20 June 2016 at paras 12-13.

7.3 Lack of Investigation Planning

383. The *NDA* does not provide for the creation of a military police service. This Act simply specifies the authority of “[o]fficers and non-commissioned members who are appointed as members of the military police under regulations made for the purposes of this section . . .”⁶⁴⁸

The CFPM is appointed by the CDS, and the CFPM’s responsibilities include investigations and the training of military police.⁶⁴⁹ *Canadian Forces Administrative Order (CFAO) 22-4 (Security and Military Police Services)* states that the mandate of the military police is to “provide security and police services to the CF and DND, its establishment and works.”⁶⁵⁰ Paragraph 7 of this CFAO states that the duties and responsibilities of the military police are described in Chapter 1 of the MPPTP.⁶⁵¹ Chapter 1, paragraph 4, of the MPPTP reads as follows:

The CFPM is authorized to issue the CF MP Policies and Procedures on behalf of the Chief of the Defence Staff. These policies and procedures dictate the minimum departmental standards for the MP operating procedures in support of domestic or international operations. They will be adhered to in all circumstances and any deviations from or modifications to these policies may only be authorized by the CFPM.

Therefore, the policies and procedures set out in the MPPTP must be observed by CFNIS JTF-Afg members.⁶⁵²

384. Chapter 6, Annex B, of the MPPTP focuses on investigation management. Paragraph 6 of this annex specifies that an investigation plan must be prepared for every investigation and must be reviewed by a supervisor. CFNIS SOP 201, *Investigations-General/Briefing Protocol*, states that an investigator must draft a plan and submit it to their warrant officer so that the latter and the detachment comd can review it and make any necessary changes. This plan is then given back to the investigator. The investigation plan template found in SAMPIS⁶⁵³ must be used except in complex investigations where it is suggested to use an operations plan. An

⁶⁴⁸ *NDA*, s 156.

⁶⁴⁹ *NDA*, ss 18.3, 18.4.

⁶⁵⁰ CFAO 22-4 at para 3.

⁶⁵¹ A-SJ-100-004/AG-000 - *Security Orders for the Department of National Defence and the Canadian Forces*; Volume 4 – *Military Police Policies and Technical Procedures (MPPTP)*.

⁶⁵² In 2012, CF MP Orders and, before 2012, Police Policy Advisories (PPAs) replaced a large part of the information in the MPPTP.

⁶⁵³ This investigation plan template is also found in CF MP Order 2-340.2 (*Investigation Plans*).

investigation plan must be continually reviewed and updated to ensure that the elements of the offence are identified and to determine whether there is evidence to this effect.⁶⁵⁴

385. An investigation plan was drafted by MCpl O’Bready and the copy found in GO 2011-2411 states that it was drafted on January 30, 2011, at 1403 hours. It also states that it was reviewed by Capt da Silva on January 30, 2011.⁶⁵⁵ The case notes state that MCpl O’Bready made changes to his investigation plan on February 4 and 16, 2011.⁶⁵⁶ Capt da Silva told the Commission investigators that he had reviewed the investigation plan at the beginning of the investigation and, having been satisfied with the plan, he had not suggested any changes. He said that the investigation initially focused on [translation] “detainee abuse” rather than negligence in the performance of tasks. But, after the initial interviews, the direction of the investigation had changed.⁶⁵⁷ The investigation plan indicates [translation] “Negligence, section 124, NDA” under [translation] “Primary.”

386. The “Synopsis” part of the investigation plan states that LCol Strickland informed the CFNIS JTF-Afg on January 30, 2011⁶⁵⁸ that [translation] “around 19 Jan 2011, an exercise held in a cell at the KAF detention transfer facility under the responsibility of Maj X, CO MP Coy⁶⁵⁹, involved extracting a detainee from his cell. Members of GS Pl Shift A entered cell #7 of the detainee . . . He was so frightened that he urinated in his pants.” This investigation plan did not seek to uncover the reason(s) for the 10-day delay between the exercise and the conversation between Capt da Silva and LCol Strickland. This will be discussed in further detail in Part 7.8.1 of this report.

387. MCpl O’Bready arrived at KAF at around 0300 hours on January 30, 2011. That same day, he interviewed Sgt Degrasse at 1513 hours; Cpl Dandurand at 1624 hours; and Cpl Firreri at 1740 hours. On January 31, he interviewed Cpl Dauphinais at 0927 hours; MCpl Gasparro at 1115 hours; Cpl Bilodeau-Roy at 1153 hours; Cpl Young-Jones at 1339 hours; and Cpl Roy at

⁶⁵⁴ CFNIS SOP 201, *Investigations-General/Briefing Protocol*, October 2010 at paras 5, 9; also see Annex A of CF MP Order 2-126.5 (*Initial Complaint*).

⁶⁵⁵ Document 020 at 120-121.

⁶⁵⁶ Document 089 at 53-59.

⁶⁵⁷ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 115-117.

⁶⁵⁸ According to GO 2011-2411, the complaint was received on 29 January 2011 (Document 020 at 21).

⁶⁵⁹ The English term “CO MP Coy” means “Commanding Officer of the Military Police Company.”

1426 hours. It appears that he hurried to meet with as many witnesses as possible during the first two days of his investigation, rather than taking the time to properly assess the complaint and make an initial investigation plan. He did not establish a chronology of events in order to plan the order of his witnesses and the main questions that needed to be explored. He could have easily done this after his meeting with Sgt Degrasse.

388. This plan includes a list of 15 witnesses (in addition to Maj X and MWO Y), whereas the “*précis des faits*” (Crown brief) contains 20 (plus Maj X and MWO Y). MCpl O’Bready therefore did not change his investigation plan to include all the witness names that were added over the course of the investigation.

389. MCpl O’Bready met with Cpl Michaud on February 3, 2011. He reportedly met with him when he interviewed MCpl Perreault at building 780. Cpl Michaud stated that he had asked the detainee if he wanted to go to the washroom early in the morning of January 19, 2011, and that the detainee had replied no. He also stated that the detainee did not appear to have urinated in his pants. Cpl Michaud is not on the interview list in the investigation plan or on the interview list in the investigative summary. However, this information is important in determining the detainee’s condition on the morning of January 19, 2011. His testimony is not entered as a separate investigative activity, i.e. a witness statement. This information is found in MCpl O’Bready’s notes⁶⁶⁰ and it was also put in MCpl Perreault’s interview summary. This summary is found in two places in GO 2011-2411, namely, in investigative activity 14 and as an investigator’s activity in the “*précis des faits*” (Crown brief).⁶⁶¹ Cpl Michaud is an important witness because he is an eyewitness to the detainee’s condition. His statement should have been entered separately in GO 2011-2411 rather than being included in that of MCpl Perreault.

390. The list of tasks in the investigation plan is brief; it is not possible to know whether other tasks completed earlier were removed from the plan when MCpl O’Bready made a change. The last completed task is dated February 2, 2011. There do not appear to be any tasks added after that. Completed tasks, such as requests for assistance, getting the statement of tasks from Maj X and “MP Tech Directive Op Athena” are not included. A number of other tasks may have been

⁶⁶⁰ Document 020 at 206.

⁶⁶¹ *Ibid* at 87, 423.

considered during the investigation and not included in the investigation plan. For example, reviewing the detainee interview conducted by Lt Busset with the interpreter to clearly understand the questions asked in order to prepare to interview the detainee; using the video recording of the extraction during the detainee interview; interviewing the detainee as a priority because he was identified as a victim; getting the available DTF audio and video recordings; interviewing the personnel recalled during the January 19, 2011 exercise; and interviewing any relevant witnesses about other exercises in order to clarify the issue.

391. The CFNIS reviewed this investigation in 2015-2016.⁶⁶² On February 9, 2016, Maj Leblanc, the person in charge of the review, submitted his report in which he described the investigation plan as follows: “The invest plan is not very detailed which did translate into a singularly focused investigation.”⁶⁶³ He then made several comments on specific deficiencies of the plan, including the fact that the plan did not deviate from its initial objective despite new information being received over the course of the investigation.⁶⁶⁴

392. The investigation plan found in GO 2011-2411 had several deficiencies. The investigation plan was not further developed as new information came to light. The plan should have included any new witness, any new investigative activity and any change made to the direction of the investigation. MCpl O’Bready had additional meetings with four of the eight initial witnesses. However, he should have had additional meetings with some other witnesses, given the information he had gathered during the investigation.

393. An ad-hoc and ongoing review of the investigation plan certainly would have helped MCpl O’Bready during his investigation. In addition, it is evident from the review of the investigation plan and investigation that several additional witnesses should have been interviewed and that several other documents should have been obtained in order to clarify the events of 19 January 2011, and the events surrounding the conduct of other exercises.

⁶⁶² See Chapter IV.

⁶⁶³ Document 065 at 21, para 7(a).

⁶⁶⁴ *Ibid* at 20-25, para 7(a).

7.4 Determination of Offences and Suspects

394. Chapter 106 of the *Queen's Regulations and Orders (QR&O)*⁶⁶⁵ sets out the regulations for investigations in the CAF. An investigation is typically conducted where a complaint is made or where there are other reasons to believe that a service offence may have been committed. This investigation must be conducted as soon as practical to determine whether there are sufficient grounds to justify the laying of a charge.⁶⁶⁶ An investigation conducted pursuant to this chapter must, at a minimum, collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation.⁶⁶⁷

7.4.1 Identification of Offences

395. On February 1, 2011, MCpl O'Bready met with MCpl Gasparro and Cpls Ferreri, Roy and Bilodeau-Roy. MCpl Gasparro and Cpl Ferreri confirmed that they had looked at the detainee's pants and seen no traces of urine.⁶⁶⁸ MCpl O'Bready therefore wrote the following in GO 2011-2411: [translation] "Based on the guards' confirmation and Lt Busset's interview with the detainee, the allegation was unsubstantiated."⁶⁶⁹

396. The Commission investigators asked MCpl O'Bready if he had identified potential offences in relation to the actions taken involving the detainee. MCpl O'Bready replied that this was discussed by the investigators and they had determined that the detainee had not been abused. He justified this conclusion by noting the absence of [translation] "physical violence." In addition, there had been no [translation] "violation of their religious rights" and he was not deprived of sleep. He also relied on the video recording of the extraction to arrive at this conclusion. Therefore, in his view, the detainee was [translation] "an alleged victim" and not a victim. He also strongly emphasized his discretion, stating that he could [translation] "go from

⁶⁶⁵ *Queen's Regulations and Orders*, Chapter 106, PC 1999-1305, 1 September 1999 [QR&O].

⁶⁶⁶ QR&O 106.02.

⁶⁶⁷ QR&O 106.03.

⁶⁶⁸ Document 020 at 83. According to investigative activity 11, MCpl Gasparro and Cpl Ferreri had stated that the expression "He was so afraid he pissed his pants" was just an expression used by the guards to [translation] "make light of the situation."

⁶⁶⁹ Document 020 at 83 (investigative activity 11); this information is also found in his notes, see Document 020 at 204-205.

one end to the other” and that he had [translation] “no restrictions.”⁶⁷⁰ MCpl O’Bready also described the detainee as a victim [translation] “of the commanding officer’s negligence.”⁶⁷¹

397. The investigation plan specifies [translation] “Negligence, section 124, NDA.”⁶⁷² According to Capt da Silva, the investigation initially centred on determining whether the detainee had been abused by the guards. It was not until after the initial interviews that the investigation reportedly turned to the issue of negligence. He stated that he had to review the investigation plan at that time.⁶⁷³ Capt da Silva stated that MWO Y was [translation] “suspected of negligent performance of a task” in his email to Maj Bolduc on February 3, 2011.⁶⁷⁴

7.4.2 Determination of Suspects

398. The description of the various roles that can be assigned to a person in a GO report is found in CF MP Order 2-634.1 (*SAMPIS Entity Records: Persons*),⁶⁷⁵ and this order states that this is a mandatory field in SAMPIS. According to this order, an “involved” is “a person who is involved in an investigation in any capacity and is not a suspect, a witness or a complainant.” The term “suspect” is to be used only “where the investigator has determined that there are reasonable grounds to believe and support the allegation that the person may be involved in the commission of a crime or statute breach, but charges have not been laid.” The term “Subject” is to be used for “a person who may be a ‘Suspect,’ but the MP has not yet made that determination (e.g., a person of interest in an investigation).” The term “Complainant” is to be used only to describe persons “who are the target of non-violent offences such as break and enter, lost property, or other property crimes.” The term “Witness” is to be used to describe a person who “observed or has knowledge of an incident.”⁶⁷⁶

⁶⁷⁰ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 119.

⁶⁷¹ *Ibid* at 81.

⁶⁷² *Ibid* at 67.

⁶⁷³ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 116-117.

⁶⁷⁴ Document 020 at 339-345.

⁶⁷⁵ CF MP Order 2-634.1 is an attachment to CF MP Order 2-634 (*SAMPIS Entity Records*). These orders were published on December 13, 2012 and do not override any document. The only reference to CF MP Order 2-634 is “*Indexing Entities*, Versaterm Canadian RMS User Guide.” CF MP Order 2-634.1 does not mention any reference. The 2009 edition of “*Indexing Entities*, Versaterm Canadian RMS User Guide” does not contain any definition or description of the different roles found in CF MP Order 2-634.1.

⁶⁷⁶ CF MP Order 2-634.1, *SAMPIS Entity Records: Persons*, 13 December 2012 at para 2.

399. Though these definitions come from a document published in 2012, these terms are the ones used in SAMPIS in 2011 and commonly used at the time of the investigation. It is therefore reasonable to conclude that these definitions were the same at the time of the investigation.

7.4.2.1 The Guards

400. MCpl O'Bready explained to the Commission investigators that he had not begun his investigation by focusing on the guards involved in the January 19, 2011, exercise because he had no information about potential suspects other than Maj X and MWO Y. He would have entered all guards' names as [translation] "alleged suspect" had he had one or more names at the beginning of the investigation. He had found [translation] "the allegation to be serious" when he was initially informed of the complaint. He thought that the guards must have had a reason to enter the cell and that he would receive an explanation during the interviews. He quickly learned the names of the guards and the reasons for their actions. Therefore, the guards were not [translation] "alleged suspects" at the beginning of his investigation.⁶⁷⁷

7.4.2.2 Major X

401. Based on the information he had received from Capt da Silva, MCpl O'Bready believed that Maj X and MWO Y may be suspects.⁶⁷⁸ That said, he interviewed Maj X on February 3, 2011 at 0950 hours as an "Involved."⁶⁷⁹ Sgt Parent initially recorded Maj X as an "Involved" on February 3, 2011 at 1332 hours.⁶⁸⁰ Sgt Parent took notes during the interview with Maj X on February 3, 2011.

402. MCpl O'Bready changed Maj X's status from [translation] "involved" to "suspect" on February 8, 2011.⁶⁸¹ It should be noted that he had interviewed MWO Y on February 6, 2011. MCpl O'Bready sent a request for assistance to CFNIS CR on February 18, 2011 in which he stated that [translation] "Maj [X] is suspected of having been negligent in the performance of his duties, under section 124 of the NDA, by not correctly supervising the exercise that led to the

⁶⁷⁷ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 72-73, 302.

⁶⁷⁸ *Ibid* at 56, 62.

⁶⁷⁹ Transcript of the CFNIS JTF-Afg's interview with Maj X, 3 February 2011 at 4.

⁶⁸⁰ Document 089 at 61.

⁶⁸¹ Document 020 at 3; Document 089 at 55.

extraction of a detainee from his cell.”⁶⁸² On February 23, 2011, Capt da Silva met with Col Giguère to inform him of the CFNIS procedures concerning the filing of charges against Maj X and MWO Y, the involvement of the CFNIS CoC and the role of the RMP in this file.⁶⁸³ MCpl O’Bready informed Maj X on February 25, 2011 that his status had changed, [translation] “from involved status to subject status.”⁶⁸⁴ He informed Maj X [translation] “that he was suspected of offences under sections 124 and 129 of the NDA.”⁶⁸⁵

403. On October 23 and 24 2018, MCpl O’Bready was asked about the status of Maj X and MWO Y. Capt da Silva had informed him of the case and that Maj X and MWO Y were possibly suspects.⁶⁸⁶ He then explained that they were [translation] “alleged suspects.”⁶⁸⁷ He also stated that the “focus” of the investigation was not the [translation] “people who were responsible for the exercise,” but rather that he had only [translation] “these two names to start with.”⁶⁸⁸

404. MCpl O’Bready stated on October 23, 2018 that he considered Maj X and MWO Y to be [translation] “alleged suspects” when he discussed the case with the RMP on February 2, 2011.⁶⁸⁹ Furthermore, during his interview on October 24, 2018, he did not seem to remember having discussed Maj X’s status with the RMP before his interview on February 3, 2011.⁶⁹⁰ Near the end of the interview on October 23, 2018, MCpl O’Bready stated that he considered Maj X to be involved and not a suspect at the time of his interview on February 3, 2011.⁶⁹¹ The following day, October 24, 2018, MCpl O’Bready was questioned again on the status of Maj X and MWO Y on February 3, 2011. He replied: [translation] “I would say, he remained involved, in my mind, anyway, in SAMPIS⁶⁹², it had been marked subject. But in my head, he was a suspect

⁶⁸² Document020 at 44.

⁶⁸³ Document020 at 49.

⁶⁸⁴ Document020 at 52.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 56.

⁶⁸⁷ *Ibid* at 66.

⁶⁸⁸ *Ibid* at 73-74.

⁶⁸⁹ *Ibid* at 106.

⁶⁹⁰ *Ibid* at 231-232.

⁶⁹¹ *Ibid* at 230-231.

⁶⁹² SAMPIS means *Security and Military Police Information System*.

only from the moment when I did the interview under caution. It's only at that point that...but before that, he was an involved person in my opinion.”⁶⁹³

7.4.2.3 MWO Y and Absence of Caution

405. MCpl O'Bready entered MWO Y as [translation] “subject” in SAMPIS on February 3, 2011, at 1306 hours following the interview with Maj X.⁶⁹⁴ A review of the SAMPIS notes shows that, on February 4, 2011, MCpl O'Bready added investigative activity 13, his summary of the interview with Maj X, and he then changed MWO Y's status from [translation] “subject” to “suspect.”⁶⁹⁵ MCpl O'Bready interviewed MWO Y on February 6, 2011. He stated to MWO Y that he was [translation] “being interviewed as a person involved” in the January 19, 2011, incident.⁶⁹⁶ However, three days before, during his preamble to the interview of Maj X, MCpl O'Bready stated that [translation] “This interview is regarding GO 2011-2411, which concerns a matter of negligence under section 124 of the *National Defence Act*, in which Master Warrant Officer [Y] is a suspect.”⁶⁹⁷

406. Capt da Silva had sent an email to the RMP, Capt Carrier, on January 31, 2011, to try to establish telephone communication between the RMP and Sgt Parent. Seven guards, as well as Sgt Degrasse, were interviewed on January 30 and 31, 2011. Capt da Silva sent an email to Maj Bolduc on February 3, 2011, in which he stated that MWO Y was [translation] “suspected of negligent performance of a duty.”⁶⁹⁸

407. Capt da Silva explained to the Commission investigators why he believed that MWO Y was guilty of negligence. He said that Maj X had given a specific order to MWO Y. The latter had to [translation] “make sure that no one enters the cells” and that he had therefore failed at his task.⁶⁹⁹ According to Capt da Silva, being assigned a specific task constituted a piece of evidence in the offence of negligence.⁷⁰⁰ MCpl O'Bready was asked about the email from Capt da Silva

⁶⁹³ *Ibid* at 266-267.

⁶⁹⁴ Document089 at 61.

⁶⁹⁵ Document020 at 2; Document089 at 59.

⁶⁹⁶ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 1, 4.

⁶⁹⁷ Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 1.

⁶⁹⁸ Document020 at 344.

⁶⁹⁹ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 46.

⁷⁰⁰ *Ibid* at 178.

on February 3 2011 and replied that he was not aware of this email, because he was not on its distribution list.⁷⁰¹

408. MCpl O'Bready informed MWO Y on February 25, 2011 that his status had been changed, [translation] "from involved status to subject status." He informed MWO Y [translation] "that he was suspected of offences under sections 124 and 129 of the NDA."⁷⁰² He reportedly had discussions with Sgt Parent and Capt da Silva to arrive at this conclusion. He did not remember, but he believed that a call had been made to the RMP before this decision was made.⁷⁰³ It should be noted that Capt da Silva and the investigators did not take any notes concerning the strategic discussions they may have had on the direction of the file or concerning the moment when they formulated their reasonable and probable grounds to believe that an offence had been committed by Maj X and MWO Y.⁷⁰⁴

409. MCpl O'Bready was questioned on October 24, 2018, seven years after the events in question, regarding the status of MWO Y at the time of his interview on February 6, 2011. He did not seem to remember whether he had interviewed him once or twice. He did not remember whether he had interviewed MWO Y with a caution. The investigator informed him that he had met with him only once and that MWO Y had refused to meet with him a second time. MCpl O'Bready replied that he remembered that he had informed him of his change in status. The investigator confirmed to him that he had not interviewed MWO Y under caution. MCpl O'Bready therefore stated that MWO Y was [translation] "still involved...slash subject."⁷⁰⁵

410. MCpl O'Bready did not use the terms [translation] "involved," "subject" and "suspect" consistently. His testimony and the administrative activities of GO 2011-2411 do not reflect the exact sequence of change in status of Maj X and MWO Y as revealed by the SAMPIS case notes. According to the SAMPIS case notes, MWO Y had been considered a suspect starting on

⁷⁰¹ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 395-396.

⁷⁰² Document 020 at 53.

⁷⁰³ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 327-328.

⁷⁰⁴ MCpl O'Bready and the other investigators rarely took notes during this investigation. This will be discussed in further detail in Part 7.6 of this report.

⁷⁰⁵ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 275-276.

February 4, 2011. MCpl O'Bready should have cautioned him when he met with him on February 6, 2011. That said, this omission on MCpl O'Bready's part had no significant impact on the investigation. It is highly likely that MWO Y would not have agreed to meet with MCpl O'Bready on February 6, 2011, for an interview under caution, as he did on February 25, 2011.

7.5 Witnesses

7.5.1 Witness Selection

411. MCpl O'Bready recorded LCol Strickland in GO Information as [translation] "involved" on March 7, 2011.⁷⁰⁶ According to CF MP Order 2-634.1, an "involved" is a "person who is involved in an investigation in any capacity and is not a suspect, a witness or a complainant." Therefore, it appears that MCpl O'Bready did not consider LCol Strickland to be a suspect, witness or complainant. However, according to the complaint synopsis, it appears that LCol Strickland had been considered the complainant by Capt da Silva and MCpl O'Bready.⁷⁰⁷

412. LCol Strickland met with Capt da Silva on January 29, 2011, to inform him of the events of January 19, 2011, but he was not interviewed by MCpl O'Bready during this investigation. The Commission questioned MCpl O'Bready about this. He stated that he had obtained more information from LCol Strickland during the meeting with him on February 3, 2011. Therefore, he did not consider it necessary to conduct a formal interview with him.⁷⁰⁸ No personal note or investigative activity summarizes the information that MCpl O'Bready allegedly gathered during this meeting. GO 2011-2411 states that LCol Strickland was informed of the investigation and its direction, but it does not mention any information provided by LCol Strickland.⁷⁰⁹

413. However, LCol Strickland could have provided a great deal of information regarding the 10-day delay between the exercise and his meeting with Capt da Silva. He also could have provided information about his conversations with Maj X and his knowledge of the events of January 19, 2011. Furthermore, he could have commented on Maj X's statement that they had

⁷⁰⁶ Document 020 at 17; Document 089 at 36.

⁷⁰⁷ Document 020 at 21.

⁷⁰⁸ Commission's interview with Sgt (Retired) O'Bready, 14 September 2020.

⁷⁰⁹ Document 020 at 42.

laughed about this situation on the morning of January 19, 2011. MCpl O’Bready could have thus verified portions of the interviews with Maj X, and therefore could have verified whether Maj X had in fact informed LCol Strickland as soon as possible and what information he reportedly gave regarding the January 19, 2011, exercise and the effect on the detainee.

414. MCpl O’Bready did not interview WO Grenier, Lt Busset’s WO, Sgt Bélanger or MCpl Alie, who was responsible for the DTF computer systems. He did not meet with members of Shift B other than Sgt Waugh, MCpl Perreault and Cpl Michaud. He did not meet with the following members of the JTF-Afg MP Coy headquarters: Capt Clerk, Capt Tremblay and Capt Touchette’s WO, WO Fortier. These individuals either played a role in the events of January 19, 2011 or could have had information on this matter.

415. There is no note in GO 2011-2411 to explain how MCpl O’Bready chose his witnesses, and he was not questioned on this matter. It is highly likely that the members of Shift B would have been unable to provide information on the planning and execution of the exercise before their arrival at the DTF complex. However, Capt Tremblay, Capt Clerk, WO Grenier, WO Fortier, Sgt Bélanger and MCpl Alie could possibly have provided information. At the very least, meeting with these individuals would have confirmed whether they had information relevant to this investigation. Meeting with any person who could possibly provide information about the incident under investigation is a best practice that should be implemented by Military Police investigators.

7.5.2 Interviews

416. The interview techniques that the investigators had to follow included “should use good listening techniques and ask open-ended questions; [and] . . . follow up on information presented during the interview.”⁷¹⁰ A member other than the lead investigator must also act as the

⁷¹⁰ MPPTP, Annex E (July 2004), Chapter 7 (July 2004), Appendix 1 – the complete list: “the investigator must have a plan; the investigator must not use threats, direct or veiled; the investigator must not make promises or offer incentives; the investigator must remain professional and display an unbiased attitude; the investigator must not make disparaging comments about the alleged victims, witnesses or other police; the investigator should use good listening techniques and ask open-ended questions; the investigator must follow up on information presented during the interview; the interviewer shall ask the subject if they wish to give a written statement and will allow him/her time to do so; At the conclusion of the interview the investigator shall note the time for the camera.”

note-taker.⁷¹¹ A military police member must provide “initial cautions and chartering” and the cautions must be read again for “each and every” admission of culpability.⁷¹²

417. Two hours of preparation for each planned hour of interview time is generally recognized as being a best practice in this field. Of course, there are several other components in preparing interview plans. CF MP Order 2-340.2 (*Investigation Plans*) directs the reader to CF MP Order 2-353 for any questions regarding interviews, “interrogations” and preparing interview plans.⁷¹³ However, this order has not yet been promulgated. Therefore, it appears that it did not exist in 2011 and that there are still no CFPM directives on the preparation of interview plans.

7.5.2.1 Lack of Follow-up and Absence of Questions

418. In some cases, MCpl O’Bready asked one question and, after a very short answer, did not pursue the line of questioning. For example, the guards were ordered to go to the break room for a post-exercise debriefing. This debriefing was somewhat important, in particular because of the statements made during it. MCpl O’Bready, when he was interviewing Cpl Roy, asked him whether he participated in the post-exercise debriefing. The latter replied yes and stated that he arrived near the end of it. MCpl O’Bready replied “excellent” and continued without inquiring any further about what Cpl Roy had observed during the debriefing.⁷¹⁴

419. Some relevant questions were simply not asked; in particular with MWO Y about certain events that happened when he was on the catwalk. He did not ask him any questions about Sgt Degrasse’s or MCpl Gasparro’s visits on the catwalk during the exercise. MWO Y had stated that he had heard something under the catwalk and that he reportedly said, [translation] “What’s going on? Stop that.” MCpl O’Bready did not ask him what he had asked them to stop doing.

420. Furthermore, MCpl O’Bready did not question MWO Y about his anger towards Cpl Dauphinais, whom he lambasted immediately after the detainee had been placed back in his cell. It is clear that MWO Y was not hiding his disappointment in the work of the guards, whom

⁷¹¹ *Ibid.*

⁷¹² *Ibid* at para 27.

⁷¹³ CF MP Order 2-340.2, *Investigation Plans* at para 10.

⁷¹⁴ Transcript of the CFNIS JTF-Afg interview with Cpl Roy, 31 January 2011 at 18.

he accused of not knowing the SOPs, but no questions were asked to determine what MWO Y had observed in order to draw this conclusion.⁷¹⁵

421. MCpl O'Bready did not produce a timeline of events despite the fact that the time indicated on the video recording of the extraction and the timing entered in Maj X's notes made it possible to draw some conclusions regarding the movement of the individuals involved in the exercise. Such an exercise would have been beneficial before questioning Maj X again.

422. During the cautioned interview of Maj X on February 25, 2011, MCpl O'Bready did not bring up several points raised during the first interview. Thus, the thorny question of the entry in Maj X's notebook concerning an extraction from cells that he describes as fictitious was not part of this interview. Also, he did not ask Maj X why he had noted that the exercise had been a failure. Similarly, he questioned Maj X very little about Maj X's debriefing with those responsible for the DTF during which he reminded the group that only he could have given the authorization to carry out an extraction from the cells. He did not ask him why he had made this comment. Furthermore, he did not ask Maj X whether he had spoken with MWO Y before and after this debriefing.

7.5.2.2 Failure to Confront the Witnesses

423. There does not seem to have been any analysis of previous interviews done by MCpl O'Bready before meeting with Maj X, MWO Y or the key witnesses in the investigation. Thus, when MCpl O'Bready interviewed Maj X, he did not question him when his testimony directly contradicted that of a previous witness. For example, Maj X stated that Sgt Degrasse had initiated the recall by contacting Lt Busset, while MCpl Gasparro had stated that he called the latter; this was corroborated by Lt Busset during the latter's interview. None of these witnesses was interviewed again to clarify these questions, which could have had an impact on weighing the evidence at the conclusion of the investigation.

⁷¹⁵ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 32-33.

7.5.2.3 Detainee Interview

424. MCpl O'Bready asked PO2 Gervais, the non-commissioned officer responsible for the DTF, about the status of the detainee to find out when there would be an opportunity to interview the detainee. He also said that he had made the decision on when to meet with the witness and had not discussed this matter with Capt da Silva, as this was not something he normally discussed with him.⁷¹⁶ There is no note to that effect in GO 2011-2411.

425. Capt da Silva did not remember when the detainee had been interviewed, but he remembered that MCpl O'Bready had done it. Sgt Mantha, who assisted MCpl O'Bready during the detainee interview, returned from his mission leave on February 3, 2011. He was not present for the discussions at the start of the investigation and therefore did not participate in the decisions regarding the appropriate time to interview the detainee.⁷¹⁷

426. MCpl O'Bready interviewed the detainee on February 8, 2011, nine days after the beginning of the investigation and 20 days after the event, but he could not clearly remember the reasons for this delay. He tried to explain that this delay could have been caused by the number of files he was managing and his workload.⁷¹⁸

427. MCpl O'Bready had the leeway to conduct his investigation as he saw fit. He did not deem it necessary to meet with the detainee immediately at the start of the investigation, despite the fact that rumours concerning the possible abuse he allegedly suffered were circulating among the guards. However, on February 1, 2011, MCpl O'Bready had met again with corporals Ferreri, Roy and Bilodeau-Roy and MCpl Gasparro concerning the allegation that the detainee was allegedly so afraid during the extraction that he had urinated in his pants, and MCpl Gasparro and Cpl Ferreri both [translation] "confirmed...had physically looked at the detainee's pants and did not observe any trace of urine."⁷¹⁹ During an informal meeting on February 3, 2011, Cpl Michaud had said to MCpl O'Bready that the detainee did not appear to have urinated in his pants when he had asked him if he wanted to use the toilet early on the morning of

⁷¹⁶ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 97.

⁷¹⁷ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 184.

⁷¹⁸ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 98.

⁷¹⁹ Document 020 at 83.

January 19, 2011. Furthermore, Lt Busset had conducted an interview with the detainee on the day of the incident, and the latter did not seem to remember the events in question and did not want to file a complaint and stated that nothing had happened in his cell. While MCpl O'Bready may have stated that he inquired about the detainee's status and determined the detainee's window of availability, there are no notes to that effect in the file. MCpl O'Bready also has no personal notes of what steps he took with PO2 Gervais.

7.5.2.4 Duration of Interviews

428. The following list shows the persons interviewed by MCpl O'Bready and the duration of each interview in minutes, unless otherwise indicated:

Sgt Degrasse	42
Cpl Dandurand	44
Cpl Ferreri	30
Cpl Dauphinais	26
Cplc Gasparro	19
Cpl Bilodeau-Roy	17
Cpl Jones	19
Cpl Roy	26
Lt Busset, interview 1	1 hour, 25 minutes
PO2 Gervais	20
Maj X	49
MWO Y	25
detainee	10
Cpl Lorette	16
Capt Touchette	32
Cpl Gratton	20
Lt Busset, interview 2	23
Capt Touchette, interview 2	24
Maj X, 25 February	2 hours, 10 minutes
Maj X, 2 March	17

429. Col Giguère, Sgt Waugh and MCpl Perrault were also interviewed, but GO 2011-2411 does not list the duration of these interviews.

430. MCpl O'Bready conducted 23 interviews. It is apparent that the bulk of the interviews were conducted in less than 45 minutes; that is, 17 of them, including the interview with MWO Y, which lasted only 25 minutes, as well as the second interview with Maj X on March 2,

2011, that lasted only 17 minutes. Furthermore, 14 of these 17 interviews took 30 minutes or less. The following guards participated in the detainee extraction: Cpl Bilodeau-Roy (17 min), Cpl Gratton (20 min), Cpl Ferreri (30 min), Cpl Dandurand (44 min), Cpl Roy (26 min), and Cpl Dauphinais (26 min). Their interviews, except for that of Cpl Dandurand, lasted from 17 to 30 minutes. Cpl Young-Jones (19 min) and Cpl Lorette (16 min) were on the catwalk throughout the incident. Their interviews lasted less than 20 minutes.

431. The first interview with Lt Busset took 1 hour and 25 minutes. The interview on February 6, 2011 with Maj X took 49 minutes, and his cautioned interview on February 25, 2011 lasted 2 hours and 10 minutes. The duration of three interviews (Sgt Waugh, MCpl Perreault and Col Giguère) cannot be determined, as they were not recorded, MCpl O'Bready's notes do not state when the interview ended, and the file contains no other information that could help us to determine the duration.

432. The duration of an interview depends on the topics discussed and the way in which these topics are discussed. These interviews are relatively short, given the sequence of decisions and events that MCpl O'Bready had to elucidate and the complex nature of negligence charges. As stated elsewhere in this report, MCpl O'Bready often failed to question witnesses on matters relevant to this investigation and often failed to clarify and go into depth on other matters that were also relevant.⁷²⁰

Recommendation #2:

The Commission recommends that the CFPM publish a policy on the preparation of interview plans based on police best practices. (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted that: [translation] “*The CF MP Order on interviewing and interrogation is not yet promulgated. The order is currently under development.*”**

433. While this recommendation is accepted, the Notice of Action does not provide any indication as to the promulgation of this CF MP Order on Interviewing and Interrogating. The

⁷²⁰ See parts 7.5.2.1 and 7.5.2.2.

Commission is of a view that this order should be promulgated as soon as possible in order to provide parameters based on best police practices for this critical stage of an MP investigation.

7.6 Investigators' Notes

434. Police officers have a duty to take complete and accurate notes. This duty was confirmed by the Supreme Court of Canada in *Wood v Schaeffer* when the Court stated that, “. . . police officers do have a duty to prepare accurate, detailed, and comprehensive notes . . .”⁷²¹ The CFPM had issued directives to that effect.⁷²² According to the CFPM's directives, military police members had to take notes that answered the following questions: who, what, when, where, why and how, to ensure that they had complete and accurate notes on the topic on which they were taking notes. Furthermore, the “the critical aspects of taking police notes are the issues of timeliness, relevancy, thoroughness and accuracy.”⁷²³

435. The directives on note-taking that must be followed by CFNIS members can be found in SOP 203.⁷²⁴ Notes should be taken at the time of the incident or as soon as possible and while the facts are still fresh in the investigator's mind.⁷²⁵ SOP 203 places a great deal of emphasis on the importance of notes as memory aids; it is therefore essential that these notes be accurate, clear, concise and understandable.⁷²⁶ SOP 203 also stated that an investigator could include the details of an administrative step or an investigative action in SAMPIS, but that this SAMPIS entry still had to follow the directives of SOP 203.⁷²⁷

436. Investigators must disclose their notebook and any other notes they have taken during an investigation.⁷²⁸ The decision concerning disclosure of evidence is the responsibility of the prosecutor, not the police officer. CFNIS must disclose to the prosecutor all copies of information collected during the investigation and, if necessary, may make recommendations

⁷²¹ *Wood v Schaeffer*, 2013 SCC 71 at para 67.

⁷²² MPPTP, Annex E (July 2004) of Chapter 7 (July 2004), Annex 1 – Complete list.

⁷²³ *Ibid* at para 4, 13.

⁷²⁴ Document 216 D, CFNIS SOP 203, Notebooks/Note-taking Procedure (April 2010) at para 2.

⁷²⁵ *Ibid* at para 3.

⁷²⁶ *Ibid* at para 11.

⁷²⁷ *Ibid* at para 7.

⁷²⁸ *Ibid* at para 8; CFNIS SOP 209, Compilation and Provision of Disclosure (November 2005) at para 3.

regarding disclosure of information; but CFNIS cannot redact documents unless the prosecutor requests that they be redacted.⁷²⁹

437. According to Capt da Silva, the policy on note-taking was very simple: [translation] “As soon as anything at all happens, take notes on everything, for everything and for everything. As soon as the investigation starts, whether the complaint or day one, note-taking begins. The notes are there.” He also believed that the notes of a conversation with a prosecutor had to be in the notebook.⁷³⁰ That being said, he could not confirm to the Commission investigators that this practice had been respected within his detachment at KAF, as he had not verified this. He explained that verification of notebooks was the responsibility of the Operations WO.⁷³¹ Sgt Parent was responsible for this.⁷³²

438. Sgt Parent stated that he had the habit of working [translation] “a lot with a separate pad to take notes” when he was planning his days or his tasks and that this document was [translation] “not necessarily disclosed.”⁷³³ This practice runs counter to the best practices on note-taking and CF MP Order 2-301 (*Police Notes*).⁷³⁴ He stated that MCpl O’Bready [translation] “had to take notes directly in his notebook just to avoid having too many papers.” He agreed with the Commission investigators that a lead investigator had to take note of meetings with other investigators, record the tasks assigned and other important elements of an investigation.⁷³⁵

439. Sgt Parent was very surprised with the small amount of notes in his notebook, as he believed that [translation] “there were more things than that.”⁷³⁶ He had not taken notes on the meeting he had before the interview with Maj X on 3 February 2011. Furthermore, he did not have notes of his telephone calls with the prosecutor. He tried to explain this situation as follows:

⁷²⁹ CFNIS SOP 209, Compilation and Provision of Disclosure (November 2005) at para 3.

⁷³⁰ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 [TR note: year as it appears in the French] at 24-25.

⁷³¹ *Ibid* at 26.

⁷³² Transcript of the Commission’s interview with Sgt (Retired) Mantha, 18 October 2018 at 41.

⁷³³ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 32-34.

⁷³⁴ While this order was published after the events concerned, it reflects the standards that existed at the time of the investigation in 2011.

⁷³⁵ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 35-36.

⁷³⁶ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 76.

[translation] “I must have had a pad by my desk, that I must have taken notes on about these things.”⁷³⁷

440. Sgt Mantha stated the following regarding a conversation with the RMP during which Capt da Silva and MCpl O’Bready were also present. He had not taken notes of the conversation even though he considered that it was important to do so. He explained that he was under the impression that MCpl O’Bready or Capt da Silva would probably have made an administrative entry in the file.⁷³⁸

441. He then explained that there were often no notes of the conversations with the prosecutors because he had often been ordered not to include them in his notes. These instructions came from his chain of command; it all depended on which officer was responsible for the detachment. This instruction not to take notes of conversations with the prosecutors did not come from the SOPs.⁷³⁹

442. MCpl Carrier had not taken notes during the investigators’ meeting, and he had not seen any investigator taking notes.⁷⁴⁰ A review of the copy of MCpl Carrier’s notebook in GO 2011-2411 shows that he did not take notes indicating to whom and when he turned over the pieces of evidence seized at the DTF.

443. MCpl O’Bready did not take notes when he viewed the detainee extraction video or during his visit to the catwalk.⁷⁴¹ MCpl O’Bready did not take notes during his conversations with a prosecutor. The Commission investigator therefore asked him if he had the right to take notes for such a discussion. He replied as follows: [translation] “I’ll be honest with you, I don’t even know. What I often did, is such and such an hour, such and such a date, I met with this prosecutor, concerning that file. But I didn’t note...because the notes were subject to disclosure and that was part of the...and that’s it. Privilege...”⁷⁴²

⁷³⁷ *Ibid* at 154-155.

⁷³⁸ Transcript of the Commission’s interview with Sgt (Retired) Mantha, 18 October 2018 at 42.

⁷³⁹ *Ibid* at 48.

⁷⁴⁰ Transcript of the Commission’s interview with WO Carrier, 1 October 2018 at 30-31.

⁷⁴¹ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 91, 128.

⁷⁴² Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 17-18, 375.

444. The MPPTP required that Military Police members work in close collaboration with their prosecutors during the conduct of an investigation and that they had to regularly consult with these prosecutors regarding investigations and associated questions of law. CFNIS members also had to consult their assigned regional prosecutor before laying charges.⁷⁴³ Given these instructions, it can easily be concluded that consultations between investigators and prosecutors were important steps in the conduct of an investigation. An investigator uses text type “NP” (“Notes to Prosecutor”) in SAMPIS to forward information regarding conversations with a prosecutor.⁷⁴⁴ An investigator who had concerns regarding disclosure of a piece of information in particular could flag it by using this text type.

445. A review of investigators’ notebooks in GO 2011-2411 shows that they took very few notes in their notebooks. Sgt Parent took notes on pages that are not in GO 2011-2411. They did not take notes during meetings between investigators or during conversations with the prosecutor.

446. These investigators did not seem to know or care about the directives on note-taking. Sgt Parent, the individual in charge of ensuring that notebooks complied with standards, did not comply with the CFNIS SOPs and the MPPTP. Sgt Mantha described a very worrying practice, namely, instructions from certain officers prohibiting notes of conversations with the prosecutors. This clearly goes against the official directives of the CF MP Gp.

447. This lack of detailed notes was an obstacle to properly conducting this PII. Given the long period of time between the incident and the PII, complete and accurate notes would have helped the witnesses remember their actions and the events. Furthermore, such notes on file are an important source of information.

448. The Commission wishes to emphasize that it has often recommended during previous investigations that the CFPM ensure that military police members take complete and detailed notes of all important decisions or administrative or investigative activities as required by CF MP

⁷⁴³ MPPTP, Annex A (October 2007), Chapter 6 (October 2007), *Military Police Investigations: General* at para 23, 26.

⁷⁴⁴ Document 213, CF MP Order 2-126.5, *SAMPIS Text Types* (5 November 2012) at para 12-13.

Orders 2-301, 2-301.1, 2-340 and 2-340.1.⁷⁴⁵ This is not yet the case, despite these recommendations and the favourable responses to these recommendations from the CFPM.

449. Despite the existing policies, the Commission's files indicate that many military police members are not familiar with them or do not comply with them. This is a serious problem that has persisted for many years. The CFPM must develop strategies, programs and policies that will ensure that MPs become fully aware of the importance of proper note-taking according to the policies, as well as the value of this practice. A continuous training program on note-taking is required throughout the career of an MP and not just within specific courses taught at the Canadian Forces Military Police Academy.

450. Monitoring measures are also necessary to ensure compliance with the policies. Verification of notebooks and a quality control program by supervisors who are responsible for the notebooks of their subordinates according to existing policies would help considerably to ensure compliance with these policies. Furthermore, the annual performance review of Military Police members, investigators, supervisors and officers holding leadership positions at all levels of the CF MP Gp should include evaluations of their note-taking and their supervision of note-taking according to CF MP Gp policies and orders.

Recommendation #3:

The Commission recommends that the CFPM develop policies and programs for the continuous training of military police members on note-taking techniques and develop strategies to implement these policies and programs. (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted that: [translation] “*The CF MP Order addressing military police note-taking, issued on February 20, 2015, requires an update that has yet to be addressed due to workload. Nonetheless, note-taking has been recognized as an important issue and a plan is being developed to evaluate and develop a strategy for action based on current police best practices.*”**

451. Deficiencies in note-taking by military police are an issue that has been raised by the Commission in several cases. In its Notice of Action, the CFPM noted that the CF MP Order dealing with note-taking requires updating, but that this has not been done due to workload. The Commission considers the deficiencies in military police note-taking to be a systemic problem

⁷⁴⁵ See our complaint files: CPPM 2006-042, CPPM 2017-004, and CPPM 2018-010.

and therefore in urgent need of remediation. For these reasons, the Commission believes that this order should be updated as a priority and as soon as possible.

Recommendation #4:

The Commission recommends that the CFPM include a component on note-taking in the annual performance review of Military Police members, investigators, supervisors and officers holding leadership positions at all levels of the CF MP Gp. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “*The Annual Performance Review (APR) is a CAF evaluation tool that cannot be modified to reflect police-related criteria. A systemic concern regarding note-taking would, however, be a part of a CAF member’s “Section 4 - Performance” under the APR, and would therefore be reflected in the chain of command’s evaluation of the CAF member and the APR annotated accordingly.*”**

452. After receiving the CFPM’s Notice of Action dated June 24, 2021, the Commission sent a letter to CFPM on July 8, 2021, requesting clarification with respect to its Notice of Action. In that letter, the Commission requested that the CFPM send an electronic copy of the Canadian Forces Personnel Appraisal System (CFPAS) reference documents. A review of these documents was necessary to understand the CFPAS and to review the CFPM's response to this recommendation.

453. On July 23, 2021, the Commission received an electronic copy of the form entitled “Personnel Evaluation Report (PER).” The Commission finds that the CFPM did not adequately respond to this request for information because, instead of providing the Commission with all of the CFPAS reference documents that explain the system in question, the CFPM provided only the “PER” form, which is only one component of the CFPAS. To the Commission's knowledge, the Canadian Forces performance appraisal system has two important components: the development of a document at the beginning of the appraisal period that outlines the expectations and areas on which the member will be evaluated, and the actual evaluation (PER).

454. The Commission recommends that the CFPM include in the annual performance appraisal of military police, investigators, supervisors, and officers in leadership positions at all levels of the CF MP Gp a note-taking component in this first step of the military performance appraisal process, that is, in the development of the document that outlines the expectations and

areas of evaluation. Thus, the performance of these members would then be evaluated and this evaluation would be a component of the PER.

7.7 Lack of Documentary Evidence

7.7.1 DTF Logs

455. The copies of the catwalk visitors log, log of members on duty on the catwalk and the detainee's journal for cell 7 obtained by MCpl Carrier are not part of GO 2011-2411. MCpl Carrier had not seized these documents, but had made a copy of them to [translation] "move forward on the file, and after that, we'll be able to collect the originals," as he knew where the documents were. He also stated that they were purportedly not destroyed, because they were under Military Police control.⁷⁴⁶

456. These documents may have been classified SECRET. SAMPIS cannot contain classified documents. While they could not be digitized and entered into SAMPIS, a note should have been entered in GO 2011-2411 stating that a classified document was a piece of evidence. MCpl O'Bready was unable to explain clearly why these documents are not part of GO 2011-2411.⁷⁴⁷

7.7.2 SOP 500 and Related Evidence

457. SOP 500 is at the core of this situation, because the goal of the exercise was based on this SOP. It was discussed many times during a number of interviews. SOP 500 is not included in GO 2011-2411. This SOP was discussed with Sgt Degrasse during his interview on January 30, 2011. Sgt Parent's notes state that, following this interview, Sgt Degrasse went to get a checklist that PO2 Gervais had given the individuals present during a meeting with MWO Y. It was a checklist for SOP 500. The notes state that Sgt Parent had checked the document and that it was 7 pages long. Sgt Degrasse had received another 10-page document with a portion on riots following the exercise. Sgt Parent finished his notes stating that [translation] "photocopies of the

⁷⁴⁶ Transcript of the Commission's interview with WO Carrier, 1 October 2018 at 69.

⁷⁴⁷ Transcript of the Commission's interview with Sgt(ret'd) O'Bready, 23 October 2018 at 169.

two documents will be made for the investigation.”⁷⁴⁸ These documents are not included in GO 2011-2411.

458. During her interview with MCpl O’Bready, Lt Busset stated that she sent the new SOP 500 to her sergeants and ordered them to train their subordinates on this new SOP. She provided a copy of this email to MCpl O’Bready. Towards the end of the interview, he asked her to send him a copy of the email.⁷⁴⁹ There is no note in MCpl O’Bready’s notebook or in GO 2011-2411 regarding this email. This email is not in GO 2011-2411.

459. During his interview with MCpl O’Bready, MWO Y gave him a document that he had prepared and that he described as a [translation] “checklist for SOP 500.”⁷⁵⁰ This document is not in GO 2011-2411. MCpl O’Bready was unable to explain to the Commission investigators why all of these documents are not in this GO.

7.7.3 Personal Notes of the Persons Involved

460. MCpl O’Bready neither requested nor seized any copy of the personal notes of the police officer witnesses further to the interviews, with the exception of Maj X. However, MCpl O’Bready had a discussion on note-taking and its importance with Cpl Dandurand while interviewing him. Cpl Dandurand had stated that he did not take any notes of the incident on January 19, 2011, and MCpl O’Bready had told him that it was a good practice to take good notes in the event of an incident of this nature.

461. Lt Busset stated to the Commission that she took personal notes during the January 19, 2011 exercise that she turned over before her departure from Kandahar. Several military police members stated to the Commission that they had to submit their notebook before leaving Afghanistan. However, the notebooks were not found, despite the Commission’s efforts to search for them in the documents repatriated to Canada by the mission closure team and CJOC.

⁷⁴⁸ Document 020 at 158.

⁷⁴⁹ Transcript of the CFNIS JTF-Afg interview with Lt Busset, 1 February 2011 at 50, 72.

⁷⁵⁰ Transcript of the CFNIS JTF-Afg interview with MWO Y, 6 February 2011 at 5, 33.

7.7.4 Plans, Photos and Videos of the Premises

462. No plan of the DTF and no photos of the DTF are included in GO 2011-2411. It would have been very easy for MCpl O'Bready to obtain official plans of the DTF. He could also have easily asked the guards on the catwalk to draw diagrams and indicate where MWO Y was during the incident or ask Sgt Degrasse to draw a plan of his office and indicate the location of Maj X and the television screens. He also could have taken photos of the DTF.

463. The video of the detainee extraction was obtained on January 30, 2011 and viewed by MCpl O'Bready. Capt da Silva and Sgt Parent also viewed this video. It should be noted that there is no video evidence in the "précis des faits" (Crown brief) and that no video was sent to the RMP. Furthermore, MCpl O'Bready did not obtain other videos showing activity within the DTF during the events. He could have also filmed the catwalk area, Sgt Degrasse's office and the other relevant sectors of the DTF. These plans, photos and videos would have assisted the RMP during his file assessment.

7.8 Questions not Investigated

7.8.1 The 10-day Delay between the Incident and LCol Strickland's Complaint

464. As stated previously, LCol Strickland was not interviewed by MCpl O'Bready despite being considered to be the complainant. The Commission investigators met with LCol Strickland on January 25, 2018. LCol Strickland could not remember exactly when Maj X informed him of the extraction of the minor detainee;⁷⁵¹ but LCol Strickland remembered that he had been very angry.⁷⁵² LCol Strickland confirmed that any question regarding the detainees was very sensitive and that he had to inform HQ in Ottawa.⁷⁵³ He confirmed that he had asked for a briefing note from Maj X.⁷⁵⁴ However, Maj X contradicted this claim when he stated that he had decided to prepare a briefing note so that the information on the extraction was noted and placed on file when, [translation] "I saw that the file was not being pushed."⁷⁵⁵

⁷⁵¹ Summary of the Commission's interview with LCol Strickland, 25 January 2018 at 6, 18-19.

⁷⁵² *Ibid* at 12, 27.

⁷⁵³ *Ibid* at 2, 12-13, 20, 24-25.

⁷⁵⁴ *Ibid* at 3, 7; see also Document 149, LCol Strickland's notes from 25 January to 3 February 2011 (received at the MPPC on 25 January 2018).

⁷⁵⁵ Transcript of the Commission's interview with Maj X, 21 August 2017 at 212.

465. Since he did not try to meet with LCol Strickland, MCpl O'Bready could not know exactly what LCol Strickland knew and when he knew it. MCpl O'Bready therefore did not try to verify Maj X's version of the facts regarding the circumstances surrounding his discussions with LCol Strickland. This information was crucial to determine the reason(s) for the 10-day delay before the complaint was forwarded to Capt da Silva.

466. The evidence on this topic collected by the Commission seven years after this event is vague and incomplete. LCol Strickland relied primarily on his personal notes and had little specific memory of his discussions with Maj X or of his actions during these 10 days.

467. Evidence collected by the investigators in early February 2011 would have been much clearer for answering these questions. Confirming when Maj X had informed LCol Strickland and the allegation that they had laughed about the situation on the morning of January 19, 2011, are two relevant aspects in this investigation.

468. During her interview with the Commission, Lt Busset said that she had informed Capt da Silva of the situation even before informing Maj X and that she had informed Maj X of this on the morning of January 19, 2011.⁷⁵⁶ She also said that the latter was not happy about it. She also purportedly understood from Capt da Silva that he could not begin the investigation before receiving the order from his chain of command. She said that there were discussions on this matter, but she could not specify between whom. She stated that Maj X did not want the investigation to be conducted by CFNIS. A certain period of time elapsed before a decision was made.⁷⁵⁷

469. During her interview with Maj Leblanc in 2016, she stated that she had told Maj X that she was going to inform CFNIS.⁷⁵⁸ Therefore, her testimony before the Commission and Maj Leblanc are slightly different, but her testimony nevertheless shows that she had told Maj X that CFNIS had to be informed of the incident.

⁷⁵⁶ Transcript of the Commission's interview with Maj Busset, 27 November 2017 at 96, 106.

⁷⁵⁷ *Ibid* at 149.

⁷⁵⁸ Transcript of CFNIS CR's interview with Maj Busset, 19 February 2016 at 28.

470. Lt Busset did not say that she had informed Capt da Silva and did not mention this part of her conversation with Maj X during her interviews with MCpl O’Bready. He did not ask her whether she had informed other individuals of this situation.

471. Capt da Silva stated that he was informed of the January 19, 2011 exercise directly by LCol Strickland. He had been informed of it five or six days after, not during the same day.⁷⁵⁹ The Commission investigators asked him whether he had discussed this incident with Lt Busset, but his answers in that regard were unclear and imprecise, and sometimes contradicted the testimony of other witnesses.

472. The Commission investigators then asked him whether he knew [translation] “why it took ten days before you were contacted?” He simply replied no. He explained that the only formal complaint he received concerning the incident in question was that of LCol Strickland and that he did not know whether there had been other complaints before that. He did not know who could have made a complaint to LCol Strickland and confirmed that he had not asked him.⁷⁶⁰

473. Capt da Silva confirmed again that he did not learn of the incident until the time of his conversation with LCol Strickland. The Commission investigator asked him whether he had discussed the incident with Lt Busset on January 19, 2011; he did not remember conversations with her about this incident.⁷⁶¹

474. Maj X described a conversation about the detainee extraction that he purportedly had with Capt da Silva on January 19, 2011, or in the following days. He did not report this during his interviews with MCpl O’Bready. Capt da Silva contradicted this claim by Maj X and reiterated that he was not aware of the January 19, 2011 incident before he was informed of it by LCol Strickland.⁷⁶²

⁷⁵⁹ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 83, 86, 94.

⁷⁶⁰ *Ibid* at 92-93.

⁷⁶¹ Summary of the Commission’s interview with Capt (Retired) da Silva, 15 September 2020.

⁷⁶² *Ibid*.

475. Sgt Parent stated that they were informed of the detainee extraction on the morning of January 19, 2011.⁷⁶³ He said that it [translation] “was clear that they would be investigating.”⁷⁶⁴ However, he could not explain why there was a 10-day delay between the incident and LCol Strickland’s formal complaint. Sgt Mantha was not at KAF during the period from January 19 to 29, 2011 and had nothing to say regarding when the detachment was informed of the extraction. MCpl Carrier, although present at KAF during this period of time, could not answer this question.

476. MCpl O’Bready was in Canada at the time of the incident. His brother died on January 7, 2011, he left KAF around January 9, 2011, and returned there at about 0300 hours on January 30, 2011. MCpl O’Bready had not heard of the incident before his return to KAF.⁷⁶⁵

477. The statements of Lt Busset and Capt da Silva contradict each other on a fundamental element of the delay. Lt Busset said that she informed Capt da Silva on January 19, 2011, and he stated that he was informed by LCol Strickland on January 29, 2011. Maj X alleged that he discussed the incident with Capt da Silva on January 19, 2011, or shortly thereafter. MCpl O’Bready also said that there were purportedly discussions between Maj X and Capt da Silva. Sgt Parent said that the detachment members were well aware of the incident on January 19, 2011.

478. The statements of Lt Busset, Maj X, Sgt Parent and MCpl O’Bready present a very different version from that of Capt da Silva. Capt da Silva’s credibility is undermined. His way of answering the Commission’s questions denotes more than a simple lack of memory. He did not clearly answer the questions about Lt Busset’s statement regarding their conversation on January 19, 2011. It is clear that CFNIS JTF-Afg was aware of the detainee extraction well before January 29, 2011. Capt da Silva was aware of this situation, but he did not act before receiving the formal complaint from LCol Strickland.

479. Capt da Silva should have shown much more initiative and had an investigation conducted as soon as he was made aware of the situation. Chapter 6 of the MPPTP stated that a

⁷⁶³ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 89, 96.

⁷⁶⁴ *Ibid* at 87-89, 96, 98, 102-103, 196.

⁷⁶⁵ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 42-45.

Military Police investigation “may be initiated whenever... MP learns of an incident through an informant.”⁷⁶⁶ This lack of action by Capt da Silva is one of the causes of the 10-day delay. Furthermore, this delay meant that he could not assign this investigation to Sgt Parent. This matter will be reviewed in greater detail in 7.12 of the report.

7.8.1.1 Necessity of an SIR and a MPUIR on January 19, 2011

480. A significant incident is “any incident, even a news report, that could cause concern for DND, the CAF or the Minister of National Defence.”⁷⁶⁷ Commanding officers shall submit Significant Incident Reports (SIRs) through their chain of command to the Issue Office of Primary Interest (OPI), the CJOC and the Assistant Deputy Minister (Public Affairs) (ADM(PA)), in addition to any other organization (e.g. operational headquarters) that may need such information. A Canadian task force commander shall report any incidents of national interest directly to the CJOC.⁷⁶⁸ This *Defence Administrative Order and Directive* (DAOD) stipulates that “an SIR does not preclude the requirement to file other reports and returns in accordance with current regulations and orders, e.g., aircraft accident reports, military police reports, and others.”⁷⁶⁹

481. Paragraph 4.14 of this DAOD presents examples of significant incidents that must be reported. The following three examples are relevant to the incident of January 19, 2011: “(c) actions by DND employees or CAF members that may undermine public values, or lead to the discredit of Canada at home or abroad;” “(d) actions by DND employees or CAF members that constitute a significant breach of any act of Parliament;” and “(j) national or international incidents that may have an impact on the ability of the DND or the CAF to deliver policies, programs, services or operations;”. The Note following this list of examples emphasizes that “Many of these significant incidents involve reporting procedures external to the public affairs

⁷⁶⁶ MPPTP, Chapter 6 at para 10 d). This chapter was replaced in 2019 by CF MP Order 2-340 (*Military Police Investigation Policy – General*). This order is not available in French, only in English.

⁷⁶⁷ *Defence Administrative Order and Directive 2008-3, Issue and Crisis Management* at para 2 [DAOD]. This DAOD was published in 1998 and was amended in 2003. It was therefore in effect in 2011.

⁷⁶⁸ DAOD 2008-3 at para 4.3, 4.4. This DAOD states the Canadian Forces Integrated Command Centre (CFICC). The CFICC is part of the CJOC.

⁷⁶⁹ DAOD 2008-3 at para. 4.7.

context” and “they shall also be reported in accordance with other regulations, orders and directives, as required, and classified appropriately.”⁷⁷⁰

482. LCol Strickland believed that he had informed the Canadian Expeditionary Force Command (CEFCOM)⁷⁷¹ through an SIR, but he had no notes to that effect.⁷⁷² He did not remember having discussed an SIR with Maj X.⁷⁷³ GO 2011-2411 contains no information regarding an SIR that describes this incident. During his interview with the Commission investigators, Maj X was questioned about his conversations with LCol Strickland following the detainee extraction. He stated that he had informed LCol Strickland on the morning of January 19, 2011 and that he had asked him whether an SIR would be produced. He stated that LCol Strickland had decided that one would not.⁷⁷⁴

483. The directives regarding the Military Police Unusual Incident Report (MPUIR) can be found in two chapters of the MPPTP.⁷⁷⁵ Paragraph 8 of Annex A, Chapter 6 of the MPPTP (*Military Police Investigations: General*) states what type of incident requires the creation of an MPUIR in SAMPIS. All incidents which could be “of special and immediate interest to Area, Command, or National Headquarters” and “all allegations of misconduct against Military Police members” are part of this list. Paragraph 25, Chapter 10 (February 2000) of the MPPTP (*Information Management: Military Police Investigation Case File Reports*) also states what type of incident requires the creation of an MPUIR in SAMPIS. It states, “incidents that could impact on DND and create public interest; for example, an incident of media interest for which a superior HQ, the House of Commons, or the MND could be required to provide rapid staff response.”⁷⁷⁶ An incident involving a detainee easily meets these criteria.

⁷⁷⁰ DAOD 2008-3 at para. 4.14.

⁷⁷¹ In French, *Commandement de la Force expéditionnaire du Canada* (COMFEC).

⁷⁷² Summary of the Commission’s interview with LCol Strickland, 25 January 2018 at 3, 7, 8, 10, 13-14.

⁷⁷³ *Ibid* at 14.

⁷⁷⁴ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 212-214.

⁷⁷⁵ MPPTP, Annex A (October 2007), Chapter 6 (October 2007), *Military Police Investigations: General* at para. 8; see also Chapter 10 – *Information Management: Military Police Investigation Case File Reports* at para 20-21, 25.

⁷⁷⁶ This chapter of the MPPTP is not available in French.

484. When he described his conversation with LCol Strickland, Maj X stated that he believed that the incident was critical enough to justify an SIR.⁷⁷⁷ He also stated to the Commission investigators that he had been surprised that LCol Strickland had not immediately requested an investigation.⁷⁷⁸ That being said, Maj X did not send an MPUIR to his technical chain of command via SAMPIS as required by Chapter 10 of the MPPTP. Therefore, despite his comments on the need to produce an SIR, it appears that he decided that an MPUIR was not required.

485. MCpl O'Bready did not question Maj X on this topic. MCpl O'Bready stated that an MPUIR had to be sent by the MP unit responsible for the investigation. When questioned further about this topic, he changed his story and stated that he had not thought about this during his investigation.⁷⁷⁹

486. An SIR or MPUIR sent on January 19, 2011, or the next day would have alerted the appropriate senior HQs and would have surely initiated an investigation. The circumstances surrounding the SIR are vague, but it is obvious that Maj X did not prepare an MPUIR.

7.8.2 The Timeline of Events and Maj X's Notes

487. During his interview on February 3, 2011, Maj X referred to notes that he took throughout the exercise on January 19, 2011. MCpl O'Bready had received a copy of these notes following this interview, and they were therefore available for analysis as the investigation continued.⁷⁸⁰ While he did not remember the exact time when he had obtained these notes, MCpl O'Bready remembered a discussion about them at Maj X's express request.

488. Maj X's notes described the conduct of the exercise as follows:

- “QRF EX⁷⁸¹ 19 Jan 11 0400
- 1.3 m call made to shift I/C message not passed properly I/C⁷⁸² gone to go see what is going on
- 4.5 min info confirmed

⁷⁷⁷ Transcript of the Commission's interview with Maj X, 21 August 2017 at 214; Transcript of CFNIS JTF-Afg's interview with Maj X, 3 February 2011 at 10.

⁷⁷⁸ Transcript of the Commission's interview with Maj X, 21 August 2017 at 257.

⁷⁷⁹ Summary of the Commission's interview with Sgt (Retired) O'Bready, 14 September 2020.

⁷⁸⁰ Document 020 at 309; Document 089 at 60.

⁷⁸¹ QRF EX means *Quick Reaction Force Exercise*.

⁷⁸² I/C means *in-charge*.

- 5.5 duty shift dispatched to immediately flood catwalk
 - 6.75 IMP⁷⁸³ called
 - 7.75 Lt Busset called in for her of sit and start recall
 - Note SOP not known as MP CO⁷⁸⁴ not contacted
 - 10.45 Extraction complete of trouble maker
 - 11.5 searching for SOP
 - 12.75 DTF⁷⁸⁵ I/C contacted and told to wake up everyone to start recall
 - 18.00 shift I/C read SOP and want to contact MPCO
 - 26.5 POL OPS⁷⁸⁶ WO⁷⁸⁷ & DTF I/C show up
 - 28 SA brief giving
 - 29.4 shift I/C and DTF do not know who gives authority to enter cell nor use of pepper spray
 - 30 min people start showing up. GS MP PI⁷⁸⁸ shows up and gets briefing
 - 33 min all is confirmed recalled except for 2
 - 36 min all is recalled
- EX end at 04:37 and briefing given to PI Comd⁷⁸⁹/DTF I/C/Shift I/C⁷⁹⁰
Overall assessment FAIL⁷⁹¹

489. The Commission investigators drew MCpl O’Bready’s attention to the entry in these notes that states, “10.45 Extraction complete of trouble maker,” but he did not remember having read it. When informed that Maj X had stated that he believed that it was a fictitious extraction, MCpl O’Bready stated that he had in fact believed that it was a fictitious event, because he perceived Maj X as [translation] “a supervisor who has his timer, who calls the shots, okay. Tick! Takes his notes. He’s there and he takes care of his business.” He explained this reasoning by the fact that Maj X had remained in the shift supervisor’s office and that he was not on the catwalk at the time of the extraction.⁷⁹²

490. A clock integrated into the video recording of the extraction shows the exact time the detainee was extracted from cell 7 by the DTF guards. Thus, the following sequence can be observed:

04h:08m:43s – guards enter the cell;

⁷⁸³ IMP means *International Military Police*.

⁷⁸⁴ MP CO means *Military Police Commanding Officer*.

⁷⁸⁵ DTF means *Detainee Transfer Facility*.

⁷⁸⁶ POL OPS means *Policing Operations*.

⁷⁸⁷ WO means *Warrant Officer*.

⁷⁸⁸ GS MP PI means *General Support Military Police Platoon*.

⁷⁸⁹ Comd means *Commander*.

⁷⁹⁰ Shift I/C means *Shift in-charge*.

⁷⁹¹ Document 020 at 337-338; In general, Maj X used the chronometer method in his notes, starting at 0400 hours (start of the exercise), so that, for example, 0.5 means 30 seconds and 0.75 means 45 seconds. However, for these two entries, it seems that Maj X, in the heat of the action, probably deviated from this method. It is more probable that 10.45 meant 10 minutes and 45 seconds (rather than a complex fraction that would equal 27 seconds). The same goes for 1.3, which probably means 1 minute 30 seconds rather than 1 minute 18 seconds.

⁷⁹² Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 240.

04h:08m:50s – the detainee gets up, puts on his sandals and walks toward the guards;
04h:09m:00s – the guards grab the detainee by the arm and escort him outside the cell;
04h:10m:30s – the detainee is back in the cell;
04h:10m:40s – the detainee gets back under the covers of his bed.

491. MCpl O’Bready had watched the video of the extraction, but he had not taken notes on it.⁷⁹³ Sgt Parent believed that he had watched the video, but he was very vague in his answers.⁷⁹⁴ Sgt Mantha was convinced that he had not watched the video.⁷⁹⁵ MCpl Carrier remembered that he had obtained a copy of the video recording of the extraction from MCpl Côté and that he had given it to MCpl O’Bready. However, he did not believe that he had watched the video recording.⁷⁹⁶

492. A review of the investigators’ personal notes placed in file GO 2011-2411 does not show any entries concerning viewing the video recording of the extraction by any of them. Only MCpl Carrier had an entry in his personal notes stating that he had received the video recording of the extraction from MCpl Côté. However, he did not note whether he had watched it and whether he had made relevant observations.

493. MCpl O’Bready stated that he had not compared Maj X’s notes with the time on the video recording, as the notes did not indicate time in hours, but rather by minutes. When the investigators informed him of the coincidence between the minute timing of Maj X’s notes and the time recorded on the video, he stated that this was not a subject that was discussed among investigators and that he himself had simply not made this link. He stated in his words, [translation] “it didn’t click with me.”⁷⁹⁷

494. These notes on the exercise in Maj X’s notebook raise many questions. MCpl O’Bready simply did not realize the importance of the entries in Maj X’s notebook. Maj X had carefully and precisely noted the various actions and events during the exercise. Therefore, it appears that these entries were important in the context of the exercise for Maj X. MCpl O’Bready did not properly review these notes and compare them with the information he had from testimony and

⁷⁹³ *Ibid* at 91-92.

⁷⁹⁴ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 127-129.

⁷⁹⁵ Transcript of the Commission’s interview with Sgt (Retired) Mantha, 18 October 2018 at 117-118.

⁷⁹⁶ Transcript of the Commission’s interview with WO Carrier, 1 October 2018 at 89.

⁷⁹⁷ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 241-243.

from the extraction video. These entries should have been a fundamental element in his interrogation plan for Maj X. The entry “10.45 Extraction complete of trouble maker” casts doubt on Maj X’s claim that he was not aware of the extraction and that he could not observe what was happening in the DTF via the screens present in the shift supervisor’s office.

495. MCpl Obready’s reasons for believing that the extraction noted by Maj X was fictitious do not demonstrate critical analysis of the evidence. He seemed instead to rely on Maj X’s statements. A more in-depth analysis of this evidence and the available evidence was required before the cautioned interview with Maj X. This does not seem to have been done.

496. The other investigators were not invested in the investigation to the same degree as MCpl O’Bready. This is what the lack of interventions from them seems to show following the interviews MCpl O’Bready conducted with the witnesses. Neither Sgt Parent nor MCpl Carrier, who assisted MCpl O’Bready during the interviews with Maj X in 2011, formulated comments concerning the notes Maj X took during the exercise and the video of the extraction.

497. This failure to analyze evidence important to understanding the sequence of events and assessing the testimony of certain witnesses, Maj X and MWO Y, is a significant shortcoming. Furthermore, these pieces of evidence cast doubt on the truthfulness of Maj X’s statements.

7.8.3 MWO Y’s Discussion with Cpl Dauphinais

498. Cpl Dauphinais stated during his interview with MCpl O’Bready that MWO Y had spoken to him immediately after the detainee was returned to his cell and when the morning routine had started. MWO Y was unhappy because they did not know the SOPs and they entered the cell. In his interview with MCpl O’Bready, MWO Y did not deny this, stating even that the SOP had not been followed, although he did initially state that he did not remember this meeting. His only objection remained the exact words used, which he said he did not recall.

499. This brief meeting at the foot of the stairs leading to the catwalk is fairly revealing and allows us to infer that MWO Y did in fact realize while he was on the catwalk that the guards had not followed the SOP when they were in the DTF. In fact, if the guards had simply stuck to the normal morning routine, MWO Y would have had no reason to point out that the guards did

not know the SOP, something he also repeated a few times on the catwalk as Cpl Young-Jones previously stated. His foul mood at the time of this meeting also seems to demonstrate awareness of an action that did not match the normal DTF routine.

500. MCpl O’Bready did not exploit this aspect during his investigation. This was an important aspect, given the role that MWO Y was supposed to play as exercise supervisor on the catwalk who had to ensure that the detainees were not disturbed. In the interview with the Commission, although he may have been vague in his answers, MWO Y did not deny having known about the extraction when he was at the DTF that same morning. However, he denied having observed it while he was on the catwalk, but could not remember in what context he had learned of it.⁷⁹⁸

7.8.4 The Other Exercises

501. On February 24, 2011, Capt da Silva inserted an investigative activity in GO 2011-2411 stating that Capt Touchette had informed him that, [translation] “Maj [X] had given the order to Lt BUSSET to make sure, during exercises that were carried out in the DTF, that they make noise (shout and make noise with objects) in order to conduct a ‘show of force’ and frighten the detainees.”⁷⁹⁹ Capt da Silva had no recollection of this note and this allegation. He admitted having had several discussions with MCpl O’Bready concerning the file, but did not remember having discussed this.⁸⁰⁰

502. MCpl O’Bready interviewed Capt Touchette and Lt Busset on February 24, 2011. Lt Busset stated that she received from Maj X, in the presence of Capt Touchette and possibly MWO Y, the instruction to conduct cell extraction exercises in the DTF twice a month. Maj X had ordered her to make sure, during the exercises, that they make noise (shout and make noise with objects) in order to conduct a “show of force” and frighten the detainees. Maj X’s intention, in her opinion, was to make noise while the interpreter was walking on the DTF catwalk in order to show the detainees that they had to remain quiet. It was also to show that the DTF guards were able to react to a situation, calm tensions, calm tempers and impress the detainees. Four exercises

⁷⁹⁸ Transcript of the Commission’s interview with MWO (Retired) Y, 30 August 2017 at 145, 163.

⁷⁹⁹ Document 020 at 96.

⁸⁰⁰ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 214.

of this type took place at the DTF, two in December and two in January. Maj X allegedly observed two of these exercises. Maj X had given her the instruction not to hold any more exercises after the start of the CFNIS JTF-Afg investigation.⁸⁰¹

503. Capt Touchette confirmed that Maj X had ordered the conduct of exercises of [translation] “dynamic entry into cells” [translation] “the purpose of which was to calm them down and make them afraid.” These exercises were to take place in an empty cell. On February 23, 2011, Lt Busset had informed him that Maj X had ordered her to stop these exercises.⁸⁰² Maj X was questioned briefly on this topic by MCpl O’Bready during his cautioned interview on February 25, 2011. No other witness was interviewed regarding this question.

504. Sgt Parent was on mission leave during this stage of the investigation. He learned of it when he reviewed the file, but was not asked to investigate this allegation. Sgt Mantha had no memory of this matter. MCpl Carrier, who took notes during the interviews with Lt Busset and Capt Touchette on February 24, 2011, had no memory of having had discussions on this matter.⁸⁰³ However, his notes indicate that there were previous exercises at the rate of two per month.⁸⁰⁴

505. MCpl O’Bready acknowledged that the purpose of these interviews was to obtain more information on these exercises, but stated that he had never been assigned to investigate further on this issue. MCpl O’Bready nevertheless did include the details of this allegation from Capt Touchette concerning these exercises, as well as Maj X’s position with respect to this in the “*précis des faits*” (Crown brief) submitted to the RMP.

506. The evidence gathered by MCpl O’Bready and by the Commission demonstrates that these exercises were intended to be shows of force and authority to the detainees. This evidence does not lead the Commission to conclude that Maj X intended to terrorize the detainees.

⁸⁰¹ Document020 at 97.

⁸⁰² *Ibid* at 98.

⁸⁰³ Transcript of the Commission’s interview with WO Carrier, 1 October 2018 at 180.

⁸⁰⁴ Document020 at 220.

7.9 The “*précis des faits*” (Crown Brief)

507. The “*précis des faits*” (Crown brief) was prepared by MCpl O’Bready.⁸⁰⁵ Capt da Silva stated that he had reviewed the “*précis des faits*” (Crown brief) and that he had been satisfied with the content. However, he did state that, from what he remembered, he had watched only a few interviews conducted by MCpl O’Bready.⁸⁰⁶

508. During the interview with MCpl O’Bready, the Commission investigators questioned him about the “*précis des faits*” (Crown brief), primarily the information contained in the witness statements. The investigators had noted several omitted facts in the “*précis des faits*” (Crown brief) that had come up in the interviews conducted by MCpl O’Bready.⁸⁰⁷

509. The summary of Sgt Degrasse’s statement did not mention the following:

- a) That he was watching the monitors to assess whether there was activity in the DTF when Maj X joined him in his office;
- b) That Maj X remained in this office until the end of the exercise and that it was possible for him to watch the monitors throughout the exercise; and
- c) That Maj X, during the debriefing with the non-commissioned officers, had raised the point that only he could order a cell extraction.

510. The summary of Cpl Dauphinais’ statement did not mention the following:

- a) That a conversation with the catwalk had taken place to determine in which cell they had to intervene;
- b) That one of the guards on the catwalk had stated that it was cell 7; and
- c) That MWO Y was in position on the catwalk and could therefore hear this exchange.

511. The summary of MCpl Gasparro’ statement did not mention the following:

- a) That there had been an exchange with MWO Y and that the latter had ordered him to stop the toilet routine during the exercise;

⁸⁰⁵ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 129.

⁸⁰⁶ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 226-227.

⁸⁰⁷ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 160-255.

- b) While MWO Y had stated that when he had heard noise before under the catwalk, he believed that it was the toilet routine and had not reacted.

512. The summary of Lt Busset's first statement did not mention the following:

- a) That on her arrival at the police post, Maj X was near the monitors and taking notes;
- b) That Maj X stopped the exercise and asked her to go get the personnel who had gone onto the catwalk; and
- c) That Maj X, during the debriefing with the non-commissioned officers, had raised the point that only he could order a cell extraction.

513. The summary of Maj X's first statement did not mention the following:

- a) That Maj X had noted "10.45 Extraction complete of trouble maker" in his notebook; that the video recording of the extraction contained a clock indicating the time of the sequence of events;
- b) That the time on the end of the extraction on the video recording matches to within a few seconds the minute timing in Maj X's notebook for the extraction of the "trouble maker";
- c) That at the time that Maj X was in Sgt Degrasse's office and in position to watch the monitors;
- d) That Maj X had stated in his statement at the start of the interview, [translation] "On the video, you could see that everyone was sleeping. You know, there was no reason to do a cell extraction. And that wasn't the purpose of the exercise either.";
- e) That he stated, regarding the entry in his notes [translation] "It was 10... 10.45 cell extraction complete of troublemaker. So, that is to say in my notes, he confirmed to me that there was a cell extraction that was done. And you know, he didn't say that to me. It's just that, you know, I heard them talking" And added [translation] "But did, before that, did he ask me for the permission of the chain of command, according to the SOP, to do the cell extraction? That was never done"; and
- f) That he stated, [translation] "People didn't know the authorities to continue the cell extraction, and you know, do the procedures. Because everything is in the SOP."

514. MCpl O'Bready had summarized Maj X's statement during his first interview regarding the planning of the exercise. He attributes the following statement to Maj X: [translation] "He added that the cell extraction had to be fictitious and that only the personnel recall was to be done for real." MCpl O'Bready made no mention in this statement of Maj X's notes taken during the exercise.

515. MCpl O’Bready stated that Maj X had recorded in his notes [translation] “that the show of force on the DTF catwalk and the extraction of the ‘trouble maker’ was fictitious.” He added that Maj X did not learn of the existence of the real extraction until later in the morning. Maj X’s note concerning the detainee extraction was not discussed during the second interview. However, MCpl O’Bready included a copy of Maj X’s notes in the “*précis des faits*” (Crown brief).

516. MWO Y’s statement did not mention the following:

- a) That he had stated this: [translation] “A few minutes later, I heard: Ahh! It was at the other end, in the first cells at the bottom of . . . there, I couldn’t see through the floor. I said: What’s going on? I said: Well, I didn’t know. Hey, I said: What’s going on? Stop that. In the end, what I found out later, they were in the process of . . . much later, they were in the process of taking out a detainee. So that’s what happened.” and
- b) That based on this information MWO Y could have heard the guards, during their arrival under the catwalk, when they picked up their riot gear.

517. MCpl O’Bready stated that, on two occasions, Cpl Young-Jones asked MWO Y for instructions and that the latter simply told him to consult the SOPs and that, when he was questioned about the conversation between Cpl Young-Jones and the guards under the catwalk, MWO Y stated that he did not remember it. MCpl O’Bready did not say that during this part of the exercise, MWO Y was in position on the catwalk and able to attentively monitor what was going on and intervene.

518. Faced with these findings, MCpl O’Bready could not specifically explain these omissions, although he considered them to be significant. He also had to prepare several different documents: notes, the investigator activity, the case summary and the prosecutor summary. He found that it had to be repetitive, but that these versions could not be identical. They are in different formats, and he could not simply cut and paste.

519. The statement of a witness is under the heading [translation] “investigative activity.” According to MCpl O’Bready, the investigative activity was only a summary of a witness interview. He considered [translation] “any relevant, significant information” was in the audio or video recordings submitted to the prosecutor.⁸⁰⁸

⁸⁰⁸ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 258.

520. The video recordings of the interviews were not sent to the RMP.⁸⁰⁹ Therefore, the RMP did not view these video recordings when assessing the evidence at the time of conducting his review of the situation and the charges proposed by MCpl O’Bready. The RMP did not communicate with Capt da Silva or MCpl O’Bready after March 7, 2011, and he did not request additional investigation or copies of the audio or video recordings. As stated in Chapter 6, there is no evidence in the file that indicates that the absence of audio/video recordings in the package sent to the RMP had any effect on the preparation of the legal opinion.

521. Any investigator must ensure that he or she submits the best possible file to the RMP. The “*précis des faits*” (Crown brief) and the prosecutor summary should include a section setting out the essential elements for each charge, as well as the supporting evidence. Furthermore, all investigation plans should include such a section; that way, the investigator would know what evidence they need to obtain in order to lay the charge. At the end of their investigation, the investigator would just have to put this information into the “*précis des faits*” (Crown brief) or the prosecutor summary. The essential elements of service offences can be found in a document prepared by the Office of the JAG.

Recommendation #5:

The Commission recommends that the CFPM amend the CF MP Orders, by inserting in the directive that any “*précis des faits*” (Crown brief) or prosecutor summary should include a section that sets out the essential elements of each charge, as well as the supporting evidence. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “*The CF MP Order on Investigation Plans directs the MP to include in the investigation plan a list of each offense investigated, and the elements of each offense. The CF MP Order on Prosecution Summary articulates the requirement for the prosecution summary to provide supporting evidence for the offense(s) the investigator has reason to believe occurred. This order states “The PS {summary of prosecution} must contain a statement of facts deemed sufficient to prove the charges laid or recommended.” The investigation plan and prosecution summary form part of the record that is reviewed by the prosecution/Crown when criminal charges are laid or recommended.*”**

522. In rejecting this recommendation, the CFPM refers to the CF PM Orders on investigation plans and prosecution summary. The Commission notes that its recommendation was in respect

⁸⁰⁹ See part 7.7.4 of this report.

of the “*précis des faits*” (Crown brief) and the prosecution summary, not the CF PM Order on investigation plans.

523. With respect to the CF MP Order on prosecution summaries, the Office of Professional Standards (PS) of the CFPM had provided an electronic copy of this order to the Commission in August 2020 (Document No. 222). The Commission reviewed this order in light of the CFPM's response with respect to this recommendation.

524. While this order states in paragraph 3 that the facts at issue set forth in the prosecution summary must be sufficient to support the charges laid or recommended, it does not explicitly address the “*précis des faits*” (Crown brief) and its content. Paragraphs 5 to 17 of this order deal with the prosecution summary and provide some guidance in this regard. For example, paragraph 7(h) deals with “offences” and provides that the drafter of the prosecution summary must “list” all the offences charged or recommended for charging, and must also ensure that this list matches the information found on the front page of the GO (General Occurrence). Section 7(l) requires the drafter to concisely summarize the offence and the subsequent investigation. Paragraph 7(m) deals with “evidence available” and provides that the drafter must indicate the types of evidence available to the prosecutor/charge-laying authority, such as written statements, audio/video evidence, photographs, forensic evidence, among others. Finally, paragraph 9 provides that the drafter of the prosecution summary must tell the story of the offense and the accused. Thus, this order does not meet the intent of this recommendation insofar as it does not make it clear that every “*précis des faits*” (Crown brief) and prosecution summary should include a section that sets out the essential elements for each offense and its supporting evidence. The Commission believes that a clear link between the essential elements for each offence and the supporting evidence must be established in a manner that is helpful to the prosecutor.

525. In addition, it should be noted that the Commission used the term “amend” in its recommendation. Indeed, the Commission recommended that the CFPM “amend” the relevant CF PM Orders to ensure that the investigator collects all of the evidence, that is, the essential elements for each offense found in the “*précis des faits*” (Crown brief) or the prosecutor’s summary, during the course of the investigation. The Commission's recommendation is thus

made to assist the investigator in the collection of evidence and to ensure that the investigator presents the prosecutor with a complete and accurate document.

Recommendation #6:

The Commission recommends that the CFPM ensure that CFNIS investigators regularly consult the reference document on the essential elements of service offences prepared by the lawyers of the Office of the Judge Advocate General (JAG). (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted that: [translation] “*The Canadian Forces National Investigation Service (CFNIS) regularly refers to the publication “Elements of the Offence: A Guide of the Office of the JAG to Decision Making under the Code of Service Discipline”. This checklist is widely used within the CFNIS despite the fact that it has not been updated since August 24, 2016.*”**

7.10 Analysis of Charges

526. The legal analysis of the charges will be based on the evidence in the “*précis des faits*” (Crown brief) and the relevant case law that was available to the RMP who provided the legal opinion in this file. This RMP did not have the complete file, namely GO 2011-2411, or the interview recordings, and it must also be noted that he did not request this evidence. That being said, there is no evidence in the file that indicates that the absence of audio/video recordings in the package sent to the RMP had any effect on the preparation of the legal opinion.

7.10.1 Section 124 of the *NDA*: Negligent Performance of Duties

527. Section 124 of the *NDA* states that “Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty’s service or to less punishment.” In *R v Mathieu*⁸¹⁰, the Court Martial Appeal Court ruled that the offence created by section 124 is a penal negligence offence. The Court Martial Appeal Court stated in *R v Brocklebank*⁸¹¹ that it was a serious offence and that has two components: a military duty imposed on the accused; and negligent performance of that duty by the accused.

⁸¹⁰ *R v Mathieu*, 1995 CMAC-379 (CACM) [*Mathieu*].

⁸¹¹ *R v Brocklebank*, 1996 CMAC-383 (CACM) [*Brocklebank*].

528. In *Mathieu* as in *Brocklebank*, the Court Martial Appeal Court, basing its reasoning on *R v Creighton*⁸¹² and *R v Gosset*⁸¹³ of the Supreme Court of Canada, stated that the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of a reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. This standard applies to establish both the *actus reus* and the *mens rea*. It is an objective standard. This Court also confirmed that the marked departure from the duty of care that a reasonable person would observe in all the circumstances was an integral part of the elements of this offence. The Court stated that, in the context of a military operation, the standard of care can vary in relation to “the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation.”⁸¹⁴

529. In *Brocklebank*, the Court Martial Appeal Court placed considerable emphasis on the exact nature of the duty to which the charge refers. According to the Court, this charge relates explicitly to the manner of discharging a military duty imposed upon a member of the Canadian Forces. The impugned act or omission of the accused must constitute a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. The offence establishes a standard of conduct consistent with the goals of ensuring that service members apply themselves to their military duties in a disciplined and efficient manner.

530. An obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff is necessary to give rise to a military duty. Therefore, under *Brocklebank*, the offence must be grounded in “a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the performance of military duty per se, which, upon a plain interpretation of section 124, was clearly not Parliament’s intention to sanction by that section.”⁸¹⁵

⁸¹² *R v Creighton*, [1993] 3 SCR 3 [*Creighton*].

⁸¹³ *R v Gosset*, [1993] 3 SCR 76 [*Gosset*].

⁸¹⁴ *Brocklebank* at 12.

⁸¹⁵ *Brocklebank* at 24–25.

531. In *R v Day*,⁸¹⁶ the Court Martial Appeal Court rendered a decision on June 24, 2011, a few months after the CFNIS JTF-Afg investigation. This ruling, while expressly referring to *Mathieu*, indicates that the Court Martial Appeal Court's approach regarding negligence according to *Mathieu* and *Brocklebank* was relevant during the period from January to April 2011.

532. The essential elements of the offence are the following:

- a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- b) that a particular military duty was imposed on the accused;
- c) the accused was aware of the military duty imposed on him;
- d) there was a standard of care to be exercised by the accused;
- e) the conduct of the accused in relation to this military duty;
- f) that this conduct showed a marked departure from the conduct of a reasonable person in the circumstances;
- g) that the accused failed to direct his mind to the risks and the need to take care; and
- h) whether the accused possessed the requisite capacity to appreciate the risk flowing from his conduct.

7.10.1.1 Maj X – The Charge that was Prepared

533. The following charge was included in the Record of Disciplinary Proceedings (RDP) in the GO 2011-2411 "précis des faits" (Crown brief):

[translation]

"DETAILS: In that he, on or about 19 Jan 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, as Coy OC, did not ensure that he adequately planned a personnel recall exercise, as he had the duty to do."

534. For it to be negligent performance of a duty, Maj X had to engage in conduct, by doing something or omitting to do something in a manner that was a marked departure from the conduct of a reasonable person in all the circumstances of the case. This reasonable person must

⁸¹⁶ *R v Day*, 2011 CMAC 3.

be put in the circumstances of Maj X when the events occurred in order to assess the reasonableness of the conduct. The offence of negligently performing a military duty requires more than just carelessness on Maj X's part. What he failed to do must be a marked departure from the expected standard of conduct in the performance of a specific military duty. A mere departure from the standard expected of a reasonable person in similar circumstances will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree.

535. The military duty in question was to [translation] “adequately plan a recall exercise.” According to the evidence gathered, Maj X did not receive orders from Col Grubb or his chain of command in JTF-Afg to carry out a personnel recall exercise. The [translation] “task statement for Maj [X]” and the “MP Technical Directive OP Athena” dated January 5, 2011 do not include any specific instructions with respect to holding MP Coy personnel recall exercises.

536. Maj X said that there had been a significant increase in the number of detainees in the DTF and that these detainees were remaining in the DTF for much longer periods. Thus, this increased number of detainees along with longer times spent in the DTF greatly increased the risk of a riot within the DTF. This risk was a great concern to the JTF-Aft chain of command, the CFPM and Maj X. SOP 500 had been drafted on the basis of a much smaller number of detainees occupying the DTF for short periods of time. SOP 500 was therefore amended to specify measures to be taken in case of a riot.

537. Maj X said that he had personally planned an exercise with two goals: recall the DTF personnel and ensure that DTF members had full knowledge of SOP 500 concerning riots. Along with Capt Touchette and MWO Y, Maj X verbally planned an exercise to validate the new version of SOP 500. Capt Touchette said that the purpose of the exercise was to [translation] “assess the response time of DTF guards in the event of a riot and assess their knowledge of SOP 500.” The duties of Maj X and MWO Y were to monitor the exercise.

538. Therefore, Maj X assigned himself this planning duty. Maj X, as JTF-Afg MP Coy OC and Provost Marshal of JTF-Afg, was responsible for the detainees and the DTF, except for the aspect of interrogations and intelligence. Given the sensitive nature of these responsibilities, he

had a duty to ensure compliance to the letter of the doctrine, policies and regulations in references E, F, G, H and I of the “MP Technical Directive OP Athena.” He also had to comply with and ensure compliance with the rules of engagement and the standards established in references E, F, G, H and I.⁸¹⁷

539. The [translation] “task statement for Maj [X]” stated that he was responsible for the discipline, organization and effectiveness of the personnel under his command. He also had to ensure that this personnel demonstrated exemplary discipline and conduct pursuant to the Defence Ethics Program. Article 4.01 of the QR&O states the general responsibilities of officers. To become acquainted with, observe and enforce, the *NDA*, the QR&O and all other regulations, rules, orders and instructions that pertain to the performance of the officer’s duties, and promote the welfare, efficiency and good discipline of all subordinates, are all part of the responsibilities.

540. So, while there is no specific order pertaining to the duty to plan recall exercises, the [translation] “task statement for Maj [X]” and the “MP Technical Directive OP Athena” constitute instructions from the CO, JTF-Afg and the CFPM to Maj X. These instructions informed him that he had a duty to ensure that the DTF operated smoothly and securely. He therefore had to carry out the required duties to meet these objectives. The amendment of the SOP and the holding of exercises to ensure that his troops could adequately respond to any situation endangering the DTF or the JTF-Afg mission constituted only one aspect of his duties as JTF-Afg MP Coy OC and Provost Marshal of JTF-Afg. Therefore, while he had received no specific order to plan recall exercises from a superior, either orally or in writing, the obligation to plan such an exercise resulted directly from the orders assigning him his duties and responsibilities. Planning a recall exercise was therefore a specific military task assigned to him in the task statement and the “MP Technical Directive OP Athena” as of January 5, 2011.

541. Maj X said that he was aware of the risk of a riot and that this risk greatly concerned him. He had decided that SOP 500 had to be amended to take into account this new situation and he

⁸¹⁷ Reference E is *Hague Convention IV, Geneva Conventions and Additional Protocols*, Reference F is B-GJ-005-110/FP-020 *Prisoner of War Handling Detainees and Interrogation and Tactical Questioning in International Operations*, Reference G is B-GJ-005-220/FT-001 (Provisional) *Intelligence Interrogation, Tactical Questioning, and Debriefing in International Operations (Intg & TQJTTP)*, Reference H is B-GG-005-027/ AF-023 *Code of Conduct for CF Personnel*, Reference I is *JTF-Afg TSO 321 - Detention of Afghan Nationals and Other Persons*.

had a duty to ensure that his troops could respond appropriately in the event of a riot. He had planned this exercise to verify the recall time and knowledge of the new SOP. He knew that this task had been imposed upon him, as he had assigned it to himself.

542. Maj X and MWO Y had also agreed that no one was to enter the cells and that detainees' normal routine had to continue without them being disturbed. Maj X left MWO Y on site to ensure that the information had been properly passed along to the guards and that the situation did not degenerate during the exercise. MWO Y's duties were to supervise the guards from the catwalk and [translation] "prevent any action that would disturb the detainees."⁸¹⁸

543. Along with Capt Touchette and MWO Y, Maj X verbally planned an exercise to validate the new version of SOP 500. He assigned tasks to Capt Touchette, MWO Y and himself. Maj X stated to MCpl O'Bready that he thought it was sufficient to have only himself and MWO Y to correctly assess the DTF members and to ensure the success of the exercise.

544. There is no documentary evidence that shows a proper standard for planning a recall exercise in the specific context of the KAF DTF. The evidence concerning the standard can be found in the evidence of Maj Wight and Sgt Larson.

545. On February 28, 2011, during an interview with CFNIS, Maj Wight explained the responsibilities regarding the planning and execution of exercises when he was MP Coy OC during roto 9. Maj Wight stated that there was no SOP on exercises, as the exercises were to be done pre-deployment and not during a deployment. He stated that the CAF's training approach was known to everyone and that it had to be followed; that is, for individual training, group training, discussions ("talk-through"), a review ("walk-through") and simulation ("exercise"). The JTF-Afg MP Coy OC had to approve the plan prepared by his operations officer. He reportedly never conducted an exercise in the DTF, nor one with real detainees. Furthermore, the exercise should be done in a location simulating the DTF with enough evaluators to observe the exercise and prevent or stop any dangerous actions. These evaluators should be trained in the activities they are evaluating and have experience in the field so that they can provide debriefings to participants to help them improve.

⁸¹⁸ Transcript of the CFNIS JTF-Afg interview with Maj X, 3 February 2011 at 37.

546. Sgt Larson was interviewed as a subject-matter expert (SME) in the field of handling detainees in a theatre of operations. In his opinion, holding exercises during a deployment was encouraged, but never with detainees. He explained how an exercise should take place. The CoC should have at least one evaluator (despite the fact that there is no evaluator course) who would be aware of the scenario and who could provide a debriefing to participants following the exercise, request medical assistance if there are injuries and determine the safe word that would end the exercise for safety reasons, and one controller in the field to immediately end the exercise if necessary since this person directly observes the conduct of the exercise.

547. Thus, the evidence on file regarding the standard associated with planning an exercise consists of the testimonies of Maj Wight and Sgt Larson. Maj Wight is an ordinary witness, and Sgt Larson is presented as an expert witness. They mention the use of evaluators; Sgt Larson specified one evaluator and one controller, while Maj Wight did not give a specific number.

548. Maj X planned a personnel recall exercise that seems to comply with the minimum standards described by Sgt Larson, with the use of one evaluator and one controller. He understood the risks of an unplanned and unwanted entry into the cells and appointed a controller to prevent this risk. He demonstrated some degree of care.

549. There is no evidence on file that demonstrates that Maj X did not have the capacity required to assess and understand the risks resulting from his conduct.

550. The note in article 107.02 (*Authority to Lay Charges*) of the QR&O states that “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.”

551. It is very important to note that the details of this proposed charge allege that he failed in planning the exercise and not in the execution of his plan. Therefore, the *actus reus* of this charge is the planning of an exercise and not the execution of this plan. The second charge in the RDP for Maj X focuses on the execution of the plan, because it is alleged in the second charge that Maj X did not adequately supervise the guards. The evidence on file does not create a

reasonable belief that there is a marked departure between Maj X's planning of the exercise and the standard as described by Sgt Larson and Maj Wight.

7.10.1.2 The Maj X – The Charge that should have been Prepared

552. Given the evidence on file, a charge of not having adequately monitored a personnel recall exercise to ensure that no guards enter a cell could have been laid against Maj X.

553. The following legal analysis of the marked departure will be similar to the one presented in part 7.10.1.1. There is no documentary evidence that shows a standard for a recall exercise in the specific context of the DTF at KAF. The evidence concerning the standard is in the testimony of Maj Wight and Sgt Larson. Maj Wight stated that a recall exercise could be done with an evaluator, but he could not categorically specify a minimum number for a recall exercise at KAF.

554. Sgt Larson was interviewed as an SME in the field of handling detainees in a theatre of operations. He could conceive of an exercise of this type having two evaluators who would be located on the catwalk. He referred to a ratio of two evaluators for 25 people to be monitored. He explained that he conducted exercises that were "very slow and methodical and it's very set in drills and procedures."

555. As previously noted, the evidence in the file concerning the standard for planning and conducting an exercise is summarized in Maj Wight and Sgt Larson's testimony. They provide a general description of how to plan and conduct an exercise. Their testimony concerns exercises intended to train people, and they place a lot of emphasis on preparing personnel for such exercises and on the orderly and well-controlled conduct of an exercise. However, the exercise on January 19, 2011 was intended to test the knowledge and reactions of the personnel in Lt Busset's platoon. Maj X wanted it to be a surprise for everyone.

556. Maj X did not devote a lot of time and attention to planning this exercise. He tried to explain that by the fact that this exercise was intended solely to recall personnel and not to extract detainees. In his view, it was a [translation] "commonplace" exercise that had [translation] "degenerated." MCpl O'Bready did not inquire about the need to properly plan such an exercise, given the specific context of the DTF and the CAF standards for planning exercises.

MCpl O'Bready did not question Maj X about the value of having a written plan that would have described the objectives of the exercise and the evaluation criteria, each individual's role, and the monitoring and security measures.

557. Maj X did not ensure that SOP 500 had well and truly been distributed to all of the members of Lt Busset's platoon, and he did not ensure that they had received the required training on the new SOP. He did not check with Lt Busset to ensure that the supervisors and guards had had an opportunity to discuss the measures to be taken in the event of a riot and to ask questions to thereby ensure that the platoon members were ready to handle a riot. Instead, he chose to organize a surprise exercise without conducting those checks beforehand.

558. Maj X therefore increased the potential for there to be unintended consequences, given the surprise element that he intentionally inserted into his exercise. That increased potential for unintended consequences therefore increased the need for a detailed plan and for proper supervision of such an exercise in order to prevent such consequences or to intervene if they arose.

559. The DTF was a very sensitive site for Canadian military authorities at all levels. The standard clearly showed that holding exercises at the DTF was not encouraged and that such an exercise needed to be properly planned and supervised in order to avoid any issues. Maj X created and inserted himself into a situation that required a great deal of caution and for a great deal of attention to be paid to the actions of all shift members. He knew, or ought to have known, that he needed to supervise them very closely. Although he left MWO Y on the catwalk, he still needed to show heightened vigilance during the exercise in order to stop any action that did not fulfill the objectives of his exercise and that posed a danger to the security of DTF operations and the detainees. Through his reckless behaviour, he demonstrated a disregard for that danger, which represents a marked departure from the supervisory standard of care for such an exercise.

560. Maj X planned an exercise within the DTF that did not take into account the increased potential for problems, given the above-mentioned factors and the need to ensure that an adequate team of controllers was present to properly supervise the exercise. He did not

demonstrate the level of concern for risk or the degree of caution that the special circumstances of this exercise required.

7.10.1.3 MWO Y

561. The following proposed charges were included in the RDP in the GO 2011-2411 “*précis des faits*” (Crown brief):

[translation]

DETAILS: In that he, on or about 19 Jan 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, when he was performing duties as the controller of a personnel recall exercise, failed to carry out the instructions of the Coy OC and let the guards enter a detainee’s cell.

562. Maj X left MWO Y on site to ensure that the information was properly communicated to the guards and that the situation would not degenerate during the exercise. MWO Y was tasked with intervening if people went up on the catwalk or tried to enter a cell without authorization. The detention complex was not supposed to be affected by the conduct of the exercise, and the detainees were not to be disturbed. He was therefore supposed to serve as a controller during the exercise.

563. There is ample evidence (testimony from Maj X and Capt Touchette) in the file that shows that MWO Y was aware of his tasks. Maj X and MWO Y had also agreed that no one was to enter the cells and that the detainees’ normal routine was to continue uninterrupted.

564. MWO Y was on the first part of the catwalk, near the centre, where he could not observe cell 7. He more or less remained seated in the same place during the exercise and while the detainee was extracted from the cell.

565. Maj X said that he gave clear instructions to MWO Y not to let the guards enter the cells. Sgt Larson stated that it was necessary that an evaluator with a direct view of the interns be present during an exercise in order to intervene immediately if needed. The evidence shows that his lack of vigilance constitutes a marked departure from the supervisory standard of care during the exercise.

566. MWO Y remained seated for most of the exercise and was not very active about ensuring that he was attentively supervising what was happening in the cell area. He demonstrated a

disregard for his controller tasks and for the need to exercise caution. There is no evidence in the file that shows that MWO Y could not understand the risks arising from his conduct.

567. Therefore, according to the evidence in the file, there were reasonable grounds to believe that MWO Y had committed this offence. MWO Y knew that he had been assigned to be the exercise controller. The evidence shows that his conduct could constitute a marked departure from the conduct of a reasonable person placed in the same circumstances.

7.10.2 Section 129 of the *NDA*: Conduct to the Prejudice of Good Order and Discipline

568. Subsections (1) and (2) of section 129 of the *NDA* read as follows:

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

(2) An act or omission constituting an offence under section 72 or a contravention by any person of:

a) any of the provisions of this Act;

b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or;

c) any general, garrison, unit, station, standing, local or other orders.

569. The Court Martial Appeal Court has repeated on many occasions that section 129 of the *NDA* is a general provision that covers any conduct to the prejudice of good order and discipline within the CF.⁸¹⁹ The offence is described in subsection (1). Evidence of prejudice is an essential element of the offence and it must be demonstrated beyond a reasonable doubt.⁸²⁰ The court can deduce that there was prejudice if the evidence clearly establishes that it was the natural consequence of acts that are proven beyond a reasonable doubt.⁸²¹ That description of the burden of proof applies to cases in which a charge is based on subsection (1).

570. Subsection (2) states that contravening any provisions of the *NDA*, or any regulations, orders or instructions published for the general information and guidance of the CF or any part

⁸¹⁹ *R v Tomczyk*, 2012 CMAC at paras 24-25.

⁸²⁰ *R v Jones*, 2002 CMAC 11 at para 7.

⁸²¹ *R v Bradt (BP)*, 2010 CMAC 2 at paras 40-41.

thereof, or any general, garrison, unit, station, standing, local or other order constitutes conduct to the prejudice of good order and discipline. A charge based on subsection (2) indicates which regulation, order or instruction was violated by the accused's act or omission.

571. In this matter, the charges brought against Maj X and MWO Y are based on subsection (1), as the details make no mention of a regulation, order or instruction. The essential elements of the offence are as follows:

1. The identity of the accused;
2. The date and time of the offence;
3. The conduct of the accused;
4. The prejudice to good order and discipline caused by that conduct; and
5. The blameworthy state of mind of the accused.

572. The following proposed charge was prepared for Maj X:

[translation]

In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by observing them in order to intervene in the event that things got out of control.

573. The following proposed charge was prepared for MWO Y:

[translation]

In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by directly observing them in order to intervene in the event that things got out of control.

574. The charges are practically identical. They allege that Maj X and MWO Y did not adequately supervise the guards in order to intervene in the event that things got out of control. This out-of-control situation was in fact the extraction of the detainee.

575. A detainee was extracted from his cell during the exercise of January 19, 2011. The guards who extracted the detainee were not all aware that they were taking part in an exercise. Following the exercise, some of the guards wondered why they had been ordered to extract a detainee during an exercise intended to practise the measures to be implemented in the event of a riot. All of them were aware that the detainees were not supposed to be involved in exercises.

Maj Wight and Sgt Larson also said as much. In addition, Maj X and MWO Y were well aware of that fact.

576. The evidence on file leads one to reasonably believe that Maj X and MWO Y committed this offence. The evidence shows that not intervening to prevent an extraction during the exercise was a marked departure from the proper operation of the DTF. This evidence leads to the conclusion that there was prejudice to good order and discipline, because it clearly establishes that it was a natural consequence of Maj X and MWO Y's omissions.

7.11 The Supervision of the CFNIS JTF-Afg Investigation and the Investigator's Assistance

577. Although it is often mentioned that he discussed the file with Capt da Silva and Sgt Parent, MCpl O'Bready stated that Capt da Silva [translation] "was not active in the file" and that he served as an administrator. He was responsible for informing the CFNIS and JTF-Afg chain of command when necessary.⁸²² According to MCpl O'Bready, Sgt Parent's role was to [translation] "give me a hand when I needed it; that was about it."⁸²³ Sgt Mantha participated in several interviews, but MCpl O'Bready rarely discussed the file with him.

578. According to Chapter 6, Annex B of the MPPTP, an investigation team consists of a case manager, a file manager, a primary investigator, and investigators. The annex also describes those individuals' roles. The minimum steps involved in planning an investigation are described in CFNIS SOP 201.⁸²⁴ That SOP also sets out that it was intended to [translation] "elaborate on" chapters 6 and 7 of the MPPTP. Nowhere in SOP 201 is the management of major cases mentioned.

579. MCpl O'Bready described a work environment in which each person was mainly working alone. The work was not done as a team; there was no case manager, investigators or person in charge of evidence [translation] "like it was supposed to be in real life." He was alone to perform those tasks in his file. He had to ask for help from whomever was available when he

⁸²² Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 39-41.

⁸²³ *Ibid* at 37.

⁸²⁴ Document 216 B, SOP 201 of CFNIS Investigations – General/Briefing Protocol (October 2010) at para 1.

needed to interview a witness and [translation] “when we have help, it’s more like a note taker.”⁸²⁵

580. Preparation for an interview was done quickly. He would give a copy of his interview plan to his colleague before the interview. The investigation was not managed as a major case, with discussion sessions on the investigation strategy or in preparation for a specific interview, as it was [translation] “James’ file. Do your work, and then, if you need a hand, let us know, and we’ll help you.” The only discussions that were held took place after the interview and were used to [translation] “inform the chain of command.”⁸²⁶

581. During the interviews that were conducted by MCpl O’Bready, the investigators who were taking notes only rarely had questions for the witnesses. None of the investigators said that they had seen the audio/video recordings of the interviews that were conducted earlier, in which they had not participated, so that they could prepare for the interview to come. Preparation involved having a brief discussion with MCpl O’Bready before the interview. No one suggested to MCpl O’Bready that they meet with one or more of the witnesses again in order to clarify some of the contradictions in the testimony that was gathered. A file manager would have analyzed the information that was collected from the witnesses and used it to establish links in order to better prepare the investigators for their interviews. The assistance that was provided by the other investigators was not up to par, and there was a total lack of team work. In short, MCpl O’Bready was left to his own devices during this investigation, and there was no investigation team. An investigation manager should have been assigned to the investigation to adequately supervise MCpl O’Bready. Daily team meetings would have greatly helped MCpl O’Bready in planning and conducting the investigation.

582. The Major Case Management model is a methodology that focuses on accountability and uses a multidisciplinary approach to conduct investigations into offences that meet the criteria for major cases. This model establishes a centralized coordination, organization and investigation standard covering all fields, standardized training and shared case management technology...⁸²⁷

⁸²⁵ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 19.

⁸²⁶ Transcript of the Commission’s interview with Sgt (ret’d) O’Bready, 23 October 2018 at 277-278.

⁸²⁷ Ministry of the Solicitor General, *Ontario Major Case Management Manual*, 2017, available online: <[MCM-2017 Major Case Management Manual | Ministry of the Solicitor General \(gov.on.ca\)](https://www.solicitorgeneral.gov.on.ca/mcm-2017-major-case-management-manual)>.

This investigation management model is the result of recommendations from the 1996 Campbell Report. Most Canadian police services use this system.

583. The Major Case Management system is intended to create a permanent record of the timeline of the investigation that includes the direction, speed, progress and decision-making process throughout the investigation. The minutes of investigation team meetings have a specific category in the Major Case Management system that records the details on who was responsible for specific decisions or recommendations, as well as the reasons that led to them. Thus, this system makes it possible to follow the investigation as it develops and observe the results of each of the decisions and actions in the investigation. The Major Case Management system software provides investigators with the tools required to organize, manage, retrieve and analyze the sometimes large volumes of data collected in the investigation.

584. This system and software program improve and greatly facilitate disclosure in criminal proceedings or in the context of other investigations or monitoring reviews. Through this system and its disclosure mechanisms, the investigators are able to better describe and explain the reasons that led to the decisions and actions that influenced the conduct of the investigation.

585. The CFNIS had no SOP for Major Case Management in 2011. The MPPTP also made no mention of it. The CF MP Orders came out in 2012. A review of the table of contents of the CF MP Orders shows that investigation management is the subject of CF MP Order 2-500. That order refers the reader to CF MP Order 2-530 for more information on Major Case Management policies and procedures. CF MP Order 2-530 is entitled *Major Case Management—Principles* and CF MP Order 2-540 is entitled *SAMPIS Major Case Management Subsystem*. However, these orders have not yet been published.

586. The Major Case Management model must be used “in the case of major joint investigations with other law enforcement agencies” or when “a complex investigation task force is deemed necessary.”⁸²⁸ CF MP Order 2-500, the source of the above quotations, should be

⁸²⁸ CF MP Order 2-500, *Investigation Management* at para 6.

amended to correctly set out the threshold and context for the use of the Major Case Management model.

587. This investigation should have been managed as a major case. This model's methodology would have avoided many of the deficiencies identified in this PII. At the beginning of an investigation, the CFNIS investigators should assess the situation to decide whether they should use the Major Case Management model. The person in charge of the investigation should also indicate in the file the reasons why they decided not to use this model in the investigation. The Commission had recommended in 2006 that CF MP Gp policies be amended to include the principles of the Major Case Management model.⁸²⁹

Recommendation #7:

The Commission recommends that the CFPM develop and publish a policy that clearly identifies the situations and offences that must be managed as major cases and ensure that MPs receive training on this subject throughout their careers. (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted that: [translation] “*CF MP orders on jurisdiction and CFNIS references define major cases and how they are to be investigated and managed throughout the investigation. In addition, CFNIS members receive training in major case management through recognized civilian police training institutions. An update to the CF MP Order on Major Case Management is underway.*”**

588. The Commission believes that the CFPM response to this recommendation could have gone further. Although the CF MP Order on CFNIS Jurisdiction defines serious or sensitive offenses, it does not address major case management. As mentioned in the Interim Report, the CFNIS had no SOPs on Major Case Management in 2011. There was also no mention of the Major Case Management model in the MPCC. The CF MP Orders came into existence in 2012. A review of the table of contents of CF PM Orders shows that investigation management is the subject of CF MP Order 2-500. This order refers the reader to CF MP Order 2-530 for more information on major case management policies and procedures. CF MP Order 2-530 is entitled “*Major Case Management-Principles*” and CF MP Order 2-540 is entitled “*SAMPIS Major Case Management Subsystem.*” However, these orders have not yet been published. The Notice of

⁸²⁹ Our complaint files: MPCC 2006-033 and MPCC 2006-037.

Action offers no indication as to when these orders will be promulgated. The Commission believes that these orders should be promulgated as soon as possible.

7.12 Personal Conflicts and Conflicts of Interest

7.12.1 Capt da Silva's Request and Maj Bolduc's Decision

589. Sgt Parent stated that it would have been preferable to use a team of independent investigators from Ottawa to investigate the incident, given the close relationship between the members of the Coy and CFNIS JTF-Afg.⁸³⁰ Sgt Mantha, for his part, said that he did not believe that they should have investigated this file, considering the relationship between CFNIS JTF-Afg and the JTF-Afg MP Coy (“...because of the closeness of the Detachment with the—and the way it was going...”). That being said, he specified that CFNIS JTF-Afg could carry out the task independently, as it was their responsibility to do so.⁸³¹

590. When questioned by the Commission whether he had asked Capt da Silva for the investigation to be conducted by investigators from the Ottawa detachment, MCpl O’Bready replied that they were [translation] “people who had worked at Valcartier in the past.” But, when he was asked about whether there might be a perceived conflict of interest, MCpl O’Bready said that investigators from Halifax could have been assigned to this file. He also suggested that Sgt Mantha⁸³² could have conducted the investigation, as he did not believe that there would be any real or perceived conflict of interest.⁸³³

591. Capt da Silva stated that he immediately notified Maj Bolduc by telephone that a complaint had been received concerning the incident on January 19, 2011 and the upcoming investigation. He said that he then tried to obtain independent investigators to conduct the investigation. He purportedly explained that the members of his detachment were too close to the subjects of the investigation.⁸³⁴ Maj Bolduc purportedly told him that his team was more than capable of conducting the investigation and that he would not send investigators to KAF.

⁸³⁰ Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 103.

⁸³¹ Transcript of the Commission’s interview with Sgt (Retired) Mantha, 18 October 2018 at 61-62.

⁸³² Sgt Mantha was an English-speaking investigator who was not from Valcartier, unlike most of the members of the CFNIS JTF-Afg team and the JTF-Afg MP Coy.

⁸³³ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 389-392.

⁸³⁴ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 88.

Maj Bolduc did not remember such a request, but he also said that he did not believe that it would have been possible to fulfill it.⁸³⁵

592. Capt da Silva described his reaction to Maj Bolduc's decision this way: [translation] "No problem. Roger Dodger, yes sir, no sir. Click your heels, let's go, let's move forward."⁸³⁶ Therefore, despite his concerns about the highly sensitive nature of the file, Capt da Silva did not push the point any further during the call following Maj Bolduc's refusal.

593. Capt da Silva should have persevered and made a written request that would have clearly presented to Maj Bolduc all of the reasons for an external team to be assigned to this investigation. Such a request would have shown the conflicts of interest that were inherent to the situation, in addition to emphasizing the fact that there was no investigator available who had the knowledge, experience and language abilities to conduct such a sensitive and serious investigation. In addition, this written request would be a tangible demonstration of Capt da Silva's efforts. His email of February 3, 2011 does not reflect the effort that Capt da Silva said that he made on January 29 and 30, 2011.

594. Capt da Silva wrote an email to Maj Bolduc on February 3, 2011, asking him for help communicating with the RMP. He ended the email as follows: [translation] "You'll understand that the situation is a bit strange. It will definitely cool relations with the MP Coy. There is no problem taking charge of the situation, but the investigators really want to make sure that it's unavoidable."⁸³⁷ The investigators asked him to explain what he meant. He replied that accusing the major and the master warrant officer of the JTF-Afg MP Coy would cause [translation] "a wave," as Maj X would accept it [translation] "like a hot knife through butter."⁸³⁸ Therefore, this reply indicates that he believed there would be consequences that would impact the relationship between the CFNIS detachment and the JTF-Afg MP Coy following any charges against Maj X and MWO Y.

⁸³⁵ See part 6.2.2 of this report.

⁸³⁶ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 89.

⁸³⁷ Document 020 at 345.

⁸³⁸ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 179-180.

595. He wrote that there was [translation] “no problem taking charge of the situation” despite the fact that his investigators wanted to ensure [translation] “that it [was] unavoidable.” Capt da Silva’s email is vague and confusing. It in no way reflects the message that he claims to have conveyed to Maj Bolduc during his first phone call.

596. This message does not clearly or vigorously request that the investigation be assigned to another CFNIS detachment. Rather, the message seems to reflect Capt da Silva’s ambivalent approach to this file and his vague answers to the investigators’ questions.

597. Commission investigators also asked Maj Bolduc to explain how he interpreted the final sentences of Capt da Silva’s February 3, 2011 email. He understood that it was a sensitive situation, as the subject of the investigation was the OC of the JTF-Afg MP Coy. In his view, [translation] “there was nothing more to take away from the email in any other sense.” He said that, at the camp in Kandahar, [translation] “it’s a...it’s not as though you can get away. The offices of the NIS are practically right next to those of the military police.” He compared the situation to professional standards that [translation] “go into a police office” or [translation] “the Sûreté du Québec going into another police force” to conduct an investigation. Consequently, it was [translation] “a situation that was a bit uncomfortable for the people there, and all that.”⁸³⁹ Maj Bolduc did not answer the question clearly and specifically.

598. Maj Bolduc also emphasized the fact that Capt da Silva said that there was [translation] “no problem taking charge of the situation.” He would have [translation] “thought about how to tackle the file” if Capt da Silva would have told him that there were problems. One option seems to have been to [translation] “send other people.” However, he stated that [translation] “sending other people to Afghanistan to deal with the file would not have changed the situation. It’s not as though I could send them to the Holiday Inn and they could work somewhere else. They would be there.”⁸⁴⁰

599. He stated that Capt da Silva did not ask him for additional resources or whether he could take charge of the file. However, Maj Bolduc also said that he did not remember whether

⁸³⁹ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 85.

⁸⁴⁰ *Ibid* at 86.

Capt da Silva had asked him that and that he did not think that he had. He also stated that there were other options available in such situations.

600. Commission investigators asked him whether he had considered sending another team of investigators, given the situation. He did not remember whether he had considered it, but he did not believe that he would have been able to send investigators at the time. He explained that he [translation] “would have done everything in [his] power” had Capt da Silva asked him for help in this file, but, given that it was a Francophone deployment, he said that his Francophone investigators were in Quebec and that there were not many of them in Ottawa. He also said that he had been [translation] “super busy during those years.” In spite of that, he would have [translation] “done it had he been asked, but he never asked [him].”⁸⁴¹

601. Maj Bolduc was then questioned about the tense relationship between Capt da Silva and Maj X.⁸⁴² He was well aware of it, since [translation] “everyone knew that those two did not get along.” He had also [translation] “played referee between the two of them” throughout the training in preparation for the deployment. That said, he stated that there was [translation] “never any indication in the course of the entire investigation that the tension had an impact on this file.”⁸⁴³

602. When asked about the possibility of there being conflicts of interest and the fact that those individuals—the investigators and Maj X—were all from Quebec, Maj Bolduc replied that he had never thought about it. He explained that other Francophone investigators would also have been from Quebec and that they might have been under Maj X’s command in the past. He did not believe that Capt da Silva, Sgt Parent and Sgt Mantha had worked for Maj X, and he was unsure about whether MCpl O’Bready had. However, he had never discussed the matter with Capt da Silva.⁸⁴⁴

⁸⁴¹ *Ibid* at 87-88.

⁸⁴² The sergeants from CFNIS JTF-Afg also described Maj X and MWO Y as being arrogant. One sergeant had a good relationship with Maj X, while the other did not like him, as he had tried to exert a certain amount of control over CFNIS JTF-Afg from the start of the pre-deployment training.

⁸⁴³ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 88-89.

⁸⁴⁴ *Ibid* at 89-90.

603. Although he could not confirm whether the CFNIS had an SOP on conflicts of interest in 2011, Maj Bolduc confirmed that an investigator was supposed to notify their supervisor if there was a conflict of interest during an investigation. He did not believe that Capt da Silva had notified him of such a conflict. Such a situation [translation] “had not occurred to him.” He concluded this part of his testimony by stating that Capt da Silva had not told him [translation] “that he was incapable of working on the file.” He added that his [translation] “resources were limited,” that he did not receive any request, and that he had not considered the possibility of there being a conflict of interest.⁸⁴⁵

604. Maj Bolduc was familiar with the particular environment of the deployment at KAF and how it was different from the normal environment in Canada. That was clear when he described the shared working areas and discussed the potential deployment of additional investigators. He described the [translation] “uncomfortable” situation of the CFNIS detachment investigating the JTF-Afg MP Coy as being similar to an investigation by the MP professional standards office or an investigation of another police force by the Sûreté du Québec. That comparison is surprising, given that the professional standards office or the Sûreté du Québec do not share work areas or associate with the people being investigated, as was the case with CFNIS JTF-Afg. In addition, he was well aware of the tense relationship between Capt da Silva and Maj X, but he does not seem to have reflected on it.

605. Maj Bolduc does not seem to have questioned the sensitive nature of the file, given that it involved a detainee and the ranks and positions of the subjects of the investigation. He did not ask himself about real or perceived conflicts of interest and the need for transparency in such a file.

606. An investigation that had as its subjects the OC and the master warrant officer of the JTF-Afg MP Coy in an operational context was not an ordinary investigation. In addition, the fact that the treatment of a detainee was also a major element of this investigation made it all the more sensitive and delicate. Maj Bolduc knew very well what the situation was on the ground.

⁸⁴⁵ *Ibid* at 90.

Ensuring that the investigation was conducted effectively without impediments should have been his priority.

607. According to Capt da Silva's testimony, he focused on the relationship between his detachment and the JTF-Afg MP Coy, not on the potential conflict of interest between himself or his investigators and the subjects of the investigation, or on the fact that he could not assign his investigator who had the most seniority and experience to conduct such a sensitive investigation. It is clear that Capt da Silva did not vigorously try to persuade Maj Bolduc that he needed to send a team of independent investigators to KAF. Capt da Silva did not correctly present to Maj Bolduc the issues and risks associated with this investigation. Capt da Silva and Maj Bolduc were interviewed in November and December 2018, respectively, nearly eight years after the events at the centre of this file. There is no note in the file or personal note or email that summarizes the conversations that they described. The Commission is of the opinion that Capt da Silva should have at least taken notes on those discussions, given the importance that he testified having accorded to this request.

608. This sensitive situation is a good example of why a contingency plan is needed within the CFNIS to support detachments deployed overseas; that could take the form of an independent investigator or team of independent investigators with experience and seniority who would meet the specific requirements of the investigation, given the ranks of the subjects and the nature of the investigation. In addition, the independent investigator or team of investigators would need to be available on short notice to conduct sensitive investigations.

7.12.2 Capt da Silva's Decision to Assign the File to MCpl O'Bready

609. Capt da Silva did not vigorously request that an investigator be sent from Canada and therefore had to assign an investigator to the file. The choice of MCpl O'Bready seems to have been based on the fact that he was the only trained Francophone investigator who was present at KAF for the entire duration of the investigation. Capt da Silva was convinced that he had assigned the file to one of his sergeants when he was questioned by the Commission. He then tried to justify the choice of MCpl O'Bready. Also, according to Capt da Silva, MCpl O'Bready could rely on the support of Sgt Parent in addition to being able to turn to Sgt Mantha and himself.

610. The evidence shows that Sgt Parent was not at KAF for most of February and the beginning of March. Sgt Mantha, although present from the start of February, did not actively participate in the investigation. He did not supervise MCpl O'Bready. Capt da Silva was fully aware of Sgt Parent's upcoming absence and Sgt Mantha's capabilities when he made his decision. The testimony of MCpl O'Bready and that of Capt da Silva clearly demonstrate that Capt da Silva did not adequately support or supervise MCpl O'Bready.

611. MCpl O'Bready was probably not in a physical or mental state to conduct such a demanding and sensitive investigation. His brother had died unexpectedly, and he had had to quickly return to Canada for the funeral. He arrived at KAF on the evening of January 29-30, 2011; on the return trip, he had had to pass through nine time zones and it had taken at least 18 hours. There was therefore a major time difference, and the trip would have affected MCpl O'Bready physically. Less than 12 hours after arriving back at KAF, he was informed of the file, and he had to conduct an evaluation and initial planning and start his interviews.

612. Capt da Silva did not ask MCpl O'Bready whether he was comfortable with the task, and MCpl O'Bready did not ask Capt da Silva to be removed from the file or to have other investigators come to KAF. MCpl O'Bready said: [translation] "I wasn't uncomfortable with it. They weren't my friends. I knew them, but I didn't have any type of relationship with them."⁸⁴⁶ That will be examined in greater detail in the next part of the report.

613. MCpl O'Bready said that he worked mainly alone on this most sensitive and delicate file. His answers to the Commission show that he was definitely not comfortable with the situation. It seems as though he did not receive support to plan and conduct the investigation.

614. The choice of MCpl O'Bready was the simplest for Capt da Silva, given the circumstances. Appointing Sgt Parent would have required him to reschedule Sgt Parent's mission leave at the last minute. That is not an easy thing to do, even though it is possible.⁸⁴⁷ That being said, it does not appear as though Capt da Silva considered that option, despite the fact that Sgt Parent was his investigator who had the most seniority and experience. Sgt Mantha

⁸⁴⁶ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 389-390.

⁸⁴⁷ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 62.

was looking after mortuary affairs and the Anglophone files. Although he maybe could not have conducted this investigation on account of the language barrier, he could have at least been assigned to closely supervise MCpl O'Bready. In addition, Capt da Silva definitely could have, and should have, supervised the planning and conduct of this investigation much more closely.

615. Sgt Mantha said that he did not feel pressure during his investigations and that it was no different in Afghanistan. He had been very surprised to learn that MCpl O'Bready had been given the task of investigating this file. He believed that either he or Sgt Parent should have been in charge of the file, given Maj X's personality and Maj X and MWO Y's attitude towards lower ranked CAF members. He would not have assigned MCpl O'Bready to interview Maj X and MWO Y; he would have preferred to have either he or Sgt Parent conduct the interviews. However, he understood Capt da Silva's decision, because Sgt Parent had participated in Maj X's first interview and, in addition, it was only an interview, not an interrogation ("It's not an interrogation—well, the first one was just an interview, the last one was an interrogation.").⁸⁴⁸

616. Capt da Silva would not have found himself in that situation had he reacted immediately after being informed of the incident by Lt Busset on January 19, 2011.⁸⁴⁹ Setting aside the matter of the proximity between the subjects and the members of CFNIS JTF-Afg, he could have assigned his investigator with the most seniority and experience to the file, and Sgt Parent could have conducted a good part of his investigation before going on leave. Capt da Silva would therefore not have had to resort to a less experienced investigator who was returning from a very trying journey.

7.12.3 MCpl O'Bready and the Subjects of the Investigation

617. Commission investigators asked Capt da Silva to read a part of a transcript from one of Maj X's interviews and explain MCpl O'Bready's words to them. Capt da Silva replied that he acknowledged that MCpl O'Bready was not [translation] "comfortable" during his interview of Maj X.⁸⁵⁰ Capt da Silva also acknowledged that, in his view, some members of the CFNIS might have difficulty with respect to the difference in military ranks. However, he did not believe that

⁸⁴⁸ *Ibid* at 61-63.

⁸⁴⁹ See part 7.8.1 of this report.

⁸⁵⁰ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 111-113.

the difference in rank was what made MCpl O’Bready uncomfortable, but rather that it was [translation] “the situation we were in,” in other words, the fact that they were nearly all from Quebec, that they had trained together, and that they worked alongside one another at KAF.⁸⁵¹

618. The other investigators were also asked about the possible effect that the difference in rank between an investigator and an officer or senior non-commissioned officer might have. Sgt Parent replied that it was possible that some investigators might feel intimidated. In his view, it depended on the [translation] “investigator’s personality” and the [translation] “personality” of the person being interviewed.⁸⁵² Sgt Parent took notes during Maj X’s interview on February 3, 2011. He described Maj X [translation] “as being very cooperative during the interview, almost friendly,” [translation] “despite his arrogance.” He stated that MWO Y did not behave very well during his interview.⁸⁵³

619. MCpl O’Bready was questioned on October 23 and 24, 2018. Commission investigators asked him at the very beginning of the interview on October 23 to tell them what he remembered about the incident. MCpl O’Bready said that his first reaction when he was informed of the file was that it was “un dossier coupe-gorge” [translation] “a cut-throat file.”⁸⁵⁴ He explained his reaction as follows:

[translation]

“These allegations, if founded, are serious. And investigating someone who had been my boss when I was a patroller, who I know that, in three or four years, might be my boss again, as there aren’t that many of us, and we just move around like this internally. I said to myself that it was a sensitive ... what I’m trying to explain, I said to myself, okay, if we’re doing it, we’re going all the way.”⁸⁵⁵

620. On October 24, 2018, he explained his initial reaction to the file again:

[translation]

“If means that ... in my head, it wasn’t normal that I was investigating my bosses ... well, ‘my bosses’ ... they weren’t my bosses directly in the chain of command, but they were people for whom I’d worked in the past. I was well aware that they were people whom I’d end up working for again one day. We were close. I did it completely impartially. I was ... but it can give the impression, for instance, that we’re

⁸⁵¹ *Ibid* at 114–115.

⁸⁵² Transcript of the Commission’s interview with WO Parent, 9 October 2018 at 79.

⁸⁵³ *Ibid* at 78. Also see note 871.

⁸⁵⁴ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 27, 386.

⁸⁵⁵ *Ibid* at 27.

investigating each other, and that...that doesn't send the right message, in any case. Because what it looked like was that the military police investigated its own members, and there were no charges in the end. That's the end result that we see now. And when I, when I took..."⁸⁵⁶

621. On October 23, 2018, he also mentioned his interview with the CFNIS investigators who were reviewing the investigation in 2015-2016. He had this to say concerning his ability to lay charges:

[translation]

"...After that, the NIS called me to conduct the review of the investigation. They asked me the same question five times, I believe. I gave the same answer five times. Why didn't you lay charges? Why didn't you lay charges? The prosecutor didn't want to follow up. And some part of myself was saying, as the master corporal, to go kick up...that was...it was more than quirky [ph], it...and then those guys are going to be my bosses the next day. It's...they say that the NIS is independent, but that's not true. It's not true. Because you can join the NIS, but you can also leave the NIS. It's not as though it's an organization where, once you join, it's your occupation [inaudible] and it's all that you do, and you're never going to be a military police member again. Because every four years, we're posted somewhere. I could have ended up working for Major [X] or the master warrant officer, Lieutenant Bussette. It's all the same crew. You have to be careful with what you do as well."⁸⁵⁷

"...It's not...let's be straight here. So, the threat of payback is always there. It's always there. You have to be careful. We have the power but, shit, using it can cost you your career. It can cost you your career advancement. It can cost you all sorts of things. So, yes, by the book. I can go with the prosecutor, but who has the guts to do it? I've never heard of anyone doing it. And that is when I realized, in that moment, that it wasn't independent. If I had been independent, and my...if I knew that I would be at the NIS for another 10 or 15 years of my career, and that the crew that I was working with was always going to be the same, I would have had no problem to going above it, because there wouldn't have been any repercussions after that. There wouldn't have been any threat of payback..."⁸⁵⁸

622. On October 24, 2018, the investigator asked him whether he believed that there had been a real or perceived conflict of interest in this investigation. MCpl O'Bready believed that there was a perceived conflict of interest.⁸⁵⁹ He was then asked whether those notions were well-established within the military police, and this was his reply:

[translation]

"Well, what they'd tell us was that the NIS is an independent organization that is free from interference, free from...yes, on paper. But in real life, if tomorrow I'm posted somewhere...I'm no longer doing investigations. If I'm promoted and go as a warrant officer to a new posting, I might work with major so-and-so whom I've investigated in the past. I've investigated military police members. I've investigated lieutenants. I've investigated master corporals. But, tomorrow, if I leave the NIS, I'm back working with

⁸⁵⁶ *Ibid* at 386.

⁸⁵⁷ *Ibid* at 32-33.

⁸⁵⁸ *Ibid* at 33-34.

⁸⁵⁹ *Ibid* at 386, 390.

them. I'm going back to...it doesn't work. It's not something that...we're independent on paper, but in real life, we're not."⁸⁶⁰

623. Sgt Mantha also said that, despite the fact that the CFNIS was created to ensure the independence of the military chain of command, the service had lost its transparency over the years:

“But yeah, all in all, through the years the NIS has kind of fallen back into the rank structure and I think that goes with forgetting the focus. I'm getting into opinions here and stuff, but that's losing the focus. From all my time in the NIS, the NIS has lost its independence and it's lost its transparency, and that's one of the reasons I had a hard time at the end. But that's neither here nor there.”⁸⁶¹

624. MCpl O'Bready's behaviour towards the subjects of the investigation offers more clues for evaluating an important component of this issue. MCpl O'Bready did not appear to be comfortable interviewing Maj X. During the interview with Maj X on February 3, 2011, after the customary formal introductions, he immediately made this comment:

[translation]

“The situation that we currently find ourselves in is obviously a bit odd. These aren't files that are fun to investigate either, but I'm sure you understand that we have the mandate to investigate them and that we are required to do so. We have to remain professional in the work that we do. It's not a personal choice or...MAJ X: No, that's it.”

625. During Maj X's cautioned interview on February 25, 2011, MCpl O'Bready broached the question of Cpl Dauphinais, who entered the break room to alert the guards to the riot exercise in the DTF. Maj X had initially said to MCpl O'Bready that he had instructed Sgt Degrasse not to change the DTF routine, to which MCpl O'Bready replied:

[translation]

“MCPL O'BREADY: Excellent. The investigation showed that Sergeant Degrasse was informed of those instructions by you, afterwards, after the telephone call with Young Jones. That's clear.”

626. However, nothing in the file leads one to believe that Sgt Degrasse had indeed received that instruction. And then MCpl O'Bready went on to tell Maj X that his last answer to a question was not consistent with a previous answer, which put Maj X on the defensive somewhat:

⁸⁶⁰ *Ibid* at 387.

⁸⁶¹ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 18.

[translation]

“But from there to say that ...you know, I want to be very clear with you, James, that I, from my side, there was no intent whatsoever to enter the cells.

MCPL O'BREADY: I agree with you. It's...

MAJ X: Okay.

MCPL O'BREADY: The investigation also established that, in the small amount of planning that took place, it was never a concern; entering the cells was never considered. And it's not something that I discovered in the investigation either. And we are speaking the same language in that respect. And I have no reason not to believe you on that point. And we can..."

627. MCpl O'Bready nevertheless continued his line of questioning about letting the troops go towards the catwalk, and Maj X said that there should have been better planning and that he took the blame for that deficiency. MCpl O'Bready replied as follows:

[translation]

“But I appreciate, for instance, again, I understand your situation. I see that you...as a soldier, as a leader, that you are taking responsibility for the actions that were taken, and the lack of preparation, planning and supervision. I hugely appreciate that, Major. It's very much appreciated. And the objective, at the end of all this, as you said earlier, and as I told you this morning—the objective is to find out what happened. And it is in talking like this that we can arrive at a better understanding.”

628. However, MCpl O'Bready did not really obtain an answer to his questions on that topic, and he did not continue his line of questioning on a point that was critical to the investigation. In addition, near the end of the interview, MCpl O'Bready went on to say the following to Maj X about the interview that they had just finished:

[translation]

“Thank you for your cooperation. You have been super transparent with me today. You answered my questions. You were really cooperative.”

629. Maj X then asked some questions about the investigation, including whether other subjects had been identified, a question that MCpl O'Bready answered before being vaguer in his replies to Maj X. All in all, MCpl O'Bready did a good job handling the matter, but it should be noted that Maj X did not hesitate to ask questions about the investigation even though he was its subject.

630. During MWO Y's interview, MCpl O'Bready seemed much more relaxed, even though MWO Y was somewhat arrogant and disrespectful towards the investigator at times.⁸⁶² It should be noted that MCpl O'Bready did not emphasize certain contentious issues during the interview.

631. MCpl O'Bready had a lot to say about the nature of the investigation and how it was conducted. It was [translation] "a cut-throat file," but he stated that he could conduct an impartial investigation. He said that his relationship with the subjects was too close, that he had worked with MWO Y in the past, and that he could very likely end up working for one of the subjects of the investigation in the future and that [translation] "you have to be careful with what you do as well," but he also maintained that he could conduct an impartial investigation.

7.12.4 Conflicts Inherent to the Investigation

632. This investigation was problematic on two levels: because of its specific context and the conflicts of interest. The evidence clearly shows that the main stakeholders were convinced that this investigation should not have been conducted by CFNIS JTF-Afg. Ties had been established between the members of CFNIS JTF-Afg and the members of the JTF-Afg MP Coy during their pre-deployment training, and they practically worked together. Capt da Silva seems to have emphasized that fact during his conversations with Maj Bolduc.

633. There was also a personal conflict between Capt da Silva and Maj X. For that reason, Capt da Silva did not invest himself in the investigation as he should have. The CFNIS had a specific SOP on conflict of interest.⁸⁶³ That SOP stated that a conflict of interest arose when a member of the MP "has a personal, professional or financial reason to provide other than an objective view as it pertains to a situation he or she is responsible to investigate."⁸⁶⁴ A military police member should not participate in or supervise an investigation if he/she has, whether directly or indirectly, a personal interest as it pertains to the complainant, the victim or the presumed offender, or if he/she has a personal interest in the outcome of the investigation.⁸⁶⁵ A

⁸⁶² This attitude was present throughout his interview. The way that he presents a document to MCpl O'Bready only to immediately take it back before MCpl O'Bready can take it from him shows his clear lack of respect for MCpl O'Bready.

⁸⁶³ Document 220 M, SOP 239 of CFNIS – Conflict of interest (September 2010).

⁸⁶⁴ *Ibid* at para 2.

⁸⁶⁵ *Ibid* at para 4.

member of the MP who believes himself/herself to be in conflict of interest must notify his/her supervisor.⁸⁶⁶ The supervisor must then take the appropriate measures, including the ones set out in para 6 of that SOP.

634. As with any police force in which a member of the service is conducting an investigation of other members of that same police force, there was a potential conflict of interest between MCpl O'Bready and the subjects of the investigation. MCpl O'Bready was clearly uncomfortable investigating the subjects of the investigation. He had already worked under MWO Y, and he could foresee potentially having to work under Maj X in the future. He also seemed to have been influenced by the difference in rank between himself and those two individuals.

635. Maj Bolduc was well aware of the personal conflict between Maj X and Capt da Silva, but he did nothing. He did not put in the time and effort required to properly examine that issue. Had he done so, he would surely have arrived at the conclusion that it was necessary to send an independent investigator or team of investigators to KAF. Capt da Silva did not try to examine the conflicts of interest associated with assigning MCpl O'Bready to the file.

636. Their approaches to this very sensitive situation are surprising. They show that there is a need for a training program within the CFNIS on identifying conflicts of interest and on the policies of the CAF, the CF MP Gp and the CFNIS on conflicts of interest.

637. The subjects of the investigation were a Major and a Master Warrant Officer from the MP. An MP Master Corporal with only four years of experience as an investigator was responsible for this investigation. It was not surprising that MCpl O'Bready was very uncomfortable in his role. He was given a task and, like a good soldier, he tried to carry it out. Despite what MCpl O'Bready said, his behaviour during the interviews and his testimony show that he felt he was under enormous pressure and that he was not independent. MCpl O'Bready was not the ideal choice to carry out this task, but he was the only person available on the ground on January 29, 2011 who could conduct the investigation from start to finish.

⁸⁶⁶ *Ibid* at para 5.

638. Capt da Silva had the responsibility of ensuring that the investigator could carry out the task. After deciding to assign MCpl O'Bready to this investigation, Capt da Silva should have ensured that MCpl O'Bready was adequately supported and supervised. This investigation would therefore have benefitted from being managed according to the Major Case Management model. If he could not find the right person within his detachment, he should have then obtained external support.

Recommendation #8:

The Commission recommends that the CFPM develop a training program on identifying conflicts of interest and on CAF and CF MP Gp policies on conflicts of interest. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “CAF References dealing with conflicts of interest are included in the DAOD 7021-1. The CF MP Order on Military Police Investigation Policy addresses conflict of interest from the investigative perspective. The Military Police Policies and Technical Procedures also address conflict of interest from a police perspective. The resources available do not allow for the creation of a training program.”**

639. The Commission is not satisfied with this response to its recommendation. In rejecting this recommendation, the CFPM is referring to CF MP orders, directives and policies while the recommendation is directed at training. The Commission would like to note that the CFPM's response of "available resources do not permit the creation of a training program" is not an acceptable justification for rejecting this recommendation given the testimony of the CFNIS JTF-Afg investigators and the deficiencies identified in the Interim Report with respect to conflict of interest.

640. The Commission believes that the development of a training program on identifying conflicts of interest as recommended is fundamental to effectively managing these issues upon identification and preventing them from arising during the course of MP investigations. Accordingly, the Commission requests that the CFPM reconsider its response to this recommendation and consider requesting the Commandant of the CF MP School to incorporate this element into MP training.

641. Many Canadian police forces ask other police forces to conduct an investigation when the subject of the investigation is one of their members. Those policies exist to prevent any real or perceived conflict of interest. When developing such a policy, a number of factors must be considered, such as the rank and position of the suspect, and the offence and its context. The rank of the investigator must also be taken into consideration. Such an approach demonstrates to the public that the police force wants to ensure that all of its investigations are impartial and transparent, and will be perceived as such.

642. Maj Bolduc's testimony shows that there was no directive or institutional culture concerning investigations of other military police members. There was no identified team of investigators that could have been assigned to a sensitive investigation such as this one. An independent investigator with the required rank, experience and qualifications could have gone to KAF and conducted this investigation with the support of the CFNIS JTF-Afg members. Such an investigator or team of investigators should be available to travel anywhere in Canada or the world to independently conduct investigations when the CFNIS detachment that is normally responsible cannot conduct an investigation because of conflicts of interest or for another legitimate reason.

Recommendation #9:

The Commission recommends that the CFPM develop and distribute a policy that takes into account situations requiring the deployment of an independent investigator or team of investigators to provide support during investigations when there is a conflict of interest or as otherwise needed. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “*There are many circumstances that may lead to a review of a file reassignment and the CF MP Gp has several options to meet the investigative requirements in the event of an identified conflict of interest. The CFNIS or any MP from another unit or geographic location may be tasked to intervene and investigate in support of an identified need. Reassignment of an MP investigation is left to the discretion of the CFPM.*”**

643. The Commission is not satisfied with this response to its recommendation. In rejecting this recommendation, the CFPM asserts that the CF PM Gp has several options for addressing the investigation requirements in the event of an identified conflict of interest. In addition, the CFPM states that the CFNIS or any PM from another unit or geographic location may be tasked

to respond and investigate in support of an identified need. Both of these statements are incomplete and do not address the Commission's concerns identified in the Interim Report. The Commission recommended that the Military Police develop a policy that would clearly identify situations that would require the deployment of new independent investigator(s) to support conflict of interest investigations or as required. **This recommendation is made as there exists no capacity to identify an investigator or a team of investigators that could be assigned at short notice to a sensitive investigation such as the one conducted by CFNIS JTF-Afg investigators in 2011.**

644. Furthermore, the statement rejecting this recommendation, “reassignment of an MP investigation is left to the discretion of the CFPM” only confirms the need for such a policy. In investigative situations where there is a potential conflict of interest, it is even more important to have a commonly known policy that contains the parameters or guidelines that will guide the person making the request and the person authorized to make a decision regarding the reassignment of an investigation. This discretion must be based on objective standards.

645. Furthermore, in some cases, given the rank or position of the subject of the investigation or the nature of the incident, it would be preferable that an investigation be conducted by another police force. This type of investigation would ensure a level of independence and impartiality that would greatly increase CAF members’ and Canadians’ confidence in the results of such an investigation and in the resulting decisions.

Recommendation #10:

The Commission recommends that the CFPM develop a policy regarding investigations in which Military Police members are the subjects. This policy would clearly state which investigations would be referred to another police service. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “*The CF PM Gp has a policy outlining that the CFNIS has the jurisdiction to investigate other MP. The CFPM has the discretion to request the assistance of another police service or agency with an investigation, if required.*”**

646. The Commission is not satisfied with this response to its recommendation. In rejecting this recommendation, the CFPM noted that it “has the discretion to request assistance from

another police service or agency regarding an investigation, if required.” As mentioned earlier, it is important to have a commonly known policy that contains the parameters or guidelines that will guide the person making the request and the person authorized to make a discretionary decision. This discretion must be based on objective standards. This would only increase confidence in the decision and the organization making that decision. The Commission’s goal is to foster continuous improvement in military policing by adopting clear and specific policies.

VIII FINDING REGARDING ALLEGATION #1

8.1 Analysis of Deficiencies in relation to the Allegation

647. This investigation included a significant number of deficiencies. These deficiencies or errors show a lack of rigour by the investigators and, on some occasions, lack of competence or experience. These can be divided into two categories: minor and major deficiencies. The following deficiencies are considered to be the most serious: the selection and lack of supervision of the lead investigator and the lack of adequate support for the lead investigator. The other deficiencies, i.e., the lack of investigation planning, selection of witnesses, interview planning and conflicts of interest, are deficiencies with respect to best practices in the field of police investigations.

648. None of the deficiencies or errors had an impact on the final result of the investigation and the conclusion that there was sufficient evidence to lay charges, as recommended by the investigators, but they show that the investigators did not always use best practices during this investigation.

649. The Commission noted these omissions because its mandate is also to promote excellence in the Military Police. The Commission can therefore note omissions and recommend improvements in relation to an allegation, while also finding that an allegation is unsubstantiated.

650. Capt da Silva was ultimately responsible for this investigation. He was right to ask that other investigators be responsible for this file. While he stated that he had asked Maj Bolduc to send a team of investigators from Canada, he did not vigorously try to convince him. Capt da Silva should have persevered in trying to convince him and submitted his request in writing. At the very least, he should have supported and supervised his investigators.

651. It is evident that assigning MCpl O'Bready to this file was not his first choice. However, given the deployment leave of other detachment members and the lack of external investigators, his only option was to assign this investigation to MCpl O'Bready. Having assigned MCpl O'Bready to this investigation, Capt da Silva was expected to provide MCpl O'Bready with the necessary support, supervision and assistance throughout this sensitive and demanding task.

652. This investigation and MCpl O'Bready would have greatly benefited from assistance and close supervision throughout the investigation. Sgt Parent, although he was absent for a good portion of the investigation, did not support or supervise him adequately when he was present at KAF. Sgt Mantha and MCpl Carrier provided only occasional support when asked. Sgt Mantha offered him only minimal administrative support; he did not give him advice or suggestions that could have helped MCpl O'Bready through the various stages of this investigation.

653. It is likely that MCpl O'Bready was not in the right physical and mental state to conduct such a demanding and sensitive investigation. His brother had died unexpectedly, and he had to get back to Canada quickly for the funeral. He arrived at KAF during the night of January 29 to 30; during this return trip he had cross nine time zones and it took at least 18 hours. This is a major time difference, and the trip would have physically affected MCpl O'Bready. Yet, he undertook this difficult, sensitive and complicated work without complaint, in the hours following his arrival at KAF. Although he received very limited assistance, he conducted the investigation diligently in the circumstances. Less than 12 hours after he arrived at KAF, he was informed of the file and had to complete an assessment, make initial plans and start interviews. The speed with which he developed his investigation plan and the interviews certainly reflected the magnitude of the task and the lack of assistance. The deficiencies that were identified in these areas are more attributable to the fact that he did not receive the assistance and support warranted and required for this type of investigation, and which MCpl O'Bready should have received and were owed to him.

654. It is evident that MCpl O'Bready was not at all comfortable conducting this investigation. His behaviour and his questions during interviews with Maj X and MWO Y clearly reflect this state of mind. The potential consequences for his career appear to have been like a sword of

Damocles that loomed large throughout the investigation. This perception of negative consequences when the subjects of an investigation are senior MP members is totally inconsistent with the idea that the CFNIS is an independent investigative unit.

655. The interviews, having been planned in a hurry, were too short and did not cover all the questions required to gather all the possible information from every witness. The other investigators did not take part in planning the interviews and rarely suggested questions during them. However, the interviews did provide sufficient evidence of the offences being investigated such that charges could have been laid.

656. Although the investigator has full discretion in choosing witnesses, the Commission is of the opinion that MCpl O'Bready should have interviewed more people. That being said, these additional witnesses, with the exception of LCol Strickland, when questioned by the Commission, did not actually provide any evidence that was useful for the CFNIS JTF-Afg investigation.

657. LCol Strickland could have provided information about the delay between the exercise and his meeting with Capt da Silva to make an official complaint. The impact of this delay on the investigation is administrative. Had the complaint been made immediately after the exercise, Sgt Parent, as the most experienced investigator, could have been assigned and the investigation would have been well under way before he went on mission leave. LCol Strickland could have described his meetings with Maj X to support or rebut Maj X's statements regarding these meetings. However, this omission had no real impact on the investigation.

658. The lack of documentary evidence, be it logs, SOP 500 or site photos and plans, is evident. Being able to clearly identify the location of the suspects and the people present at the time of the incident is a major source of evidence and information necessary in assessing the file and offences. This evidence would have greatly assisted the narrative of this file. This is a fundamental aspect of any investigation of this type, but none of the investigators considered it to be necessary.

8.2 Commission's Findings regarding the Allegation

659. The majority of the omissions identified by the Commission represent failures to observe CFPM directives or police best practices. The Commission finds that, despite these shortcomings, this investigation collected sufficient evidence to support the proposed charges, which could have been laid. The evidence on file supports a reasonable belief that Maj X and MWO Y had committed these offences.

660. It is important to note that the standard of care required of police officers as part of any Commission review is not perfection. The Commission bases its work on the relevant case law, and more particularly on *Hill v Hamilton-Wentworth Regional Police Services Board*,⁸⁶⁷ to determine the standard of care required of the subjects of the review.

661. The principles in *Hill* are used to assess the conduct of the subjects of a conduct complaint. Therefore, it is expected that a peace officer will act as a reasonable investigator in the circumstances. The relevant circumstances may include urgency and insufficient information. Peace officers are entitled to exercise their investigative discretion as they see fit, provided they stay within the bounds of reasonableness and that their intentions are honest, non-arbitrary and not motivated by favouritism or any other dishonest motivation. The expected standard of care is not perfection, or even the optimum, judged from the vantage of hindsight. Any professional may make minor errors or errors in judgment that cause unfortunate outcomes, but which are not “unreasonable mistakes” that breach the expected standard.⁸⁶⁸

662. It must always be remembered that any review is done with the benefit of hindsight and that one or more omissions does not necessarily represent misconduct.

663. After reviewing the investigation as a whole, taking into consideration all of the circumstances and applying the standard of care as defined in *Hill*, the Commission is satisfied that the investigators conducted their investigation in a reasonable manner. The errors and omissions identified are not “unreasonable mistakes” that breach the expected standard of care.

⁸⁶⁷ *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*].

⁸⁶⁸ Final report of the Commission concerning a complaint by Amnesty International Canada and the British Columbia Civil Liberties Association submitted in June 2008 (MPCC 2008 042) at 361.

Finding #1:

The Commission finds that Allegation #1, that the CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010-2011, is UNSUBSTANTIATED. (Accepted by the CFPM)

Allegation #2: The CFNIS made an inappropriate decision in deciding not to lay charges following its investigation.

IX THE DECISION NOT TO LAY CHARGES

9.1 Introduction

664. A service offence means an offence under the *NDA*, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the *Code of Service Discipline*.⁸⁶⁹ A charge against a person subject to the *Code of Service Discipline* for committing a service offence is laid against that person when it is reduced to writing in Part 1 of the RDPs and that Part is signed by a person authorized to lay charges.⁸⁷⁰

665. The following persons may lay charges under the *Code of Service Discipline*: a commanding officer; an officer or non-commissioned member authorized by a commanding officer to lay charges; and a member of the military police assigned to investigative duties with the CFNIS.⁸⁷¹

9.2 Initial Finding of the CFNIS JTF-Afg

666. On March 7, 2011, Capt da Silva sent a “*précis des faits*” (Crown brief) and two RDPs to the RMP in Ottawa. Capt da Silva considered the evidence sufficient to enable the RMP to issue an opinion supporting a decision to lay charges. He stated that the RMP could have requested further inquiry or asked them for more information if he believed this was necessary.⁸⁷² Capt da Silva confirmed that he did not receive a request for further inquiry from the RMP following the submission of the “*précis des faits*” (Crown brief).⁸⁷³

⁸⁶⁹ *NDA*, s 2(1).

⁸⁷⁰ QR&O at para 107.015.

⁸⁷¹ QR&O at para 107.02.

⁸⁷² Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 227-228.

⁸⁷³ *Ibid* at 231.

667. The RDPs of Maj X and of MWO Y each contained two proposed charges, namely, one charge against each individual under section 124 of the *NDA* and one charge against each individual under section 129 of the *NDA*.⁸⁷⁴

668. The following proposed charges were prepared against Maj X:⁸⁷⁵

[translation]

Section 124: “In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, as Coy OC, did not ensure that he adequately planned a personnel recall exercise, as he had the duty to do.”

Section 129: “In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by directly observing them in order to intervene in the event that things got out of control.”

669. The following proposed charges were prepared against MWO Y:⁸⁷⁶

[translation]

Section 124: “In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, when he was performing duties as the controller of a personnel recall exercise, failed to apply the instructions of the Coy OC and let the guards enter a detainee’s cell.”

Section 129: “In that he, on or about Jan 19, 11, at the Detainee Transfer Facility (DTF) at KAF, Afghanistan, during a personnel recall exercise, did not supervise the DTF guards by directly observing them in order to intervene in the event that things got out of control.”

9.3 Requirement to Obtain Advice from Legal Officer and the “*précis des faits*” (Crown Brief)

670. The four situations in which a person having authority to lay charges must obtain advice from a legal officer before laying a charge are set out in paragraph 1 of section 107.03 of the QR&O. One of these cases is when the offence is alleged to have been committed “by an officer or a non-commissioned member above the rank of sergeant.”⁸⁷⁷ Paragraph 2 of this section states that the officer or non-commissioned member “shall 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.” Therefore, Capt da Silva was required to

⁸⁷⁴ Document 020 at 453-454.

⁸⁷⁵ *Ibid* at 453.

⁸⁷⁶ *Ibid* at 454.

⁸⁷⁷ QR&O at para 107.03(1)(b).

obtain advice from a legal officer before laying any charges in this case, as the subjects of his investigation were a Major and a Master Warrant Officer.

671. Capt da Silva stated that he discussed the case with the RMP several times over the course of the investigation. However, Capt da Silva could not specify the number of times or the dates of these reported telephone conversations.⁸⁷⁸ Capt da Silva did not take notes or make entries in SAMPIS about these calls.⁸⁷⁹ As previously indicated in part 7.6 of this report, the CF MP Orders state that military police members must take complete and accurate notes of every important step in an investigation. A conversation with a legal officer is an important step in an investigation.

672. The former CFPM, Col Grubb, was interviewed by an investigator from the CFNIS CR Detachment on February 28, 2011. Maj Wight, who had preceded Maj X as MP JTF-Afg Coy OC, was interviewed by an investigator from the CFNIS Centre Detachment on February 28, 2011. Sgt Larson, an expert on detainees assigned to the CFSPDB, was interviewed by an investigator from the CFNIS WR Detachment on March 3, 2011.⁸⁸⁰ The summary of these interviews can be found in the “*précis des faits*” (Crown brief) that was sent to the RMP in Ottawa on March 7, 2011.⁸⁸¹

673. Capt da Silva, Sgt Mantha and MCpl O’Bready stated that, in Canada, audio and video recordings of interviews typically accompanied the “*précis des faits*” (Crown brief). However, MCpl O’Bready also stated that the audio and video recordings were not sent to the RMP in Ottawa in GO 2011-2411. These videos remained within the Detachment and were not sent to Canada until the end of the rotation. Capt da Silva and MCpl O’Bready confirmed that the RMP had not asked them to send the videos.⁸⁸²

⁸⁷⁸ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 154, 185, 186.

⁸⁷⁹ *Ibid* at 298-299.

⁸⁸⁰ *Ibid* at 50-51, 144, 229, 297.

⁸⁸¹ Document 020 at 446-448, 442-445, 449-451.

⁸⁸² Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 66-67; transcript of the Commission’s interview with Sgt (Retired) Mantha, 18 October 2018 at 209-210, 219-220; and transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 136-137.

674. Maj Bolduc stated that he had not looked at the audio and video recordings of the interviews in this case because they were in Afghanistan and SAMPIS would not allow him to download them. He could not recall, but did not believe that the RMP had asked him for access to the audio and video recordings of the interviews. However, Maj Bolduc said that the RMP could have contacted the investigators directly to get the recordings.⁸⁸³

675. The RMP was in Ottawa. Capt da Silva sent him the “*précis des faits*” (Crown brief), but did not send the audio and video recordings. The Commission did not interview the RMP and did not review his legal opinion because it is protected by solicitor-client privilege. According to the evidence gathered in the course of the Commission’s investigation, the RMP relied solely on the “*précis des faits*” (Crown brief) to write his legal opinion. Consequently, there is no evidence on file indicating that the lack of audio and video recordings in the package sent to the RMP had any effect on the drafting of this legal opinion.

676. An RMP must provide pre-charge legal advice in writing to the CFNIS investigator. The RMP must clearly communicate and explain his legal advice.⁸⁸⁴ After consultation, the investigator and prosecutor typically come to an agreement on whether or not to lay charges. However, in cases of continued disagreement, the prosecutor may discuss the file with the officer commanding the CFNIS detachment concerned. In cases where the disagreement persists even further, the matter must be discussed by the CO CFNIS with the Regional Deputy Director of Military Prosecutions. This directive clearly states that the final decision to lay or not lay charges belongs to the person authorized to lay a charge, not to the DMP.⁸⁸⁵ Maj Leblanc stated in his report that the pre-charge advice was received on April 8, 2011.⁸⁸⁶

677. MCpl O’Bready stated that it was very difficult to communicate with the RMP throughout the investigation.⁸⁸⁷ Capt da Silva also stated that he was disappointed with the level

⁸⁸³ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 61-63.

⁸⁸⁴ DMP Policy Directive #002/99, Pre-Charge Screening, issued 1 March 2000, updated 1 September 2018; (002/99) at para. 15, online: <<https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html>>

⁸⁸⁵ *Ibid* at para 17.

⁸⁸⁶ Document 065 at 21.

⁸⁸⁷ Transcript of the Commission’s interview with Sgt (Retired) O’Bready, 23 October 2018 at 28, 30, 367.

of support from the RMP.⁸⁸⁸ Around March 10, 2011, Maj Casswell was temporarily deployed to Afghanistan to replace Capt da Silva as the officer in charge of the CFNIS while Capt da Silva was on mission leave.⁸⁸⁹ Maj Casswell stated that he was quite surprised that the RMP did not want to send them his pre-charge legal advice in writing.⁸⁹⁰ This was a first for him, having a prosecutor refuse to provide written advice.⁸⁹¹ Maj Bolduc had understood that the RMP did not want to put his legal advice in writing. Maj Bolduc believed he asked the RMP's superiors for the RMP's legal advice to be written and sent to the CFNIS as soon as possible. This advice was produced on April 6, 2011 and received on April 8, 2011.⁸⁹²

Recommendation #11:

The Commission recommends that the CFPM develop a directive that its investigators maintain close and well-documented communications with the regional military prosecutors, thereby ensuring that the investigation is well-planned, supported and executed. (Accepted by the CFPM)

- **In accepting this recommendation, the CFPM noted that: [translation] “*There is already a CF MP Order that addresses the requirement for the MP to seek legal advice through regional military prosecutors, provincial crowns or the MP Legal Advisor, depending on the requirements dictated by the investigating entity and jurisdictional requirements.*”**

9.4 Involvement of CFNIS Headquarters

678. Maj Bolduc stated that the decision to lay charges in a file where the subject is a military police member belongs to the CO of the CFNIS. He did not recall whether it was an SOP or a directive from the CO of the CFNIS.⁸⁹³ Maj Bolduc was the DCO of the CFNIS at that time. LCol Santerre had commanded the CFNIS from January to March 2011, and LCol Delaney was the CO of the CFNIS beginning in April 2011.⁸⁹⁴ Maj Bolduc's testimony is not specific about

⁸⁸⁸ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 185.

⁸⁸⁹ Transcript of the Commission's interview with Maj Casswell, 18 January 2018 at 5.

⁸⁹⁰ *Ibid* at 43.

⁸⁹¹ *Ibid* at 65-66.

⁸⁹² Transcript of the Commission's interview with LCol (Retired) Bolduc, 6 December 2018 at 142-144, 158.

⁸⁹³ *Ibid* at 34, 126, 166.

⁸⁹⁴ *Ibid* at 17, 30, 168, 169.

the exact nature of his decision-making authority in this file. Maj Bolduc made all decisions in Francophone files.⁸⁹⁵

9.5 Final Decision of the CFNIS in the Case

9.5.1 Legal Advice

679. A document entitled [translation] “Pre-charge screening; do not disclose” is found on pages 458 and 459 of GO 2011-2411. Although it is fully redacted, one can read [translation] “Protected B - lawyer’s work product privilege” above and below the redacted block.

680. A number of documents provided to the Commission by the CFPM are redacted. Typically, this redaction is based on a claim of solicitor-client privilege. The Commission reviews the work of military police members, not that of the lawyers who advise them. In many cases, these military police members make decisions based on legal advice. Having access to this information is essential to clearly understanding the reasoning of the military police members. Not having this information makes it difficult to conduct a fair and complete review of a complaint.

681. As stated in several of the Commission’s annual reports, there are circumstances where this information could help the Commission resolve complaints more fairly and more transparently. The Commission notes that Parliament appears to have come to this conclusion with respect to the RCMP Civilian Review and Complaints Commission in 2013 when it amended the *Royal Canadian Mounted Police Act* to enable the RCMP Civilian Review and Complaints Commission to gain access to protected information. Any information protected by solicitor-client privilege is included in the definition of protected information under this Act.⁸⁹⁶ Thus, the Commission could more effectively obtain information relevant to its mandate under the law and ensure independent supervision of military police operations, while maintaining strict control over any protected information as defined by the enabling act.

⁸⁹⁵ *Ibid* at 27.

⁸⁹⁶ *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, ss 45.39-45.48.

Recommendation #12:

The Commission recommends that the Department of National Defence take steps to have the *National Defence Act* amended to include provisions regarding information similar to those found in Part VI (Civilian Review and Complaints Commission for the Royal Canadian Mounted Police) of the *Royal Canadian Mounted Police Act*.

682. In its Notice of Action, the CFPM deferred responding to this recommendation to the Minister of National Defence. It should be noted that at the time of the issuance of the Final Report, the Commission had not received a response from the Minister of National Defence with respect to this recommendation. Once the Minister's response is received, the Commission will review and publish it verbatim in its Final Report, along with the Commission's comments.

683. When Capt da Silva received the RMP's legal advice, he called the RMP in Ottawa. The conversation was short because Capt da Silva was angry. He admitted that he did not ask for much explanation because he was really beside himself and wanted to end the conversation as quickly as possible.⁸⁹⁷

684. Capt da Silva then called Maj Bolduc. Maj Bolduc had also received the legal advice and informed Capt da Silva that he had decided not to lay charges. A heated conversation ensued during which Capt da Silva expressed his opinion about the legal advice and his disagreement with Maj Bolduc's decision. Maj Bolduc ordered Capt da Silva to close the file.⁸⁹⁸

9.5.2 Maj Bolduc's Decision and Reasons

9.5.2.1 Was the Detainee Abused?

685. Maj Bolduc placed considerable importance on the fact that the detainee had not been abused during the exercise. Being satisfied that no one had abused the detainee was his [translation] "primary concern."⁸⁹⁹ During his interview with Commission investigators, Maj Bolduc mentioned this concern at least six times.⁹⁰⁰ He also said that the detainee did not appear

⁸⁹⁷ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 192, 231-233, 274.

⁸⁹⁸ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 233, 249, 274-275; transcript of the Commission's interview with LCol (Retired) Bolduc, 6 December 2018 at 34, 101, 155, 199-200.

⁸⁹⁹ Transcript of the Commission's interview with LCol (Retired) Bolduc, 6 December 2018 at 151.

⁹⁰⁰ *Ibid* at 23, 39, 42, 45, 139, 151, 194.

to have been afraid during his interaction with the guards. Maj Bolduc therefore focused on the issue he considered serious because, for him, abusing a detainee was an [translation] “extremely serious offence.”⁹⁰¹

9.5.2.2 A Sensitive Situation

686. Maj Bolduc focused on the detainee because any file involving a detainee was a [translation] “very, very sensitive” subject.⁹⁰² Any file involving a detainee was [translation] “examined in minute detail” by many people. He referred to investigations into the treatment of detainees,⁹⁰³ and complaints from Amnesty International⁹⁰⁴ and Professor Attaran.⁹⁰⁵ He had been tasked with preparing a table of all investigations involving a detainee, as well as preparing a summary to ultimately inform the CF Strategic Joint Staff.⁹⁰⁶ This investigation was part of that task. The case of Capt Semrau⁹⁰⁷ as well as the investigation into the actions of JTF-2⁹⁰⁸ also weighed on his mind.⁹⁰⁹ In short, for Maj Bolduc, any issue surrounding the abuse of a detainee by Canadian soldiers was [translation] “hyper-sensitive for all the Canadian Armed Forces.”⁹¹⁰ Capt da Silva also gave considerable attention to the fact that the subjects of this investigation were the JTF-Afg MP Coy OC and MWO. He believed that the possibility of charging these two individuals and their potential repatriation could have serious repercussions. Moreover, Capt da Silva had received instructions concerning detainees prior to his deployment. He had

⁹⁰¹ *Ibid* at 45

⁹⁰² *Ibid* at 51.

⁹⁰³ *Ibid* at 50.

⁹⁰⁴ The MPCC held public interest hearings following complaints from Amnesty International Canada and the British Columbia Civil Liberties Association (AIC-BCCLA). The final report MPCC 2008-042 is available on the Commission’s site.

⁹⁰⁵ The MPCC investigated a complaint made by Dr. Attaran. The final report MPCC 2007-003 is available on the Commission’s site.

⁹⁰⁶ The Strategic Joint Staff provides military analyses and advice to the CDS to enable him to provide strategic leadership to the CAF.

⁹⁰⁷ Capt Semrau was charged with murder in the second degree, attempted murder, negligent performance of a military duty and disgraceful conduct. His court martial was held in 2010; see *R v Semrau*, 2010 CM 4010.

⁹⁰⁸ LCol Bolduc appears to be alluding to an MP investigation and a board of inquiry into the actions of JTF-2 members in 2008; see online: <<https://nationalpost.com/news/canadian-inquiry-into-its-non-criminal-issues-from-afghan-war-still-not-public-after-almost-a-decade>>.

⁹⁰⁹ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 23, 49-51.

⁹¹⁰ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 147-148.

understood that any investigation involving a detainee was important and that it [translation] “... could topple the government...” Therefore, this was a sensitive investigation.⁹¹¹

9.5.2.3 The Exercise

687. From the start, during his interview with the Commission, Maj Bolduc said there was nothing wrong with carrying out exercises in Afghanistan. He stated that there were many people in the DTF. He justified the need to conduct exercises by referring to the escape of detainees in Kandahar.⁹¹² He considered that conducting exercises to ensure that members are prepared to carry out their duty is the right thing to do. He explained this by stating that it is necessary to ensure that members know the SOP and are able to respond to situations. He also said that the facilities in place at KAF differed from the training facilities in Canada. He stated that planning this type of exercise was part of Maj X’s military duties, and that it was evident that JTF-Afg MP Coy personnel were not well-prepared and had not been given the chance to succeed.⁹¹³

688. He agreed with Capt da Silva that an exercise that involved entering a detainee’s cell [translation] “was not the best idea in the world.”⁹¹⁴ He also believed that the exercise could have been better planned or that [translation] “the plan at least should not have involved entering a detainee’s cell.” He stated that the lack of planning of the exercise was obvious. According to him, the decision to enter the cell was not an appropriate decision.⁹¹⁵

689. Maj Bolduc said that many [translation] “things” are done in operations that cannot be done in Canada for many reasons. But he stated that [translation] “in operations, sometimes, we have to work with what we have.”⁹¹⁶ Consequently, he still believed [translation] “that the decision to enter a detainee’s cell was not the best decision Maj X made, perhaps not the best decision MWO Y let him make.”⁹¹⁷ He also appeared to wonder if Maj X had had a lot of time to plan the exercise. However, despite his opinion on the poor planning and execution of the

⁹¹¹ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 47-48, 104, 155-157, 270.

⁹¹² Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 104, 114.

⁹¹³ *Ibid* at 105-106.

⁹¹⁴ *Ibid* at 36.

⁹¹⁵ *Ibid* at 36, 100, 102, 112.

⁹¹⁶ *Ibid* at 39-40.

⁹¹⁷ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 40.

exercise, he did not believe that the threshold for negligent performance of a military duty had been met.⁹¹⁸

690. Maj Bolduc was also asked about a possible decision had the detainee been injured. He replied that he certainly would have considered this and that charges of assault instead of negligence may have been laid.⁹¹⁹

9.5.2.4 Criminal Negligence

691. Maj Bolduc considered the offence of negligent performance of a military duty to be a serious offence according to [translation] “the scale of offences under the *National Defence Act*.”⁹²⁰ He also believed that this was a difficult offence to prove.⁹²¹ According to Maj Bolduc, the offence of negligence was originally connected to the fact that a detainee was allegedly abused, but it was clearly demonstrated that there had been no abuse.

692. Maj Bolduc relied heavily on a publication in deciding whether or not to lay charges. This document, prepared by legal officers, describes the basic elements of an offence for every military offence, with examples for each offence.⁹²² He said that the [translation] “crux of 124” was “marked departure.”⁹²³

693. He believed that the marked departure had to be fairly significant and gave the following example: [translation] “officer who made the wrong . . . who did not do his job. As a result, one of his soldiers died.” He referred to the Canadian mission in Somalia where [translation] “one of the Colonels who was in charge when Somalis died; he was investigated, he was charged under 124. But he was found not guilty because of marked departure and all that.”⁹²⁴

⁹¹⁸ *Ibid* at 39-40, 102, 105-107.

⁹¹⁹ *Ibid* at 40.

⁹²⁰ *Ibid* at 35-36.

⁹²¹ *Ibid*.

⁹²² *Ibid* at 103-104, 137, 191-192.

⁹²³ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 136. It should be noted that, although LCol Bolduc used the term *écart de conduite* in French, he was referring to the *écart marqué de conduite* (“marked departure”) that is one of the basic elements of the offence as described in Chapter VII.

⁹²⁴ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 106. LCol Bolduc appears to be referring to the prosecution of LCol Mathieu.

694. According to Maj Bolduc, when considering laying charges against a person under section 124 of the *NDA*, one should place [translation] “three people in the same position with the same training, with the same type of qualification” to prove that [translation] “the decision the member made was truly non-standard.”⁹²⁵ These people therefore should have been placed in the same position as Maj X to determine whether they [translation] “would all come up with a different solution.”⁹²⁶ The case law pertaining to criminal negligence does not require this type of proof, i.e. “three people” to prove the standard. As described in Chapter VII, the standard of care applicable to the charge of negligent performance of a military duty or task is that of the conduct expected of a reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred.

695. According to Maj Bolduc, he therefore had to compare Maj X with a major who had [translation] “the same type of experience, with the same type of qualification, made in the same type of situation.”⁹²⁷ Thus, the file should have contained testimonies [translation] “from other Majors who had Major [X]’s responsibilities in Afghanistan.” These testimonies would have answered questions about detention, their experience as officers in the Canadian Armed Forces, commanding a Military Police company in Afghanistan, planning an exercise in the detention facility and preparing an SOP.⁹²⁸

696. The Commission investigator asked him if he knew Maj Wight, and Maj Bolduc replied that he did. He had seen his name on the witness list, but specified [translation] “after.” He thought Maj Wight had preceded Maj X in Afghanistan. He did not believe that Maj Wight’s interview focused on the question of marked departure.⁹²⁹

697. Maj Bolduc strongly emphasized the fact that the CFSPDB expert who had provided this advice about exercises taking place in Canada was a Sergeant. He did not believe that this gave him the evidence to establish marked departure. He explained that a Sergeant [translation] “would never be in a Major’s position” and that the [translation] “expertise of a Sergeant and a

⁹²⁵ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 104.

⁹²⁶ *Ibid* at 114.

⁹²⁷ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 104.

⁹²⁸ *Ibid* at 120-122.

⁹²⁹ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 192-193.

Major are two totally different things.” Therefore, for Maj Bolduc, while a Sergeant could say how things should be planned, it was like comparing [translation] “apples and oranges.”⁹³⁰

698. He said that there had been no interviews with people who had held [translation] “a similar position at the same time as Major X in the same situation.” [translation] “Why wasn’t it done? Why didn’t I request that it be done?” He asked these rhetorical questions but could not remember why this was not done. He did not remember discussions with Capt da Silva about further inquiry (or investigative steps, according to Maj Bolduc) to complete the investigation.⁹³¹ The Commission notes that Maj Wight was interviewed because he had commanded the JTF-Afg MP Coy during the rotation preceding Maj X and his testimony can be found in the “*précis des faits*” (Crown brief).

9.5.2.5 The Decision and his Discretion

699. Maj Bolduc said that he had reviewed the legal advice received in 2011, but he clearly stated that the RMP gave him a legal opinion and that it was ultimately his decision to lay or not lay charges.⁹³² Maj Bolduc decided not to lay charges in this case.⁹³³ He purportedly made this decision between April 8 and 14, 2011, between the time when the advice was received from the RMP and when the second case summary was prepared.⁹³⁴

700. Maj Bolduc often mentioned his discretion to lay charges during his interview. He explained that, after consulting the file, discussing with Capt da Silva and reviewing the legal advice, he decided to use his discretion not to lay charges. His conversations with Capt da Silva had not convinced him that the investigators could bring more evidence to the case in order to address his concerns about the lack of evidence to establish marked departure.⁹³⁵

701. The fact that the detainee had not been abused was an important element in making his decision. A file involving poor exercise planning was not at the top of the list of files he had to

⁹³⁰ *Ibid* at 119-121.

⁹³¹ *Ibid* at 137-138.

⁹³² Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 108, 129.

⁹³³ *Ibid* at 34, 126, 166.

⁹³⁴ See part 9.5.2.6 of this report.

⁹³⁵ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 35, 37, 101, 108, 115, 129, 138, 198, 199.

manage. He believed he had other files that were much more important than this one and that he had to devote resources to those. He believed he had enough experience to make his decision. He also stated that his time was limited. These statements effectively summarize his thought that [translation] “[w]e investigated. We verified, we confirmed that the detainee was not . . . was not . . . was not abused. Then we moved on to other things.”⁹³⁶

702. Maj Bolduc stated that, although he was missing evidence to demonstrate marked departure, this additional investigative work was not done in this case. This evidence was available, taking years spent in Afghanistan into account.⁹³⁷

703. Maj Bolduc did not think he could put himself in Maj X’s situation in order to judge the situation. Although he did not agree with entering the cell, he was not ready to cast judgment. He did not believe he was the right person to assess Maj X’s actions because he did not have Major X’s experience in operations, he had not commanded a company in Afghanistan and he had not managed a detention facility. He wondered about Maj X’s state of mind and the physical locations where Maj X could have conducted his exercise. He expanded on this approach by saying [translation] “I wasn’t there. I can’t judge.”⁹³⁸ This is an erroneous analysis by Maj Bolduc.

9.5.2.6 Reaction to Maj Bolduc’s Decision

704. As stated, Capt da Silva called Maj Bolduc immediately after his conversation with the RMP. The conversation was short, about 10 minutes long, but it was very heated. He attempted to convince Maj Bolduc that the essential elements of offences were in fact present. Maj Bolduc informed him that the detainee had not been [translation] “molested.”⁹³⁹ Capt da Silva informed Maj Bolduc that this was about charges of negligent performance of a task. MWO Y had not seen what happened because he was on the catwalk and Maj X had conducted an exercise when [translation] “technically, he should not have done so in theatre.”⁹⁴⁰

⁹³⁶ *Ibid* at 151, 193, 194, 195.

⁹³⁷ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 116, 121-123.

⁹³⁸ *Ibid* at 105-106, 114.

⁹³⁹ *Ibid* at 55.

⁹⁴⁰ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 55-57, 233, 273-275.

705. Capt da Silva said that Maj Bolduc had already decided to close the file. Capt da Silva tried to understand why he was being ordered to close the file, but he did not believe he had received real answers to his questions. He said he had been given [translation] “meaningless statements.”⁹⁴¹ To this day, Capt da Silva disagrees with Maj Bolduc’s decision not to lay charges and to close the file.

706. Capt da Silva was convinced that he could have laid charges and that he had the right to do so. But he questioned the value of laying charges if his direct chain of command would not support his actions. He felt his [translation] “hands were tied” and he had no [translation] “other way out at the time of the incident there.”⁹⁴² Despite what Capt da Silva said, the decision to lay or not lay charges in this case belonged to Maj Bolduc, not Capt da Silva, and this will be explained in more detail in Chapter X.

707. Maj Bolduc said that Capt da Silva could have discussed his disagreement with the CO of the CFNIS, LCol Delaney.⁹⁴³ However, Capt da Silva did not believe he had this option. He knew that Maj Bolduc and LCol Delaney were friends. Maj Bolduc had decided to close the file without laying charges; therefore, Capt da Silva believed there was no point in discussing the decision with the CO of the CFNIS. He said he would do things differently if the situation were to occur again.⁹⁴⁴

708. Capt da Silva should have contacted LCol Delaney in writing to express his disagreement with Maj Bolduc’s decision. This written communication would have clearly set out Capt da Silva’s objections and would have outlined actions to address the shortcomings or concerns that might be found in the legal opinion. He also should have asked to discuss this file with LCol Delaney.

709. Capt da Silva said that all the investigators [translation] “disagreed because they were all on the same wavelength at that level.”⁹⁴⁵ Sgt Parent stated that the investigators in the case had

⁹⁴¹ *Ibid* at 57, 233, 249, 273-275.

⁹⁴² Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 15-16, 55-57.

⁹⁴³ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 127.

⁹⁴⁴ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 250, 256-257.

⁹⁴⁵ *Ibid* at 248.

not taken the news well and were all disappointed with the outcome.⁹⁴⁶ Sgt Mantha was not happy with the outcome even though he had played only a small role in the investigation.⁹⁴⁷ MCpl O'Bready stated that he and his colleagues were disappointed with the outcome and that their impression was that a decision had been made at a higher level and was out of their control.⁹⁴⁸

9.6 The File is referred to the JTF-Afg Chain of Command

710. On April 19, 2011, Capt da Silva met with Col Giguère, JTF-Afg 2IC, to inform him of the CFNIS's decision not to lay charges in file GO 2011-2411. After that meeting, no one in the JTF-AFG Chain of Command questioned him or discussed this file with him. He concluded that no actions had been taken because Maj X and MWO Y were still on mission and he had never heard anyone talk about disciplinary or administrative actions being taken against these two individuals.⁹⁴⁹

711. On April 19, 2011, Capt da Silva had also given the MPIR and cover letter in GO 2011-2411 to Col Giguère.⁹⁵⁰ This letter said that [translation] "Maj [X]'s and MWO [Y]'s conduct was more akin to professional misconduct than to criminal behaviour."⁹⁵¹ It then informed the Comd JTF-Afg that, [translation] "in the interests of military justice," the CFNIS JTF-Afg had decided not to lay charges and was using its discretion to [translation] "give the chain of command the opportunity to weigh in on the interest of acting in this case."⁹⁵²

712. Maj Bolduc stated that the terminology used was not appropriate because it is not up to the CFNIS to determine whether it is in the interests of military justice to lay charges, because this is more a matter for military prosecutors. He specified that using one's discretion not to lay a charge is correct and that this is what he had done in this case.⁹⁵³

⁹⁴⁶ Transcript of the Commission's interview with WO Parent, 9 October 2018 at 325.

⁹⁴⁷ Transcript of the Commission's interview with Sgt (Retired) Mantha, 18 October 2018 at 223-224.

⁹⁴⁸ Transcript of the Commission's interview with Sgt (Retired) O'Bready, 23 October 2018 at 381.

⁹⁴⁹ Transcript of the Commission's interview with Capt (Retired) da Silva, 1 November 2018 at 258.

⁹⁵⁰ Document 020 at 57, 61-63.

⁹⁵¹ Document 020 at 460 at para 3.

⁹⁵² Document 020 at 460 at para 4.

⁹⁵³ Transcript of the Commission's interview with LCol (Retired) Bolduc, 6 December 2018 at 161-162.

713. The message from Capt da Silva's letter was ambiguous. Annex B of CFNIS SOP 225 in force in 2011 specified that the cover letter of the MPIR had to state that the file was submitted to the Comd of the subject of the MPIR so that the latter could decide whether administrative or disciplinary actions were appropriate. The letter prepared by Capt da Silva did not say that the file was submitted to BGen Milner so that he could decide whether administrative or disciplinary actions were appropriate. The text of this letter did not faithfully comply with the directives and the template cover letter found in CFNIS SOP 225.

714. A performance deficiency occurs if a CAF member fails to meet an established standard of performance.⁹⁵⁴ The CoC must take appropriate action to address a performance deficiency. Depending on the circumstances, the appropriate action may involve administrative or disciplinary action, or both.⁹⁵⁵ Even if a CAF member has been charged with an offence under the *NDA* or the *Criminal Code*, the CoC may take administrative action to address any conduct or performance deficiency.⁹⁵⁶ The CO of the CAF member is responsible for implementing the appropriate corrective action.⁹⁵⁷

715. According to the "Military Police (MP) Technical Directive Op Athena,"⁹⁵⁸ the JTF-Afg MP Coy was commanded by the JTF-Afg Comd.⁹⁵⁹ BGen Milner, the JTF-Afg Comd, was therefore responsible for deciding whether Maj X had demonstrated a performance deficiency and to determine what type of action, disciplinary or administrative, was appropriate.

716. Maj X had learned from BGen Milner, accompanied by Col Giguère, that no charges would be laid against him. BGen Milner was very disappointed in his performance and made sure he understood. Maj X confirmed that no formal disciplinary or administrative action was taken against him.⁹⁶⁰

⁹⁵⁴ DAOD 5019-0, Conduct and Performance Deficiencies at para 3.4.

⁹⁵⁵ DAOD 5019-0 at para 3.6.

⁹⁵⁶ DAOD 5019-0 at para 3.7.

⁹⁵⁷ DAOD 5019-4 at para 3.9.

⁹⁵⁸ Document 020 at 346.

⁹⁵⁹ Document 020 at 353, para 19.

⁹⁶⁰ Transcript of the Commission's interview with Maj X, 21 August 2017 at 237-238.

717. MWO Y stated that Maj X had informed him that there would be no charges laid against him.⁹⁶¹ The Commission's investigation also did not uncover any evidence regarding formal administrative action against MWO Y.

718. Maj Bolduc had decided that no charges would be laid in this case. Therefore, contrary to what is alleged in the anonymous complaint, no charges were referred to BGen Milner. The evidence demonstrates that BGen Milner orally reprimanded Maj X. There is no evidence that any formal administrative or disciplinary action was taken against Maj X and MWO Y following the CFNIS JTF-Afg investigation.

Recommendation #13:

The Commission recommends that the CFNIS send cover letters that clearly and fully explain the decisions made further to an investigation, as well as the options available to the commander of the subject of the investigation, and that these letters comply with CFNIS SOPs. (Not accepted by the CFPM)

- **In not accepting this recommendation, the CFPM noted that: [translation] “*The CFNIS cover letters are always accompanied by Military Police Investigation Reports (MPIRs). These reports clearly and fully explain the decisions made by the CFNIS and should be read in conjunction with the cover letter. The provision of options to the Commanding Officer is the responsibility of the Commanding Officer’s legal advisor and not the CFNIS.*”**

719. The Commission is not satisfied with the CFPM's response to this recommendation. As the Commission noted in its Interim Report, Appendix B of CFNIS SOP 225 in force in 2011 specified that the covering letter of the MPIR had to state that the file was submitted to the Comd of the subject of the MPIR so that the latter could decide whether administrative or disciplinary actions were appropriate. The letter prepared by Capt da Silva in this case did not say that the file was submitted to BGen Milner so that he could decide whether administrative or disciplinary actions were appropriate. The wording of this letter did not faithfully comply with the directives and the template covering letter found in CFNIS SOP 225. As such, the purpose of this recommendation is to ensure that cover letters clearly and fully explain the decisions made further to an investigation, as well as the options available to the Comd of the subject of the

⁹⁶¹ Transcript of the Commission's interview with MWO (Retired) Y, 30 August 2017 at 238.

investigation; and that these letters comply with the CFNIS SOPs. This would avoid situations similar to this case where the message in the letter written by the CFNIS member during the 2011 investigation was ambiguous and did not faithfully comply the CFNIS SOPs. This recommendation was made with that in mind.

X FINDING REGARDING ALLEGATION #2

10.1 Who had the Authority to Decide whether or not to Lay Charges?

720. A member of the military police assigned to investigative duties with the CFNIS can lay charges under the *Code of Service Discipline*.⁹⁶² Maj Bolduc, Capt da Silva and the members of the CFNIS Detachment at KAF were assigned as investigators in the CFNIS. These individuals were therefore authorized to lay charges.

721. The directives regarding the discretion of the military police and the investigative policies in effect in 2011 can be found in chapters 2 and 6 of the MPPTP. Annex H of Chapter 2 reads as follows in paragraph 8:

“ . . . The final authority to decide whether or not a charge within the purview of the CFNIS shall be laid rests with the OCs of CFNIS Detachments or those MP superior in rank and in the direct or technical chain of command. If a CFNIS member decides to lay a charge they must always personally have the **reasonable belief** that the accused committed the offence.”

722. Maj Bolduc said that only LCol Delaney, the CFNIS CO, could lay a charge when the accused was an MP. He also said that he had this authority in this case because he was the DCO and LCol Delaney had delegated this authority to him for Francophone files.

723. The CO of the CFNIS had to review files involving MP and officers at the rank of Lieutenant-Colonel and above, and had to sign the cover letter to the investigation report.⁹⁶³ These directives can be found in CFNIS SOP 225. Therefore, unless clearly stated in this SOP, it appears that the CO of the CFNIS reserved the authority to lay charges against MPs or superior officers. The authority of CFNIS investigators to lay charges under the *Code of Service Discipline* is also described in SOP 238 (*CFNIS Policy to Lay Charges*).⁹⁶⁴ Despite its title and

⁹⁶² See part 9.1 of this report.

⁹⁶³ Document 220E, CFNIS SOP 225, Military Police Investigation Reports (December 2010) at para 10.

⁹⁶⁴ Document 200H, CFNIS SOP 238, CFNIS Policy to Lay Charges (September 2010) at para 2.

subject importance, this SOP contains no reference to this restriction on the authority to lay charges against MPs.

724. LCol Delaney had delegated his authority to Maj Bolduc. Therefore, contrary to what Capt da Silva thought, it was indeed Maj Bolduc, as DCO of the CFNIS, who had the authority to decide whether or not to lay charges in this file. Capt da Silva could have discussed this situation with the CO of the CFNIS, but he chose not to do so. He should have discussed this file with LCol Delaney.

10.2 Maj Bolduc's Decision

10.2.1 A Sensitive File

725. Maj Bolduc's primary concern was to find out whether a detainee had been abused by a CAF member. He does not appear to have given much attention to this file once he was reassured that this was not the case.

726. Maj Bolduc's response to the hypothetical situation of a detainee injured during the exercise is indicative of his approach to the planning and execution of the exercise. He envisioned only assault charges, not charges of negligent performance of military duty in such a case. He therefore appeared to ignore Maj X's responsibility in planning the exercise that allegedly led to this outcome and MWO Y's alleged failure to adequately supervise the exercise.

727. As described in his testimony, the treatment of detainees was a very sensitive subject at that time. Many boards of inquiry, civil and military court cases and public inquiries focused on this matter. He had to prepare a table and a summary of all investigations involving a detainee, and this information was ultimately to be used to inform the CAF Senior Staff. In Capt da Silva's view, that a Major of the MP was involved in this file and the potential consequences, as well as a detainee, made this file very sensitive.

10.2.2 Assessment of the Offence of Negligent Performance of a Military Task or Duty

728. Maj Bolduc considered that the conduct deficiency that must be proven for a charge of criminal negligence must be marked departure. This observation is correct, but his example that it often involves an officer who failed to do their job, leading to the death of a soldier does not accurately reflect the case law and represents a standard that is much too high. He stated that he relied on a publication prepared by legal officers. The Commission did not examine the version of this publication that was reportedly used by Maj Bolduc in 2011, although it did examine a version of this document that is undated. The Commission can assume that the version of the publication available to Maj Bolduc accurately presented the essential elements of the offence as well as the relevant case law. This case law established that the applicable standard of liability is an objective standard based on the court's assessment of what a reasonable person would have done in the circumstances.

729. While it is true that GO 2011-2411 had to include evidence to establish the objective standard, it appears that Maj Bolduc did not understand what this objective standard means when he referred to [translation] "three people in the same position with the same training, with the same type of qualification." As discussed in Chapter 9, Maj Bolduc did not use the right test to determine the objective standard and what constitutes 'marked departure'.⁹⁶⁵

730. Maj Bolduc was rather vague in discussing Maj Wight. He knew Maj Wight and thought he had preceded Maj X in Afghanistan. He said he had seen his name on the list of witnesses [translation] "after." Though he expressed having little knowledge about Maj Wight's testimony, he stated that he did not believe that Maj Wight's interview focused on the issue of marked departure. Maj Wight was, however, a person who could be compared to Maj X. Maj Bolduc also quickly set aside the evidence provided by Sgt Larson because he did not seem to believe he could use this evidence to establish marked departure given the difference in ranks and responsibilities.

⁹⁶⁵ See Part 9.5.2.4 of this report.

731. Maj Bolduc identified several deficiencies in this file. He repeatedly stated that he did not believe the threshold for negligent performance of a military duty, i.e. marked departure, had been met in this case. He stated the requirement to compare Maj X with three other Majors. Despite that, he did not request further inquiry. He could not explain why he had not requested further inquiry.

10.2.3 His Discretion

732. Maj Bolduc placed a great deal of importance on his discretion. The directives regarding this discretion can be found in Annex H (February 2008) – Military Police Discretion – in Chapter 2 of the MPPTP.⁹⁶⁶ This annex gave him guidelines and considerable latitude in exercising his discretion to lay charges or to refer the file to BGen Milner. As indicated in part 9.6 of this report, BGen Milner could have then decided whether administrative or disciplinary actions were appropriate.

733. This annex states that “MP must consider issues such as fairness, justice, accountability, consistency and wider CF interests and expectations” when they decide whether or not to lay a charge. It also specifies that the MP’s decisions should not “display arbitrary and inexplicable differences in the way that different people are treated by the MP.”⁹⁶⁷ This annex seems to offer a great deal of latitude regarding the offences at the core of this file. It also states that “the priority of the offence and the screening criteria must be carefully considered prior to referring matters back to unit level for disposal.”⁹⁶⁸

10.2.4 Consequences

734. Maj Bolduc disagreed with the letter containing this anonymous complaint, which alleges that there were no consequences for Maj X following the events of January 19, 2011. He stated that Major X never commanded troops again and that [translation] “he was on a shelf for a while.” His promotion to Lieutenant-Colonel was also delayed by several years.⁹⁶⁹

⁹⁶⁶ A-SJ-100-004/AG-000, MPPTP, Chapter 2, Annex H (February 2008), *Military Police Discretion*.

⁹⁶⁷ *Ibid* at para 3.

⁹⁶⁸ *Ibid* at para 8.

⁹⁶⁹ Transcript of the Commission’s interview with LCol (Retired) Bolduc, 6 December 2018 at 107.

735. Maj X stated that the events of January 19, 2011 had serious consequences for his military career. He said that he was placed in [translation] “a penalty box” for at least four years. He said that he was fourth on the merit list to be promoted to Lieutenant-Colonel immediately after his deployment to Afghanistan and that he was no longer on that list the following year. Therefore, his military career was delayed for at least four years.⁹⁷⁰

736. Capt da Silva was purportedly never officially informed of the administrative or disciplinary repercussions after the file was referred to the JTF-Afg Chain of Command. During his interview with Commission investigators, Capt da Silva said that he spoke to LCol Bolduc in 2016 about this file. LCol Bolduc purportedly mentioned Maj X’s postings after Afghanistan and the fact that he no longer commanded troops as a consequence of these events. Capt da Silva disagreed with Maj Bolduc and believed that Maj X had gotten off easy.⁹⁷¹

737. Maj X was not charged, and no formal administrative corrective action was taken against him. According to Maj Bolduc and Maj X, the incident had consequences. Commanding troops is a major privilege within the CAF. The evidence shows that Maj X did not command troops after his deployment at KAF and he does not appear to have benefited from assignments that were conducive to promotion. He was purportedly removed from the merit list and his promotion to Lieutenant-Colonel was delayed by at least four years; this represents a serious consequence financially, as well as for his reputation.

10.2.5 Conclusion

738. It is evident that Maj Bolduc did not pay as much attention to this file after learning that the detainee had not been abused. He placed too much attention on this aspect of the file. Any file with a “detainee” component would be added to the table and to the report he was required to prepare on this matter. Any file questioning the treatment of a detainee was very sensitive in Canada, given the MPCC investigations and public hearings and other investigations in that regard. The detainee had not suffered any abuse, but that did not mean there was no breach of the *Code of Service Discipline*. Maj Bolduc believed that Maj X had failed in his duty during the

⁹⁷⁰ Transcript of the Commission’s interview with Maj X, 21 August 2017 at 253.

⁹⁷¹ Transcript of the Commission’s interview with Capt (Retired) da Silva, 1 November 2018 at 8, 58-59.

planning of the exercise and that MWO Y had not properly supervised the exercise. Of course, these behaviours do not necessarily represent failings meriting charges under the *Code of Service Discipline*.

739. Maj Bolduc strongly emphasized the need to prove marked departure. His understanding of the test to demonstrate the marked departure is incorrect, because this test does not require the evidence of [translation] “three majors.” Maj Wight and Sgt Larson were excellent witnesses to prove the standard in this file. Maj Wight had commanded the JTF-Afg MP Coy during the deployment prior to that of Maj X and had transferred responsibilities to the latter. Sgt Larson represented the Commanding Officer of the CFSPDB as an expert in the field of guarding detainees. Maj Bolduc therefore did not use the correct test to assess marked departure and did not consider all the relevant evidence, namely, the testimony of Maj Wight, which was in the “*précis des faits*” (Crown brief). That being said, it is true that the threshold for proving marked departure from the standard of care is high and that a charge of criminal negligence is difficult to prove.

740. Having considered the legal opinion from the RMP, Maj Bolduc had decided that the file did not contain the evidence required to prove marked departure. He placed a great deal of importance on the fact that the detainee had not been abused. This is not surprising given the public discussions on this issue and the incidents under investigation. Any file involving a detainee was very sensitive, so he was relieved that, as he saw it, this was nothing more than poor planning and execution of an exercise. This was not a detainee abuse file; he had therefore decided that it was instead a performance deficiency case that could be submitted to Maj X’s chain of command, not a disciplinary case.

741. This was Maj Bolduc’s decision to make and it was well within the bounds of his discretion. That said, his relief led him to underestimate the seriousness of the incident. A minor detainee had in fact been extracted from his cell by a tactical team during an exercise. However, this decision was still a reasonable exercise of his discretion to lay or not lay a charge.

742. It was therefore not unreasonable for Maj Bolduc to conclude that the high threshold for a marked departure from the expected standard of care had not been met and that, consequently, the charge of negligent performance of a military duty would be difficult to prove beyond a reasonable doubt. It was within his discretion to consider that the conduct could be addressed more appropriately as a performance deficiency rather than criminal conduct, and therefore to decide not to lay charges.

743. The CFNIS officer's decision not to lay charges was reasonable given all the factors and it was also a reasonable exercise of his discretion to lay or not lay a charge.

Finding #2:

The Commission finds that Allegation #2, that the CFNIS made an inappropriate decision in deciding not to lay charges, is UNSUBSTANTIATED. (Accepted by the CFPM)

XI SUMMARY OF FINDINGS AND RECOMMENDATIONS

Finding #1:

The Commission finds that Allegation #1, that the CFNIS conducted an inadequate investigation that failed to collect the relevant evidence concerning the exercises that were carried out at the DTF in 2010-2011, is UNSUBSTANTIATED. (ACCEPTED)

Finding #2:

The Commission finds that Allegation #2, that the CFNIS made an inappropriate decision in deciding not to lay charges, is UNSUBSTANTIATED. (ACCEPTED)

Recommendation #1:

The Commission recommends that the CFPM, in concert with the Canadian Joint Operations Command, develop a better system for the repatriation of military police files, as well as their storage, following the end of an overseas operation. (ACCEPTED)

Recommendation #2:

The Commission recommends that the CFPM publish a policy on the preparation of interview plans based on police best practices. (ACCEPTED)

Recommendation #3:

The Commission recommends that the CFPM develop policies and programs for the continuous training of military police members on note-taking techniques and develop strategies to implement these policies and programs. (ACCEPTED)

Recommendation #4:

The Commission recommends that the CFPM include a component on note-taking in the annual performance review of Military Police members, investigators, supervisors and officers holding leadership positions at all levels of the CF MP Gp. (NOT ACCEPTED)

Recommendation #5:

The Commission recommends that the CFPM amend the CF MP Orders, by inserting in the directive that any “précis des faits” (Crown brief) or prosecutor summary should include a section that sets out the essential elements of each charge, as well as the supporting evidence. (NOT ACCEPTED)

Recommendation #6:

The Commission recommends that the CFPM ensure that CFNIS investigators regularly consult the reference document on the essential elements of service offences prepared by the lawyers of the Office of the Judge Advocate General (JAG). (ACCEPTED)

Recommendation #7:

The Commission recommends that the CFPM develop and publish a policy that clearly identifies the situations and offences that must be managed as major cases and ensure that MPs receive training on this subject throughout their careers. (ACCEPTED)

Recommendation #8:

The Commission recommends that the CFPM develop a training program on identifying conflicts of interest and on CAF and CF MP Gp policies on conflicts of interest. (NOT ACCEPTED)

Recommendation #9:

The Commission recommends that the CFPM develop and distribute a policy that takes into account situations requiring the deployment of an independent investigator or team of investigators to provide support during investigations when there is a conflict of interest or as otherwise needed. (NOT ACCEPTED)

Recommendation #10:

The Commission recommends that the CFPM develop a policy regarding investigations in which Military Police members are the subjects. This policy would clearly state which investigations would be referred to another police service. (NOT ACCEPTED)

Recommendation #11:

The Commission recommends that the CFPM develop a directive that its investigators maintain close and well-documented communications with the regional military prosecutors, thereby ensuring that the investigation is well-planned, supported and executed. (ACCEPTED)

Recommendation #12:

The Commission recommends that the Department of National Defence take steps to have the *National Defence Act* amended to include provisions regarding information similar to those found in Part VI (Civilian Review and Complaints Commission for the Royal Canadian Mounted Police) of the *Royal Canadian Mounted Police Act*.

Recommendation #13:

The Commission recommends that the CFNIS send cover letters that clearly and fully explain the decisions made further to an investigation, as well as the options available to the commander of the subject of the investigation, and that these letters comply with CFNIS SOPs. (NOT ACCEPTED)

Ottawa, September 2, 2021

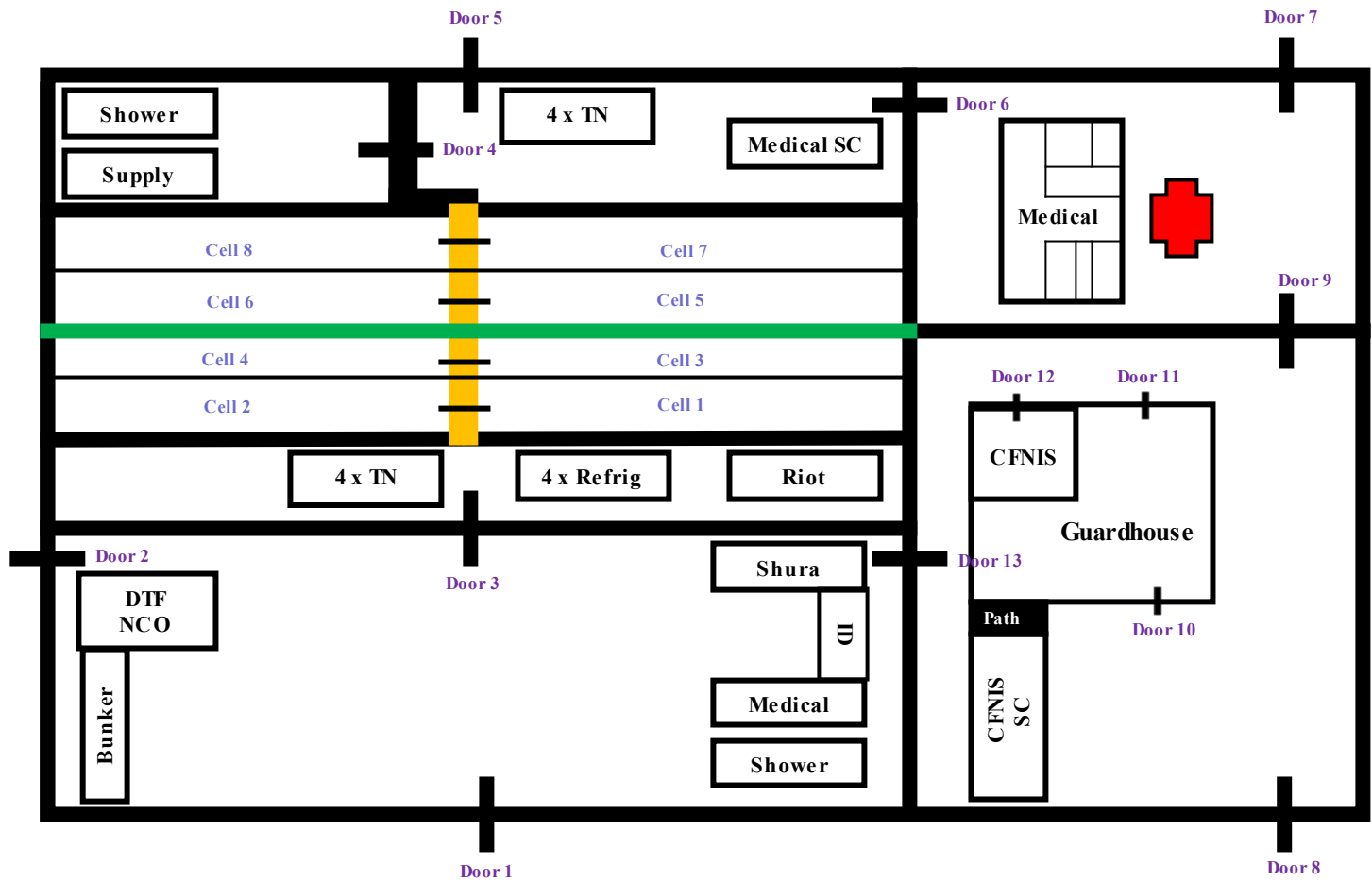
Original Signed by:

Hilary C. McCormack
Chairperson

APPENDICES

ANNEX A
DTF SITE MAP (ROTO 10)

Annex A : DTF Site Map (Roto 10)



ANNEX B

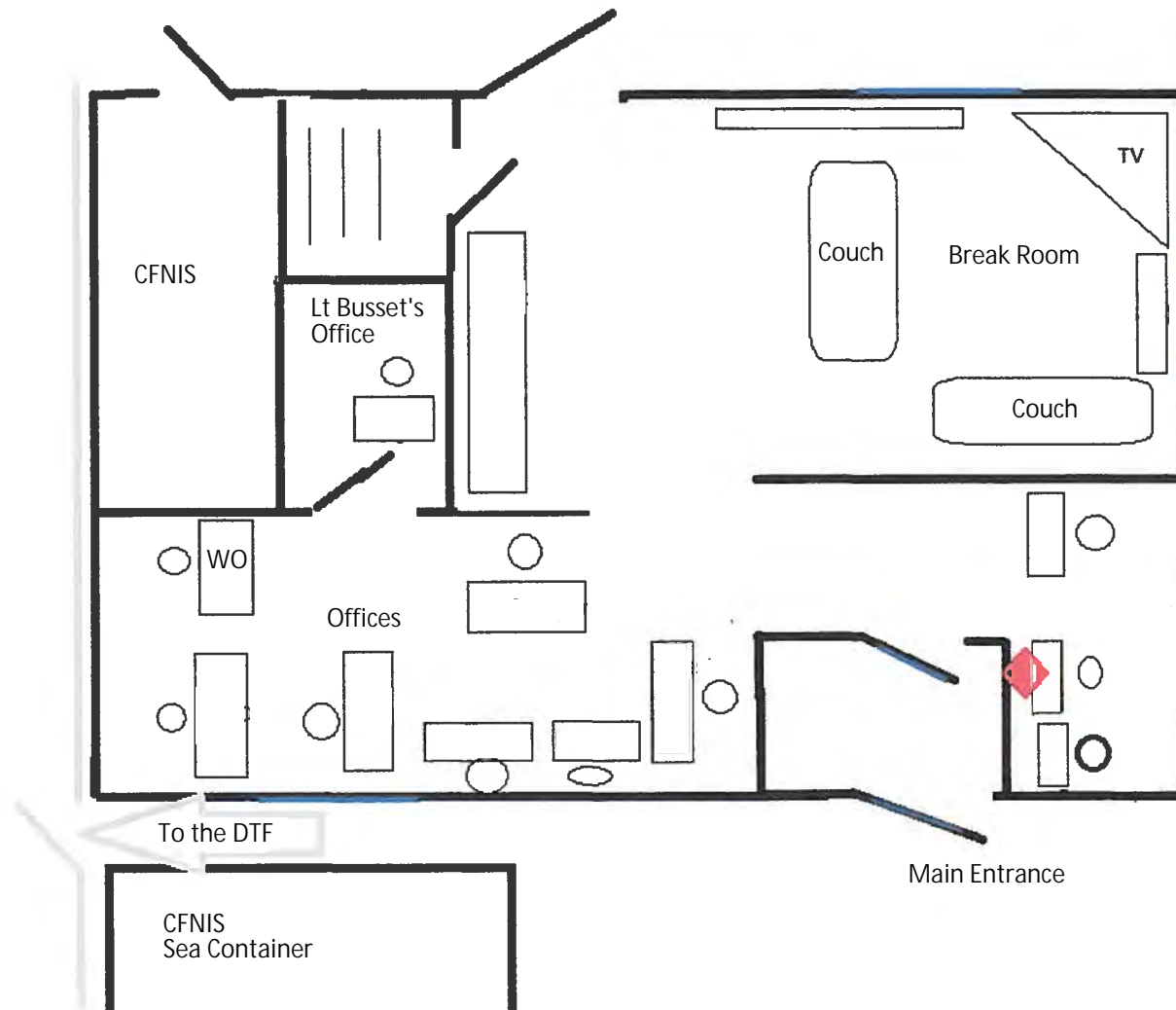
LAYOUT OF

GUARDHOUSE

Annex B : Layout of the Guardhouse

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Document Number: 218
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Note: The diamond-shaped symbol in red indicates the location of the DTF surveillance camera monitors.

**GLOSSARY OF
ACRONYMS, ABBREVIATIONS
AND TERMS USED
IN THIS REPORT**

Glossary of acronyms, abbreviations and terms used in this report

Acronym	Complete rank
2IC	Second in Command
ADM (PA)	Assistant Deputy Minister (Public Affairs)
AFG	Afghanistan
APR	Annual Performance Review
ASU	Area Support Unit
BGen	Brigadier-General
CAF	Canadian Armed Forces
Capt	Captain
CDS	Chief of the Defence Staff
CEFCOM	Canadian Expeditionary Force Command
CF	Canadian Forces
CF MP Gp	Canadian Forces Military Police Group
CFAO	Canadian Forces Administrative Orders
CFB	Canadian Forces Base
CFICC	Canadian Forces Integrated Command Centre
CFMPA	Canadian Forces Military Police Academy
CFNIS	Canadian Forces National Investigation Service
CFNIS JTF-Afg	Canadian Forces National Investigation Service of the Joint Task Force-Afghanistan
CFPAS	Canadian Forces Personnel Appraisal System
CFPM	Canadian Forces Provost Marshal
CFSPDB	Canadian Forces Service Prison and Detention Barracks
CJOC	Canadian Joint Operations Command
CoC	Chain of Command
Col	Colonel
Comd	Commander
Coy	Company
Cpl	Corporal
CPO 2	Chief Petty Officer, 2nd class
CR	Central Region
DAOD	Defence Administrative Orders and Directives
DND	Department of National Defence
Dr	Doctor
DTF	Detainee Transfer Facility
DTF NCO	Non-commissioned Officer (NCO) in charge of the Detainee Transfer Facility (DTF)
ENDEX	Exercise end
ER	Eastern Region
Ex	Exercise
GO	General Occurrence
GS	General Support
h./m./s.	hour/minute/second
HQ	Headquarters

Glossary of acronyms, abbreviations and terms used in this report

Acronym	Complete rank
ID	identification
JAG	Judge Advocate General
JTF-Afg	Joint Task Force - Afghanistan
JTF-Afg MP Coy	Joint Task Force-Afghanistan Military Police Company
KAF	Kandahar Airfiled
LCol	Lieutenant-Colonel
LO	Liaison Officer
LT	Lieutenant
Maj	Major
MCpl	Master Corporal
Mgen	Major-General
min	minute
mm	millimeter
MP	Military Police
MPCC	Military Police Complaints Commission
MPIR	Military Police Investigation Report
MPPTP	Military Police Policies and Technical Procedures
MPUIR	Military Police Unusual Incident Report
Mr	Mister
Mrs.	Madam
MWO	Master Warrant Officer
NCR	National Capital Region
<i>NDA</i>	<i>National Defence Act</i>
NIS	National Investigation Service
OMLT	Operational Mentoring and Liaison Team
Op	Operations
OPI	Office of Primary Interest
p, pp	page, pages
para	paragraph
PER	Personnel Evaluation Report
PII	Public Interest Investigation
Pl	Platoon
PO 2	Petty Officer, 2nd class
POC	Provincial Operations Centre
PPA	Police Policy Advisory
PS	Professional Standards
QR&O	The Queen's Regulations and Orders for the Canadian Forces
QRF	Quick reaction force
RCMP	Royal Canadian Mounted Police
RDP	Record of Disciplinary Proceedings
RMP	Regional Military Prosecutor
roto	rotation
SAMPIS	Security and Military Police Information System

Glossary of acronyms, abbreviations and terms used in this report

Acronym	Complete rank
SC	Sea Container
Sgt	Sergeant
sic	<i>sic erat scriptum</i>
SIR	Significant Incident Report
SME	subject matter expert
SOP	Standing Operating Procedure
Tacnet	tactical network
TASO	Tactical Aircraft Security Officer
TF	Task force
UTC	<i>Universal Time Coordinated</i>
WO	Warrant Officer
WR	Western Region